PIYADASA AND ANOTHER
VS.
BABANIS AND ANOTHER

COURT OF APPEAL.
IMAM, J.
W. L. R. SILVA, J.
CA 457/94(F).
DC EMBILIPITIYA 2389/P.
NOVEMBER 23, 2005.
FEBRUARY 13, 2006.
MARCH 28, 2006.

Partition Law, No. 21 of 1977 – Plea of Prescription – Co-owner prescribing to entire land?–Presumption of ouster – Essentials of a Kandyan Marriage – Special Law in derogation of the Common Law – Can a new point be raised for the first time in appeal?–Can there be a valid Kandyan marriage by way of habit and repute – Kandyan Marriage and Divorce Act, Section 3 – Presumption in favour of marriage under Roman Dutch Law – Evidence Ordinance, section 103.

The Plaintiff–appellant instituted action seeking to partition the land in question, giving 1/2 share to the 1st and 2nd defendant – respondents. The 1st and 2nd respondents claimed title to the whole land by prescription.

The trial Judge dismissed the plaintiff's action on the ground that Pemanisa and Salo Nona were not married and therefore appellants and defendants were not legitimate children and further rejected the plea of prescription to the whole land by the respondents. Both parties depended on the fact that there was a valid marriage.

HELD:

(1) None of the parties have led any evidence in order to prove an overt act of ouster against the other party.

per Ranjith Silva, J.

> "I must emphasize that considerable circumspection should be exercised before arriving at a finding on prescription as it deprives the ownership to the party having paper title. Title by prescription is an illegality made legal, due to the other party not taking action at the proper time.

Held further:

(2) If the parties were subject to Kandyan Law there could not have been a marriage by habit and repute. Registration is the essence of a valid Kandyan marriage.

Per Ranjith Silva, J.

> "A marriage between persons subject to Kandyan Law if not solemnized and registered under the Kandyan Law or under the Marriage Registration Ordinance will not be regarded as a valid Kandyan marriage and the intestate succession to the property of such persons will not be in accordance with the Kandyan Law. The necessary corollary of this would be that in such an event the law applicable would be the Common law."

Held further:

(3) There is no evidence that Salo Nona and Pemanisa were Kandyans and that they were subject to Kandyan Law.

(4) The trial Judge had completely ignored the overwhelming evidence sufficient to prove that there was a marriage by way of habit and repute between Salo Nona and Pemanisa.

(5) According to the Roman Dutch Law there is a presumption in favour of marriage rather than that of concubinage. When persons who were living together as husband and wife were recognized as such by everybody in the circle in which they move it created a presumption in favour of marriage and in the absence of evidence in rebuttal to the contrary the court was entitled to presume that the parties were duly married as required by law. In this case there was ample evidence before the trial Judge for him to have considered the presumption.

(6) On a question of fact the appellants cannot agitate for the first time in appeal without first having contested the matter in the original court.

(7) An entry of not married in a register is intended by parties to mean no more than not registered.

APPEAL from the judgment of the District Court of Embilipitiya.

Cases referred to :

1. *Alwis* vs. *Perera* 21 NLR 321
2. *Thilakaratne* vs. *Barfan* 22 NLR at 121
3. *Mena Fernando* vs. *Anthony Fernando* 19972 Sri LR at 350
4. *Seetiya* vs. *Ukku* 19861 Sri LR 225
5. *Podi Nona* vs. *Harathhamy and Others* 19852 Sri LR 237
6. *Spencer* vs. *Rajaratnam* 16 NLR at 321
7. *Sitha* vs. *Weerakoon* 49 NLR 225
8. *Jayasekera* vs. *Silva* 76 NLR 427
9. *Candappa* vs. *Ponnambalampillia* 19931 Sri LR at 184
10. *Sastry Valaider Aronegin and his Wife* vs. *Sembekutty Viagalie* 2 NLR at 322
11. *Dinohamy* vs. *Balahamy* 29 NLR at 114
12. *Fernando* vs. *Dabarera* 65NLR 282
13. *Laddu Adirishamy* vs. *Peter Perera* 38 CLW 87 at 88.
14. *Don Simon alias Singha Appu vs. Fernando* 38 CLW 38

L. C. Seneviratne, PC with *Anuruddha Dharmaratne* for 1A substituted–plantiff appellant and the 2nd plantiff–appellant.

S. C. B. Walgampaya, PC with *Ajith Liyanage* for the 1A substituted-defendant-respondent and 2nd defendant – respondent.

