LIVINIS SILVA AND ANOTHER
v.
WILLIAM FERNANDO AND ANOTHER

SUPREME COURT.
G. P. S. DE SILVA, C.J., KULATUNGA, J.
AND RAMANATHAN, J.
SC APPEAL NO. 44/90.
CA NO. 500/82F.
DC MOUNT LAVINIA NO. 229/ZL
MARCH 01, 18 AND 19, 1993.

Vindicatory suit – Prescription between co-owners – Ouster – Adverse and exclusive possession.

The corpus sued upon by the plaintiffs had been claimed as a divided portion in partition action No. 3381/P in 1944 by Thegis, the predecessor in title of the plaintiffs on the basis of exclusive possession. From his statement of claim in the partition action the co-owners became aware of the adverse claim. It was not a secret intention but an outright assertion of exclusive possession and the commencement of ouster.

Held :

The facts established adverse and exclusive possession of the land in suit against the rights of the other co-owners sufficient to justify the plaintiff's claim of title to the land by Prescription.

Cases referred to :

1. *Tillekeratne v. Bastian* 21 NLR 12 (FB), 24, 26, 27.
2. *Corea v. Appuhamy* 15 NLR 65.
3. *Abdul Majeed v. Ummu Zaneera* 61 NLR 361, 371-372.

APPEAL from a judgment of the Court of Appeal.

P. A. D. Samarasekera, P.C., with *N. Singaravel* and *Jayantha Almeida de Gunaratne* for defendant-appellants.

N. R. M. Daluwatta, P.C., with *Manohara de Silva* and *P. Keerthisinghe* for the plaintiffs-respondents.

Cur. adv. vult.

April 28, 1993.

G. P. S. DE SILVA, C. J.

The plaintiffs instituted these proceedings for a declaration of title to a separate portion of the land called Maragahawatta referred to as Lot B in Plan No. 16 of 1933 which was marked at the trial as P6. The plaintiffs also sought the ejectment of the 1st and 2nd defendants and claimed damages.

The plaintiffs averred that Thegis Fernando was the original owner of the corpus by virtue of purchase and prescriptive possession and that he by deed of gift No. 1041 of 1951 (P10) donated the same to the 1st plaintiff and to Simon Fernando. The latter by deed No. 193 of 1956 (P11) sold his rights to the 2nd plaintiff and thus the plaintiffs became the sole owners of the property and possessed it until 19.2.77 when the 1st and 2nd defendants wrongfully entered their land.

The defendants in their answer averred that Thegis Fernando referred to in the plaintiff's pedigree was only a co-owner of the corpus and had no exclusive and adverse possession of any divided portion of the land as pleaded in the plaint. The 1st defendant claimed that he had purchased an undivided 1/8th share of the corpus on deed No. 2590 of 03.01.75 (V7) from Laisa, a sister of Thegis Fernando. It was therefore the position of the defendants that the plaintiffs are only co-owners of the land along with the 1st defendant and others.

The District Judge held that Thegis Fernando prescribed to the land in suit and entered judgment for the plaintiffs. The defendants appealed to the Court of Appeal and the Court of Appeal too held with the plaintiffs. The 1st defendant and his son the 2nd defendant have now preferred an appeal to this Court.

Mr. Manohara de Silva, for the plaintiffs-respondents contended at the outset that the deed V7 (transfer from Laisa to the 1st defendant-appellant) does not apply to the corpus and therefore the plea of the 1st defendant that he is a co-owner of the corpus along with the plaintiffs fails. As rightly submitted by Mr. Samarasekera for the defendants-appellants, this contention cannot succeed for the reason that the plaintiffs did not at the trial raise any issue as to whether V7 dealt with a different land although the defendants had specifically pleaded V7 which is a transfer by Laisa, the sister of Thegis Fernando. The matter does not rest there. The 1st defendant gave evidence and also called Laisa. However, it was not suggested to either of them that V7 did not apply to the land in suit. It would appear that the case for the plaintiffs at the trial was that V7 did not convey rights because Laisa's brother Thegis Fernando had prescribed to lot B in plan P6. Therefore it was not the case for the plaintiffs as presented at the trial that V7 did not apply to the corpus.

