

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Appeal to the Supreme Court
against Judgment of the Provincial High Court of
North Western Province dated 22/11/2011 in
Case No. NWP/HCCA/KUR/23/2007 (F); D.C.
Chilaw Case No. 24767/L.

1. A. Rohini Hemalatha De Silva,
 2. H.M. Dilip Aminda,
 3. H.M. Nishadi Maduwanthie,
- All of at
Wellankarai, Palliwasalthure.

Plaintiffs

**SC Appeal No: 16/2013
SC/HCCA/LA No. 521/2011
NWP/HCCA/KUR/23/2011 (F)
DC Chilaw Case No. 24767/L**

Vs.

1. Rajapakshe Kanakasekera Mudiyansele
Menikhamy,
 2. Uswatte Liyanage Nihal Jayasinghe,
 3. Hitihamy Appuhamylage Banduwathie,
- All of at
Siyambalagaswela, Kakkapalliya.

Defendants

AND BETWEEN

1. Rajapakshe Kanakasekera Mudiyansele,
Menikhamy,
2. Uswatte Liyanage Nihal Jayasinghe,
3. Hitihamy Appuhamyale Banduwathie,
All of at
Siyambalagaswela, Kakkapalliya.

Defendant-Appellants

Vs.

1. A. Rohini Hemalatha De Silva,
2. H.M. Dilip Aminda,
3. H.M. Nishadi Maduwanthie,
All of at
Wellankarai, Palliwasalthure.

Plaintiff-Respondents

AND NOW BETWEEN

1. A. Rohini Hemalatha De Silva,
2. H.M. Dilip Aminda,
3. H.M. Nishadi Maduwanthie,
All of at
Wellankarai, Palliwasalthure.

Plaintiff-Respondent-Petitioners

Vs.

1. Rajapakshe Kanakasekera Mudiyansele
Menikhamy,
2. Uswatte Liyanage Nihal Jayasinghe,
3. Hitihamy Appuhamylage Banduwathie,
All of at
Siyambalagaswela, Kakkapalliya

Defendant-Appellant-Respondents

Before: **Justice P. Padman Surasena**
 Justice A.L. Shiran Gooneratne
 Justice Mahinda Samayawardhena

Counsel: Sudarshani Cooray for the **Plaintiff-Respondent-Appellants.**

 Ranjan Suwandarathne, PC with Amali Tennakoon for the **Defendant-Appellant-Respondents.**

Argued on: 01/04/2024

Decided on: 10/07/2024

A.L. Shiran Gooneratne J.

By Plaint dated 04/08/1997, the Plaintiffs-Respondents-Appellants (hereinafter sometimes referred to as the “Plaintiffs-Appellants”) filed action bearing no. 24767/L in the District Court of Chilaw against the Defendants-Appellants-Respondents (“the Defendant-Respondents”), and sought *inter alia*, a declaration of title to the property morefully described in the 2nd schedule to the Plaint, to evict the Defendant-

Respondents from the said property and for the recovery of continuous damages until such time the Plaintiff-Appellants are placed in possession of the said property.

In their Complaint, the Plaintiffs-Appellants contend that by Deed No. 4646 dated 20/05/1986, one Mahindaratne, became the lawful owner of Lot 1 in Plan No. 5817, dated 17/02/1986 (P17), made by Vernon Perera Licensed Surveyor, more fully described in the said 2nd schedule to the Complaint and after his death, his heirs, the 1st to 3rd Plaintiffs-Appellants, became entitled to the said portion. The land depicted in the said 2nd schedule, is described as in lieu of the undivided share, depicted as Lot No. 1 in the said Plan No. 5817 dated 17/02/1986, which the Plaintiffs-Appellants claim to be a definite, defined divided portion of land and seeks the ejectment of the Defendants-Respondents from that land. The Plaintiffs-Appellants claim title to the said Lot 1, the disputed portion by the said Deed No. 4646 (P10).