Cur.adv.vult.

June 2, 2006.

RANJITH SILVA, J.

The Plaintiffs–Appellants (Appellants) instituted this action bearing No. 2389/P in the District Court of Embilipitiya seeking to partition the land called Landegedarawatta alias Kaluwagewatta (hereinafter referred to as the 'Land') about one acre in extent which is depicted in plan No. 1012 prepared by G. Warnakulasuriya Licensed Surveyor marked as 2 at the trial in the District Court.

According to the pedigree relied on by the appellants the land originally belonged to one Morapitiyage Babanisa. Babanisa died intestate and upon his death title to the same devolved on his son Morapitiyage Rankira who was his sole heir. Morapitiyage Rankira died intestate leaving as his sole heir, his son Morapitiyage Pemanisa who by inheritance became entitled to the entirety of the Land. The Appellants further pleaded that the said Pemanisa died intestate leaving the 1st and 2nd appellants (Piyadasa and Edwin) and Disi Nona and William on whom devolved Pemanisa's rights; that the said Disi Nona and William in or about 1952 conveyed their undivided 1/2 share to the 1st and 2nd defendants Respondents (who shall hereinafter be referred to as "the Respondents"). The case for the Appellants as well as the Respondents mainly depended on the fact that there was a marriage by habit and repute between Pemanisa and Selonona. Why the Appellants did not propose to give any shares to Selonona the wife of Pemanisa is a mystery.

The 1st and 2nd Respondents in their statement of claim admitted that Morapitiyage Pemanisa was at one time the owner of the entire corpus. Both the appellants and the Respondents accept the devolution of title up to Pemanisa; it is from this point onwards that the Parties differ as to the devolution of title. The Respondents pleaded that upon the death of Pemanisa the widow of Pemanisa that is one Selonona became entitled to an undivided 1/2 share of the land and the balance 1/2 share devolved on the 1st and the 2nd Appellants and Disi Nona and William who thus became entitled to 1/8 share of the land each. The Respondents further averred that the said Selonona, Disinona and William conveyed their undivided 3/4 shares of the Land to the 1st and 2nd Respondents upon deed No. 13328 dated 09.02.1952 and that 1st and 2nd Respondents as

the owners cultivated the entire land in coconut, jack, arecanut and rubber and thus had been in possession of and residing on the land ever since. The Respondents claimed title to the entire land based on prescriptive possession and prayed for a dismissal of the action.

At the trial it has been recorded that there was no dispute with regard to the *corpus* and thus the identity of the *corpus* was never in dispute. The dispute is with regard to the devolution of title. The Appellants claim that they are entitled to a 1/2 share of the 'Land' and that the Respondents are entitled to the balance 1/2 share. The Respondents on the other hand do not concede that they are only entitled to a 1/2 share of the 'Land'. Instead they claim that although they are entitled to 3/4 shares of the Land on paper title they have acquired prescriptive title to the entire land based on prescriptive possession.

The Learned District Judge, after trial, held by his judgment dated 10.08.1994, that the evidence led in the case did not establish that Pemanisa was married to Selonona and therefore the 1st and the 2nd appellants and Disinona and William were not the legitimate children of Pemanisa and as such they could not have inherited the 'Land' from Pemanisa. The Learned District Judge further held that neither the Appellants nor the Respondents have proved prescriptive rights to the said 'Land' and accordingly dismissed the appellants' action.

Being aggrieved by the said judgment the appellants have preferred this appeal to this court. There is no cross appeal taken by the Respondents on the question of prescription raised by the Respondents even though the learned District Judge has held against the Respondents on that issue. The Appellants have, although whatever the relief they may have prayed for in their petition of appeal, at the stage of arguments, in this court limited the relief they sought and prayed that the judgment dated 10.08.1999 dismissing the Appellant's action be vacated and a fresh judgment be entered declaring, that the Respondents were entitled, to an undivided 3/4 shares of the land and the Appellants were entitled to an undivided 1/4 share of the land, together with similar shares that is 3/4 for the Respondents and 1/4 for the Appellants from the house and whatever the plantation standing thereon.