The evidence establishes that the land in suit was a co-owned property and among the co-owners was Thegis Fernando, the predecessor in title of the plaintiffs and Laisa, the predecessor in title of the 1st defendant. The principal submission of Mr. Samarasekera for the defendants-appellants was that there is no evidence of the separation and the division of lot B in P6 as claimed by the plaintiffs and there is no proof of ouster. At the trial the plaintiffs relied largely on P6 for proof of the separation and the division of lot B. However, as rightly submitted by Mr. Samarasekera, P6 has not been signed by the parties who are alleged to have taken part in the division of the land. There is no deed of partition nor cross conveyances following upon P6. The line of division between lots A and B is by a dotted line which indicates that it is an indefinite boundary ; there is no physical feature which corresponds to that line. The plaintiffs failed to take out a commission to show that the alleged division is physically on the ground. Therefore the Court of Appeal has rightly reached the finding that " the so called amicable division in P6 had not been acted upon or recognised by the co-owners".

Although there was no actual division and separate possession following upon P6, yet, as pointed out by the Court of Appeal, there was the earlier partition action No. 3381/P of the District Court of Colombo, which was filed in 1944. The 1st defendant in that case was Laisa, and the 2nd defendant was Thegis Fernando. The plaint

(P3), the final partition plan P7, the superimposition of plan P6 on P7 (marked P8) were produced at the trial. And more importantly, the answer filed by Thegis Fernando, was produced as P4. What is of relevance for present purposes are the averments in paragraphs 4, 5 and 7 of P4 which read as follows :–

"(4) Further answering this defendant says that the original land was an extent of soil sufficient to plant 100 coconut plants and the same was possessed in two equally divided portions, the division having taken place according to plan No. 16 dated 23.04.1933 made by J. W. de Silva, Licensed Surveyor, at the request of all the co-owners.

(5) In the said plan No. 16 Lot B which is the eastern portion, was possessed by this defendant and he is living in the said Lot B. A portion of the said Lot B has been included in the preliminary plan filed of record together with his residing house No. 5 in the said plan. The said portion containing the said house No. 5 built by him 15 years ago is an encroachment on the said Lot B and should be excluded from the partition.

(7) This defendant and his predecessors in title have been in the undisturbed and uninterrupted possession of the portion encroached upon for over 10 years by a title adverse to and independent of that of everybody else and claims the benefit of section 3 of the Ordinance No. 22 of 1871".

On a consideration of the aforesaid averments in the answer filed on 21.03.1945, it is clear that there is here an explicit and categorical assertion by Thegis Fernando of separate and exclusive possession of Lot B in plan P6. The Court of Appeal in its judgment has addressed its mind to this important aspect of the case and, in my view, rightly concluded, "The statement of claim was that he possessed exclusively. *Therefore the co-owners became aware of his adverse claim. This was not a secret intention but an outright assertion of exclusive possession and the commencement of ouster".* (The emphasis is mine).

Mr. Samerasekera, however, urged that despite this assertion in the answer, the proceedings in the partition action show that Thegis Fernando has in fact abandoned his claim of exclusive possession.

I find myself unable to agree with this contention. It was only a very small portion of Lot B in P6 that was included in the corpus sought to be partitioned (see plan 8). House No. 5 which was the house in which Thegis Fernando was living together with share of the land was allotted to him at the trial. In the plan (P7) Lot 8 and house No. 5 were allotted to Thegis Fernando and this was very nearly the portion of Lot B in P6 which was included in the corpus. It cannot be fairly said that Thegis Fernando abandoned his claim to Lot B at the trial.

It was in 1948 that the partition action was concluded. There is strong evidence to establish that since 1948 Thegis Fernando alone had adverse and exclusive possession of the land in suit against the rights of the other co-owners. This was the finding reached by the Court of Appeal, a finding which is amply supported by the documentary and oral evidence on record. I accordingly dismiss the appeal with costs fixed at Rs. 1500.

RAMANATHAN, J. – I agree.

KULATUNGA, J.

I am in agreement with the judgment of my Lord the Chief Justice and wish to add that the claim of the plaintiffs-respondents is supported by the evidence in the case and the principle stated in the Full Bench decision in *Tillekeratne v. Bastian* [1] (cited by Mr. Manohara de Silva, Counsel for the plaintiffs-respondents) where it was held that it is open to the Court, from the lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

Bertram, C. J. said (p. 24) –

> "It is a question of fact, whenever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before action was brought."