According to paragraph 6 of the Complaint, by Deed No. 1631 dated 19/08/1981, (P8) one Edmond Dissanayake had transferred the land depicted in the 1st schedule to the Complaint to the 1st Defendant-Respondent. Thereafter, the said 1st Defendant-Respondent by Deed No. 1632 dated 19/08/1981 (P9), transferred an undivided ½ of the 3/24 share of the said land to the said Edmond Dissanayake which is more fully described in the 1st schedule to the Complaint. The said Edmond Dissanayake by Deed No. 4646 dated 20/05/1986 (P10), transferred the said Lot 1 depicted in the 2nd Schedule to the Complaint containing in extent 70 perches to the said Mahindaratne, the deceased husband of the 1st Plaintiff-Appellant and father of the 2nd and 3rd Plaintiffs-Appellants. On the said Deed No. 4646, the Plaintiffs-Appellants claim title to Lot 1 in the said Plan No. 5817 (P17), which is more fully described in the 2nd schedule to the Complaint.

In order to buttress their paper title, the Plaintiffs-Appellants, in paragraph 10 of the Complaint, further contend that they are in undisturbed and uninterrupted possession of the said portion of land for over 10 years and therefore, apart from having paper title has

also acquired prescriptive title to the said defined portion of land described in the 2nd schedule to the Plaintiff.

In paragraph 13 of the Plaintiff, it is contended that during the life time of Mahindaratne, the 1st Defendant-Respondent came into occupation of the house situated in the land described in the 2nd schedule with the leave and licence of the said Mahindaratne. However, when asked to hand over vacant possession, the Defendant-Respondents failed to comply, thus initiating this action.

In the Answer filed dated 21/01/1998, the Defendants-Respondents answering paragraph 6 of the Plaintiff, do not deny its content.

It is argued that the said Edmond Dissanayake who was in possession of the said portion of land described in the said deed No.1623 dated 19/08/1981, establishes a constructive trust in the interest of the 1st Defendant-Respondent and therefore, no rights are passed to the deceased Mahindaratne by the said Deed No.4646.

The 1st Defendant-Respondent's position was that she had title to an undivided 3/24 share of the land described in the 1st schedule and the transfer of the said undivided 1/2 of 3/24 share totaling to 3/48 share to Edmond Dissanayake by Deed No. 1632, was not with the intention of alienating the land in question, but merely as a security for a loan of Rupees 17,000/- obtained by her from the said Edmond Dissanayake.

It was further contended that on several instances the 1st Defendant-Respondent had transferred the said property to third parties and repossessed it after a short period of time which is indicative of the fact that the said Deed No. 1632 was also prepared for the same purpose of securing a loan by the 1st Defendant-Respondent.

It is also contended that the land described in the 1st schedule to the Plaintiff remains an undivided land and therefore, the disputed land, described in the 2nd schedule too, remains an undivided land and thus, the Plaintiffs-Appellants action should fail.

The Defendants-Respondents did not pray for any specific relief to be granted, other than a dismissal of the action.

At the conclusion of the trial, the learned District Judge by Judgment dated 22/01/2007, held in favour of the Plaintiffs-Appellants and granted the reliefs as prayed for.

Being aggrieved by the said Judgment, the Defendants-Appellants by Petition of Appeal dated 16/03/2007, appealed to the Civil Appeal High Court of the North Western Province exercising civil appellate jurisdiction holden in Kurunegala (“the Civil Appeal High Court”). The Civil Appel High Court, after hearing, also considering the submissions tendered by both parties, by Judgment dated 22/11/2011, set aside the said Judgment of the District Judge dated 22/01/2007 and allowed the appeal with costs.

The Plaintiff-Appellant, by Petition dated 10/12/2011 is before this Court, to set aside the said Judgment dated 22/11/2011, delivered by the Civil Appeal High Court.

By Order dated 01/02/2013, this Court granted leave to appeal on the following questions of law;

- i. Did the learned High Court Judges err in holding that the Plaintiff-Respondents and the Defendant-Appellants are all co-owners of an undivided land of about 7 acres;
- ii. Did the learned High Court Judges err in holding that there actually no partition of the entire land but that Edmond Dissanayake had separated a portion from the main land which does not consist a separate portion of land;
- iii. Did the learned High Court Judges err in holding that no prescriptive title has been established by the Plaintiff-Respondents;
- iv. Did the learned High Court Judge err in not appreciating the fact that the Defendant-Appellants occupied only on the leave and license of the predecessor in title of the Plaintiff-Respondents;

The learned District Judge addressed Issues No. 23 and 24 regarding whether the 1st Defendant-Respondent, when transferring an undivided ½ share to Edmond Dissanayake by Deed No. 1623 dated 19/08/1981, intended to transfer only the beneficial interest of the land, thereby establishing a constructive trust for her benefit. The Court ruled in the negative. On this same point, the Civil Appeal High Court also held that:

“The circumstances of this case show that the position of the 1st Defendant-Appellant that she did not intend to transfer the beneficial interest is only an excuse to deprive the Plaintiffs-Respondents of whatever the rights they claim to have in this property and the various transactions referred to above in respect of this land entered into by the 1st Defendant-Appellant with Edmond Dissanayake and Dharmapala alone do not establish a constructive trust to her benefit.”

