

## MUSTAPHA ASMA UMMA

v.

## RAJAPAKSA

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND G. P. S. DE SILVA, J.

C. A. 40/75 (Inty.) – D.C. GAMPAHA 15202/P.

AUGUST 29 AND 30, 1984.

*Partition suit – Claim of prescriptive title to specific lot by recipients of undivided shares from co-owner who is alleged to have prescribed to it.*

In a partition suit it was alleged that a co-owner had prescribed to a specific lot of the corpus on the basis of ouster or something equivalent to ouster. This co-owner however conveyed undivided shares to the contesting defendants in 1962. The partition action was filed in 1969 and the contesting defendants claimed a specific lot to which they alleged their predecessor had prescribed.

**Held –**

Even if the predecessor in title of the contesting defendants had prescribed to a specific lot of the corpus yet as the deed on which they acquired title was for undivided shares they could not rely on the prescriptive title of their predecessor. They would have to establish prescription by their own possession for over the prescriptive period. But here the partition suit had been filed before they could have prescribed to the specific lot ; as they have not acquired prescriptive title, they must be bound by the terms of their own deed.

**Cases referred to :**

- (1) *Fernando v. Podisinho* (1925) 6 Ceylon Law. Rec. 73.
- (2) *Carolisappu v. Anagihamy et al* (1949) 51 NLR 355, 356.

APPEAL from a Judgment of the District Court of Gampola.

J. W. Subasinghe, P.C. with Miss. S. N. S. Edirisinghe, for 12th defendant-appellant.

H. W. Jayewardene, O.C. with Miss Seneviratne, for plaintiff-respondent.

October 12, 1984.

G. P. S. DE SILVA, J.

The plaintiff brought this action in March 1969 to partition the field called Iriyagahakumbura described in the Schedule to the plaint and depicted as lots 'A' and 'B' in Plan No. 918 dated 12.12.1969 filed of record. He averred in his amended plaint that Balaya, Lapaya, Kiriya and Pina were the original owners in the proportion of 1/3, 1/3, 1/6 and 1/6 shares respectively. Balaya and Lapaya on P 1 of 1888 transferred their 2/3 share to Hitanu who died intestate leaving as heirs her husband Puhula and two children Ungi and Labuna. Puhula then became entitled to an undivided 1/3 share and an undivided 1/6 share devolved on each of the children, Ungi and Labuna. The 1/3 share of Puhula ultimately devolved on the plaintiff and it is not in dispute that the plaintiff has legal title to a 1/3 share.

Ungi purported to convey on 12D1 of 1930 an undivided 1/3 share to Mustapha Lebbe and Labuna on 12 D2 of 1931 purported to convey an undivided 1/3 share to the said Mustapha Lebbe who on 12D3 of 1962 purported to convey an undivided 2/3 share to the 2nd, 3rd and 4th defendants who are the contesting defendants. These defendants being minors, the 12th defendant was appointed as their guardian ad litem and it is the 12th defendant who is the appellant before us. I wish to add that the devolution of the shares of the other two original owners, namely, Kiriya and Pina, is not relevant to this appeal.

One of the points of contest raised on behalf of the appellant was whether the 2nd, 3rd and 4th defendants and their predecessors in title had prescribed to lot 'A' in the aforesaid Plan No. 918. The extent of lot 'A' is 121 perches and the extent of lot 'B' is 65 perches. As pointed out by Mr. Subasinghe, Counsel for the appellant, lot 'A' constitutes almost 2/3 share of the field. The finding of the trial Judge was that the 2nd, 3rd and 4th defendants had failed to establish a prescriptive title to lot 'A'. Mr. Subasinghe strenuously contended that this finding cannot be supported on the evidence and invited us to hold that these defendants have prescribed to lot 'A'. It was Counsel's contention that on the strength of 12D1 and 12D2 Mustapha Lebbe possessed a 2/3 share since 1930 and his possession has crystallised

into lot 'A' as a separate entity. While conceding that Mustapha Lebbe was a co-owner, Mr. Subasinghe maintained that there was sufficient evidence to prove an ouster or something equivalent to an ouster.

Mr. Jayewardene, Counsel for the plaintiff-respondent, on the other hand, raised a short point which, in my view, militates against the contesting defendant's plea of prescription. Although Mustapha Lebbe purported to purchase a 2/3 share on 12D1 and 12D2, Mr. Subasinghe conceded that what actually passed on these two deeds was only a 1/3 share. Therefore Mustapha Lebbe had legal title to a 1/3 share of the corpus which was conveyed to the 2nd, 3rd and 4th defendants on 12D3.

What is important to note is that in the first place Mustapha Lebbe on 12D1 and 12D2 bought undivided shares of the field. Secondly on 12D3 he purported to convey *an undivided 2/3 share of the whole field*. Mr. Jayewardene submitted that assuming (without conceding) Mustapha Lebbe had prescribed to a 2/3 share of the corpus, yet on 12D3 the 2nd, 3rd and 4th defendants cannot claim title to the specific lot 'A' as a separate entity. In support of this proposition Mr. Jayewardene relied very strongly on *Fernando v. Podisinho* (1) wherein Bertram, C.J. enunciated the relevant principle in the following terms :

"If persons who are entitled by prescription of a land persist, after they have acquired that title in conveying an undivided share of the whole land of which what they have possessed is a part; and if the persons so deriving title pass on the same title to others, *then the persons claiming under that title, unless they can show that they themselves have acquired a title by prescription must be bound by the terms of their deeds*". (The emphasis is mine)

Nagalingam, J. in *Carolisappu v. Anagihamy et al* (2) had occasion to refer to *Fernando v. Podisinho* (*supra*) and the learned Judge lucidly explained its ratio decidendi thus :

". . . . . the facts were that a co-owner who had possessed in lieu of his undivided share certain divided portions of the common land and acquired a prescriptive title to the divided portions in transferring his interests conveyed not the specific allotments to

which he had acquired a prescriptive title but his undivided interest in the entirety of the land. On a contest as to the right of the transferee to the specific allotments to which the vendor had acquired a title by prescription it was held that *the transferee was not entitled to take advantage of the possession of his vendor but that if he relied upon prescription for his title he had to show that his possession had been for the required prescriptive period*. The reason underlying the judgment is easy to see. The vendor did not convey the specific portions of his land and it cannot be said that the transferee was a person *who was claiming under the vendor* in so far as the specific allotments which he claimed were concerned. This case, therefore, is authority for the proposition that a person who does not derive his right to the land from another cannot fall back on the possession of that other in order to establish a prescriptive title but that he would have to establish it by his possession for over the prescriptive period". (The emphasis is mine)

Applying the above principle to the instant case, it will be seen that what Mustapha Lebbe conveyed on 12D3 of 1962 to the 2nd, 3rd and 4th defendants was not a specific allotment (to which it is now claimed he had acquired a prescriptive title) but his undivided interests in the whole field. The transferees on 12D3 *are bound by the terms of their deed* unless they can show that they themselves had been in possession for the required prescriptive period. Their possession, however, was only from 1962 to the date of action, namely 1969, which is a period less than 10 years. Therefore their plea of prescription is not entitled to succeed.

In this view of the matter, it is not necessary to consider the question whether Mustapha Lebbe as a co-owner has prescribed to lot 'A'. It is right to add that Mr. Subasinghe very properly conceded that the principle laid down in *Fernando v. Podisinno (supra)* applied to the facts of the instant case.

For these reasons, the appeal fails and is dismissed with costs.

H. A. G. DE SILVA, J. — I agree.

*Appeal dismissed.*