Shaw, J. (p. 26) referred to the presumption as : "the presumption of ouster" and added that this has been recognised by the Privy Council in *Corea v. Appuhamy* [2]

De Sampayo, J. said (p. 27) :

> "A presumption of adverse possession may, I think, be drawn from the fact of exclusive possession by one co-owner extending over such a long period as to render non-possession by the other co-owner inexplicable, except upon the theory of acquiescence in an adverse claim."

Mr. Samarasekera, P.C. for the defendants-appellants in his written submissions, in reply to the written submissions for the plaintiffs-respondents, states that *Tillekeratne's case* has no application to the facts of this case ; and that in any event, the presumption referred to in that case must be understood in the light of "the explanation" of that case by K. D. de Silva, J. in *Abdul Majeed v. Ummu Zaneera* [3].

The plaintiffs claimed exclusive rights to a separate portion of the land called Maragahawatte depicted as Lot 'B' in plan No. 16 of 1933 (P6). The balance portion of the said land is depicted as Lot 'A' in the said plan. The evidence of the 1st plaintiff and his witness Rodrigo (Grama Sevaka) and Barabos, defendants' witness clearly support the finding that since 1948 it was Thegis (the father of the plaintiffs) and thereafter the plaintiffs who had the exclusive possession of the land in dispute until 1977 when the defendants entered the land and forcibly constructed a house overnight, on the strength of a purchase of an undivided 1/8 share thereof from Laisa, the sister of Thegis on deed No. 2590 of 03.01.75 (V7).

The other co-owners were no parties to the division of the land shown in the said plan P6 ; and hence the exclusive possession of Lot 'B' in that plan by itself would not constitute an ouster against them. However, the partition action 3381 filed in 1944 (P3) in which Laisa was the 1st defendant, the answer of Thegis, the 2nd defendant (P4), the final plan (P7) and the final decree (P12) together with the plan P8 which is the superimposition of P6 on P7, are relevant. Thus whilst the total extent of Maragahawatte as per plan P6 was 0A. 3R. 15.62–P., the corpus of the partition action as per plan P7

was 0A. 1R. 34.06–P. which constitutes the entirety of lot 'A' in the said plan P6 plus about 6-7 P. out of Lot 'B' in extent 0A. 1R. 27.81P, claimed by Thegis. This led to the complaint by Thegis that a part of the land exclusively claimed by him had been included in the corpus. This dispute was not pursued as the case was concluded without a contest and an extent of 6.75 P. was allotted to Thegis.

It seems to me that by excluding almost the entirety of Lot 'B' from the corpus of the partition, the co-owners, including Laisa, acquiesced in the claim of Thegis to Lot 'B' which continued to be possessed exclusively by Thegis and his successors from 1948 and without any disturbance, until 1977 ; and the circumstances of the instant case appear to amount to something more than presumption of ouster in that the conduct of the other co-owners in the partition action and thereafter for so long a period warrants the inference that the possession of Thegis and his successors constitutes "ouster or something equivalent to an ouster" referred to in *Corea's case (supra)*.

I do not agree that the dicta of K. D. de Silva, J. in *Abdul Majeed's case (supra)* have any application to the case before us. That was a case in which the land in dispute consisted of 12.61 P. in extent and a building covering practically the whole land. It was held that proof that one of the co-heirs let out the premises and appropriated to himself the entire rent (which was not much) for 37 years was insufficient, by itself, to bring the case within s. 3 of the Prescription Ordinance. The criteria specified by K. D. de Silva, J. for considering whether the presumption of ouster may be drawn must be understood in the context of that case. At the same time certain comments of de Silva, J. to the effect that in drawing the presumption (which was adopted from English law) regard must be had to the fact that common ownership of lands is rampant here whereas it is comparatively rare in England, etc. were not intended to place any general constraint in the matter; for as His Lordship himself said : "whether the presumption of ouster is to be drawn or not depends on the circumstances of each case" supra.

I therefore agree that the appeal should be dismissed with costs fixed at Rs. 1,500.

Appeal dismissed.