However, no question of law was sought to be determined by this Court on constructive trust, to the benefit of the 1st Defendant-Respondent.

In the said Judgment dated the 22/11/2011, the learned Judges of the Civil Appeal High Court held, that the 1st Plaintiff-Appellant and the 1st Defendant Respondent are co-owners of the entire land in extent of about seven acres. The Court was of the view that, since the 1st Defendant-Respondent and the 1st Plaintiff-Appellant are co-owners of a larger land, the Plaintiffs-Appellants cannot maintain this action to have their rights declared and to eject the Defendants-Respondents, since the Court is not entitled to decide on the rights of the parties who are not before Court.

The Court was also of the view that *“since there is no amicable partition among the co-owners, for the Plaintiffs-Appellants to succeed in their claim, they must establish prescriptive title to the said specific portion of land to the exclusion of all the other co-owners”* and also held that title by prescription to a land can be acquired only against a person or persons who have legal title to such land.

The Court held, that the 1st Defendant-Respondent did not transfer all her rights to the said land, but transferred only ½ share of 3/24 share and another ½ share of 3/24 share remains with the 1st Defendant-Respondent.

As pointed out earlier, it was the position of the Defendants-Respondents that the disputed land morefully described in the 2nd schedule to the Plaint is an undivided land and therefore the Plaintiffs-Appellants cannot maintain this action. It was also their position that the Plaintiffs-Appellants should initially establish that the said land described in the 2nd schedule is a proper divided portion of the land described in the 1st schedule to the Plaint, in view of the fact that Plan No. 5817 which was prepared in February 1986, is not an amicable division of the larger land.

I will now briefly discuss the relevant evidence led before the District Court.

The 1st Plaintiff-Appellant in her evidence stated that even before the death of Mahindaratne, there was a fence in existence on the northern and the southern boundaries of Lots 1 and 2, and two village council roads demarcating the eastern and western boundaries. The 1st Plaintiff-Appellant further stated that she lived in the house built on Lot 2, of the said Plan No. 5817, since her marriage to Mahindaratne on 11/05/1989 and the 1st Defendant-Respondent was in possession of Lot 1, of the said Plan, presently identified as the disputed land.

Witness Edwin Silva and H.M. Dhanapala who testified on behalf of the Plaintiffs-Appellants, while corroborating the said evidence, stated that, Lots 1 and 2 were clearly demarcated with a barbed wire fence. It is in evidence that while the Defendants-Appellants were residing in Lot 1, the Plaintiffs-Appellants constructed a house in Lot 2 of the said Plan No. 5817. The said evidence stands unchallenged. In that background, the Plaintiffs-Appellants claim that, since the 1st Defendant-Respondent parted with her entire share in the said land, Mahindaratne became the owner of Lots 1 and 2 in Plan

No. 5817, hence, there is no undivided land within the subject matter, owned by the 1st Defendant-Respondent.

Witness Edmand Dissanayake stated that he transferred a divided $\frac{1}{2}$ share depicted as Lot No. 1 in Plan 5817 dated 17/02/1986, morefully described in the 2nd schedule to Mahindaratne, the husband of the 1st Plaintiff-Appellant. Witness further states that, the 1st Defendant-Respondent is in occupation of the house located in the said Lot 1. It was his evidence that presently the Plaintiffs-Appellants are in Lot No. 2 of the said plan. His testimony before the trial court further revealed that, the said Plan No. 5817 was made with the concurrence of both parties, the 1st Plaintiff-Appellant and the 1st Defendant-Respondent.