PRESUMPTION OF OUSTER

Whether the Appellant as a co owner of the land could have prescribed to the entire land as against the other co owners in the absence of any specific overt act of ouster as far as the other co owners are concerned is a vital point that ought to be decided in this regard. In this case on a perusal of the brief. I find that none of the parties have even contemplated, let alone led any evidence in order to prove an overt act of ouster against the other party. I must emphasize that considerable circumspection should be exercised before arriving at a finding on prescription as it deprives the ownership of the party having paper title. Title by prescription is an illegality made legal due to the other party not taking action at the proper time. I would like to quote one of the relevant maxims namely the maxim **Vigilantibus non domientibus, Jura subvenient** meaning-the laws assist those who are vigilant, not those who sleep over their rights. Dealing with this maxim, it is stated, in the book entitled **'Broom's Legal Maxims' Tenth Edition at page 599** that I quote;" for if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to recover the possession; both to punish his neglect **nam leges vigilantibus, non dormientibus jura subvenient** and also because it was presumed that the supposed wrong-doer had in such a length of time procured a legal title, otherwise he would sooner have been sued."

A co–owner's possession is in law the possession of other co owners. Every co owner is presumed to be in possession in his capacity as co owner. A co–owner cannot put an end to his possession as co owner by a secret intention formed in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. (*Vide Alvis vs. Perera* [1]) In *Thilakarathne vs. Bastian* [2] it was held I quote ; "It is a question of fact, where ever long continued possession by one co owner is proved to have existed, whether it is not just and equitable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possssion had become adverse at some date more than 10 years before action was brought."

The judgment in *Maria Fernando vs. Anthony Fernando* [3] at 356 is applicable to the facts of this case. It was held in that case that long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse Party, a party, preparing plans and building houses on the land and renting it, are not enough to establish prescription among co owners in the absence of an overt act of ouster. It was held in *Seetiya vs. Ukku* [4] that nothing short of an ouster or something equivalent

to ouster is necessary to make possession adverse to end co ownership. Although it is open to a court from long lapse of time in conjunction with other circumstances of a case to presume that possession originally that of a co-owner has later became adverse, the fact of co-owners possessing different lots fencing them and planting them with a plantation of coconut trees which is a common plantation in the area cannot make such possession adverse. For the aforesaid reasons I find that there is no flaw in the findings of the learned Judge with regard to the issues based on prescription. In any case none of the parties, neither the Appellants nor the Respondents have seriously contested in this court, the findings of the learned Judge on the issues based on prescription.'

On the first day of the oral submissions the counsel for the Appellants submitted to this court for the first time that the parties were subject to Kandyan Law and therefore Selonona was entitled only to a life interest in the property and that the rights to the entire property devolved on the children of the said Pemanisa. In the lower court, it was never the case for the appellants that the parties were subject to Kandyan law. On the second day of oral submissions the counsel for the appellant abandoned the said submission but never denied that Selonona was married to Pemanisa. Therefore one can only assume that the appellant thereby conceded that the parties were married under the common law especially so in view of the fact that the appellants averred and maintained the position right through that the appellants being two of the four children of Selonona and Pemanisa inherited the property on the demise of their father Pemanisa. In any event if the parties were subject to Kandyan Law there could not have been a marriage by habit and repute. It was held in *Podinona vs. Harathhamy* and Others[5] that *registration is the essence of a valid Kandyan marriage*.

Special Law in Derogation of the Common Law

Even otherwise the law is very clear on this point. It was held in *Spencer vs. Rajaratnam*[6] at 321 that any person claiming to be subject to any special law in derogation of the common law must prove it. According to the *ratio decidendi* in the above mentioned case, the onus in the instant case was on the Appellants to prove on a balance of evidence that Selonona was subject to Kandyan Law being a special law in derogation of the common law. Since the appellants totally failed or neglected to frame any issues on this point and since there is not an iota of evidence led by either party to give the slightest indication that Selonona was subjected to Kandyan law, the argument that Selonona had only a life interest over the land cannot be sustained and therefore should be rejected in *toto*.

New point raised for the first time in appeal

On the other hand this being a question of fact the appellant cannot agitate this matter in the Court of Appeal for the first time without first having contested this matter in the original court.

In *Setha vs. Weerakoon* [7] it was held that a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point or the question is one of law and nothing more.

In *Jayawickrama vs. Silva* [8] It was held that a pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.

In *Candappa vs. Ponnambalampillai* [9] at 184 it was held that a party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial, such case not being one which raises a pure question of law.

In this regard I would also like to quote section 103 of the Evidence Ordinance which reads as follows:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person."

Since both parties admitted expressly or impliedly that Selonona was the lawful spouse of Pemanisa it was incumbent on either party to prove that fact.

Section 58 of the Evidence Ordinance is as follows ; "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading."

"Provided the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

KANDYAN LAW VS MARRIAGE BY HABIT AND REPUTE

The 2nd Respondent in giving evidence at the trial stated that Selonona and Pemanisa were married; that they both resided in one house on a land called Kumburugedera Watta and that they had four children by this union . (vide. Proceedings at page 85 and 86 of the brief) This witness also stated that they were lawfully married and that the children were born unto them. It was also admitted by this witness that the said parties lived as one family, lived at Hatangala and that William, Dissinona, Piyadasa (1st plaintiff Appellant) and Edwin (2nd Plaintiff Appellant) were their children. (Vide. page 91 of the brief). The Appellant too in giving evidence maintained that Pemanisa and Selonona were their father and mother and that they were legally married. Unfortunately for the Appellants as far as the judgment of the learned trial Judge is concerned, even though the effect is temporary,their counsel marked as P1 and produced the birth certificate of Piyadasa one of tthe Appellants, wherein it is stated that the parents of Piyadasa were not married. The learned trial Judge banking entirely on that statement, found in column 7 of the said birth certificate, fatally misdirected himself and held that the parties were not married and dismissed the case on the basis that since Pemanisa and Selonona were not married, both the Plaintiffs (Appellants) and the Defendants (Respondents) did not derive any title to the Land as they were not the legitimate children of Pemanisa and Selonona. In doing so the learned Judge has completely ignored the overwhelming evidence that was before him, sufficient to prove that there was a marriage by way of habit and repute between Selonona and Pemanisa.

There is no evidence that Selonona and Pemanisa were Kandyans or that they were subject to Kandyan Law. Hence the provisions of section 3 of Kandyan Marriage and Divorce Act will not apply. Assuming *arguendo* that Selonona and Pemanisa were persons subject to the Kandyan Law, it is my opinion that the heirs could still claim the benefit of the presumption arising out of marriage by habit and repute even though the devolution of title would be not under the Kandyan Law but the Common Law. The provisions of section 3 of Kandyan Marriage and Divorce Act is to the effect that a marriage between persons subject to Kandyan Law shall be solemnized and registered under that Act or the Marriage Registration Ordinance and any such marriage not so solemnized and registered, shall be invalid. It was held in *Podinona vs. Harathhamy and others (supra)* quote "After 1859 registration is the essence of a valid Kandyan marriage and customary Kandyan marriages ceased to be valid. The marriage here being one said to have been contracted some time prior to 1937, the entry in the Register of marriages in terms of section 39 of Ordinance No. 3 of 1870, is the best evidence of the marriage. The expression 'best evidence' as used in the said section 39 refers to the registration entry in the Register of Marriages and excludes all evidence of an inferior character."

It is therefore mainfest that there cannot be a valid Kandyan marriage by way of habit and repute. If there be any such marriage then the law applicable to intestate succession will be the common law and certainly not the Kandyan Law. In support of this view of the matter I would like to quote section 3(2) of the Kandyan Marriage and Divorce Act which reads as follows:

"The fact that a marriage, between persons subject to Kandyan Law, is solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons, or the other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan Law."

On a reading of this sub section it is apparent that the intention of the legislature in enacting section 3 of the said Ordinance was to lay down the law that a marriage, between persons subject to Kandyan Law if not solemnized and registered under the Kandyan law or under the marriage Registration Ordinance will not be regarded as a valid **Kandyan Marriage** and that the intestate succession to the property of such persons will not be in accordance with the Kandyan Law. The necessary corollary of this would be the Common Law.