R.K.M. Manikhamy, the 1st Defendant-Respondent's evidence was that, by Deed No. 1632 she transferred $\frac{1}{2}$ share of the $\frac{3}{24}$ share to Edmond Dissanayake for Rupees 17,000/-, as consideration for a loan transaction and that the transfer deed between the 1st Defendant-Respondent and Edmond Dissanayake was executed as a security for the said loan transaction, that she never intended to transfer the ownership rights of the land to the said Edmond Dissanayake. She also stated in her evidence that by Deed No. 4646 dated 20/05/1986 (P10), the said Edmond Dissanayake had transferred the said portion of land to Mahindaratne, the husband of the 1st Plaintiff-Appellant.

The said Manikhamy did not challenge the boundaries and/or the demarcation of limits of the said undivided $\frac{1}{2}$ share of $\frac{3}{24}$ share of the land depicted as Lot No. 1 in Plan No. 5817 (P17), or the said Deed No. 1632, at the trial before the District Court. It is also significant to note that, Manikhamy at no stage in this action claimed to be a co-owner of the larger land and rightly, this action is not founded on that basis.

Therefore, there is no basis for the Civil Appeal High Court to have come to a definite finding that "*The Plaintiffs-Appellants and the 1st Defendant-Respondent are co-owners of the entire land in extent of about seven acres.*" and that "*the Plaintiffs-Appellants*

are claimants to an undivided land seeking rights over and against the wishes of other co-owners who are not before Court”.

In any event, this action would not prevent any party not present before Court from asserting a claim to an undivided share of the larger land in an appropriate action. Therefore, giving consideration to prescriptive rights among co-owners were not relevant to this action, when deciding the rights of the parties before Court.

The 1st Defendant-Respondent also admitted that Lot 2 of Plan No. 5817 was conveyed to Mahindaratne. Therefore, the execution of the said conveyance and the 1st Plaintiff-Appellant’s title to the land conveyed therein, was not disputed.

The 2nd Defendant-Respondent also admitted that Lot No. 1, the disputed portion, was transferred by Edmand Dissanayake to Mahindaratne by Deed No. 4646. It is also in evidence that Mahindaratne was in possession of Lot No. 2 of the said Plan No. 5817 since 1986, and that Mahindaratne claims legal title to the said Lot No. 2, by Deed No. 4647 dated 20/05/1986. However, the said Deed No. 4647 was not produced before the District Court.

The Defendants-Respondents confined their defence only to the ½ share of 3/24 share of the land transferred by Edmond Dissanayake to Mahindaratne. Throughout her evidence Manikhamy did not challenge the identification of the said Lot 1, in Plan No. 5817, therein, the said boundaries were identified with landmarks and visible lines of division. Manikhamy has not denied that Edmond Dissanayake transferred the said Lot 1 to Mahindaratne by the said Deed No. 4646. She also asserted that she was aware that Plan No. 5817 was made. Therefore, I hold that there is sufficient evidence led by the Plaintiffs-Appellants to prove title and the identification of the disputed Lot No. 1.

Given all the above circumstances, contrary to the findings of the Civil Appellate High Court, that the remaining ½ share was with the 1st Defendant-Appellant, the evidence presented in Court and also by their own admissions, convincingly show, that the 1st

Defendant-Respondent had sold her remaining ½ share to Mahindaratne. Therefore, the District Court was correct in holding that the 1st Plaintiff-Appellant had title to Lot 1 and was also in possession of Lot 2 of the said plan.

The Plaintiffs-Appellants as co-owners of the larger land, which is not in dispute, filed this action seeking a declaration of title and ejectment of the Defendants-Respondents from the portion of land more fully described in the 2nd schedule, which is Lot 1 of Plan No. 5817. The said portion of land is presently in the possession of the Defendant-Respondents. When the Plaintiffs-Appellants have *prima facie* established in evidence of ownership for the portion of land they claim for a declaration of title, then it is for the Defendants-Respondents to prove better title.

The only substantive defence taken before the trial court by Manikhamy was that she executed Deed No. 1632 in favour of Edmond Dissanayake, not with the intention of alienating the property in question but merely as a security for a loan of Rupees 17,000/- obtained by her from the said Edmond Dissanayake. Therefore, the 1st Defendant-Respondent's claim to the disputed land was only on the basis of a constructive trust to her benefit.

The Plaintiffs-Appellants' position is that the 1st Defendant-Respondent extinguished all her undivided rights to Lots 1 and 2, nevertheless deprived the Plaintiffs-Appellants of their right to possess the land to which they have title. As a sole co-owner of the disputed land and premises, the 1st Plaintiff-Appellant is entitled to maintain an action to sue a trespasser for a declaration of title and ejectment.¹ Therefore, the Plaintiffs-Appellants being co-owners of the larger land are entitled to sue and eject the Defendants-Respondents, who are trespassers not having paper title, prescriptive or any other rights against the Plaintiffs-Appellants.

¹Attanyake vs. Ramayawathie (2003) 1 SLR 401

The 1st Defendant-Respondent claimed title only to Lot 1 in the said plan and that too having admitted the execution of Deed No. 1632 in favour of Edmond Dissanayake, not with the intention of alienating the property but on constructive trust, a claim the 1st Defendant-Respondent has now abandoned. Their own evidence before Court would prove that the ½ share depicted as Lot 2 in the said plan was transferred to Mahindaratne way back in 1986. Therefore, it is observed that the Plaintiffs-Appellants have acquired title to the said Lots 1 and 2, a smaller portion of the larger co-owned land, to the exclusion of the Defendants-Respondents.

As discussed earlier in this Judgment, this is not an action filed by one co-owner against another. By this action the Plaintiffs-Appellants have not interfered or endangered the rights of any of the other co-owners. In this action, the 1st Plaintiff-Appellant is not claiming co-ownership to the larger land, asserting prescriptive rights over other co-owners not before Court. However, as a sole co-owner, the 1st Plaintiff-Appellant can sue a stranger trespasser in ejectment, and recover damages without joining other co-owners as Plaintiffs. ²

It is well settled law that a co-owner can sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land. In *Hevawitarane vs. Dangan Rubber Co. Ltd.*³ Wood Renton A.C.J declared;

“Any co-owner, or a party claiming under such a co-owner, is entitled to eject a trespasser from the whole of the common property,” also was of the view that *“prima facie evidence of title is all that is required in such an action.”*

In this action, *prima facie* evidence supports the Plaintiffs-Appellants title to the smaller land described in the 2nd Schedule. The Defendants-Respondents have failed to discharge the burden of adducing evidence on exclusive possession and the acquisition

²Ismail vs. Andris 7 S. C. C. p.48 at p.87

³ [1913] 17 NLR at 53

of a prescriptive title by ouster, of the land described in the said schedule. Consequently, the Defendants-Respondents are deemed trespassers on the common property. In the circumstances, the Plaintiffs-Appellants are entitled to file an action seeking a declaration to their undivided rights of the land and ejectment of a trespasser from the whole of the common property.

In all the above circumstances, I answer the Questions of law No. 1, 2, and 3 in the affirmative.

The 1st Plaintiff-Appellant in her evidence before the District Court states that the 1st Defendant-Respondent was in possession of the said Lot 1 as a licensee and by Notice dated 24/02/1997 (P16), was required to give vacant possession to the Plaintiffs-Appellants. She further stated that since 1986, out of 27 coconut trees within the said Lot 1, Mahindaratne tapped toddy from about 20 trees. It was also the contention of the 1st Defendant-Respondent that the produce of the land was taken by Edmond Dissanayake and Mahindaratne.

The said H.M. Dhanasena in his evidence stated that the 1st Defendant-Respondent was in possession of the said lot 1 at the time it was transferred to the 1st Plaintiff-Appellant, however asserted, that Mahindaratne and the 1st Plaintiff-Appellant plucked coconuts from the said land. H.M. Dhanasena who was a witness to the attestation of the said Deed No. 4646 (P10), also testified that, at the time of the said attestation, the 1st Defendant-Respondent gave an undertaking that she would hand over possession of the said Lot 1 to the 1st Plaintiff-Appellant, when required, facts not disputed by the Defendants-Respondents in evidence.

It is also to be noted that the 1st Defendant-Respondent does not deny that Mahindarante and thereafter, the 1st Plaintiff-Appellant entered the land for the purpose of plucking coconuts, drawing toddy from a number of coconut trees growing on it and taking away

the produce, facts in support of the Defendants-Respondents' possession of the disputed land was subordinate in character, devoid of any claim to ownership.

In the said premise and in consideration of all the above circumstances, I answer the Question of Law No. 4 also in the affirmative.

In these reasons, the Judgement dated 22/11/2011 of the Civil Appeal High Court is hereby set aside and the Judgement dated 22/01/2007 of the District Court of Chilaw is affirmed. No order for Costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree

Judge of the Supreme Court