It was never the intention of the legislature to deprive the Kandyans of their right to rely on or claim the benefit of the presumption arising out of marriage by habit and repute, in a fit case, if they so wish. To hold otherwise will result in the bastardization of hordes of unsuspecting innocent children, depriving them of their legitimate dues. Such an interpretation will be against public policy and should be dissuaded from, unless there is no alternative.

In the case of *Sastry Valaider Aronegiri and his wife vs. Sembekutty Viagale* [10] at 322 it was held that according to the Roman Dutch Law of Ceylon there is a presumption in favour of marriage rather than that of concubinage. According to the law of Ceylon, as in England where a man and woman are proved to have lived together as man and wife the law will presume unless the contrary be clearly proved that they were living together in consequence of a valid marriage.

In *Dinohamy vs. Balahamy* [11] at 114 once again the Privy Council held that under the law of Ceylon, where a man and a woman are proved to have lived as husband and wife, the law will presume unless the contrary be clearly proved that they were living together in consequence of a valid marriage and not in a state of concubinage. In the instant case before us too the evidence discloses that Selonona and Pemanisa had lived together

as husband and wife and were thus recognized by the villagers and all those who knew them. What is more they had four children and all the parties concerned have admitted this fact in no uncertain terms.

In *Fernando vs. Dabrera* [12] the Supreme Court held that the evidence of marriage ceremonies or religious rites was not essential to establish a marriage by habit and repute if both parties were dead and the marriage was contracted at a very early stage. The Supreme Court, in this case too, held that the fact that when persons were living together as husband and wife and were recognized as such by everybody in the circle in which they move it created a presumption in favour of marriage and in the absence of evidence in rebuttal to the contrary, the court was entitled to presume that the parties were duly married as required by law. In this case too there was ample evidence before the learned District Judge for him to have considered this presumption. The District Judge did not propose to rely on this presumption, instead held otherwise apparently because he completely misdirected himself on the law. He, I believe, came to this conclusion simply because the birth certificate of one of the Appellants states in column 7 that the parents were not married. In *Laddu Adirishamy vs. Peter Perera* [13] at 88 it was held by the Supreme Court citing earlier cases that such declaration to a Registrar of Births might well amount, particularly in the case of an ignorant villager to little more than an admission that the marriage of the parents was not registered, and not necessarily an admission that a marriage by custom has not taken place. The learned trial Judge appears to have pitched, the fact that column 7 of the birth certificate contained such entry, very high and given undue weight to that fact, in arriving at his findings on this point. Following the dictum in *Don Simon alias Singha Appu vs. Fernando* [14] it was held by Sinnetamby, J. in *Fernando vs. Dabrera (supra)* at 282 that, I quote "The only positive item of evidence against the marriage is the document 7D1, which is the birth certificate of one of the children, where the parents are stated not to have been married: but as was observed by the judges who decided *Laddu Adirishamy vs. Peter Perera* (supra) at 87, an entry of "Not married" in a register is intended by parties who are illiterate to mean no more than "not registered".

For the aforesaid reasons I hold that the findings of the learned Judge on this issue to be *per incuriam.*

Therefore on the facts and the law and for the reasons adumbrated above I find that I am unable to agree with the findings of the learned District Judge other than with his findings on the issues of prescription. Accordingly I set aside the judgment of the learned District Judge dated 10.08.1994 and hold that the devolution of title to the property should be on the basis as setout by the Respondents. Namely an undivided 1/4 share of the land, to the 1st and 2nd appellants jointly and an undivided 3/4 share to the 1st and 2nd Respondents jointly. This shall include a similar share in the plantation and the house on the land that is 1/4 share of the house and plantation to the 1st and 2nd Appellants jointly and 3/4 share of the house and plantation to the 1st and 2nd Respondents jointly. Accordingly I hold that the answers, to the issues framed by the parties, at the trial held in the District Court to be as follows :

(1) Yes
(2) Yes
(3) Yes
(4) No
(5) Yes
(6) No
(7) No
(8) The Plaintiffs are jointly entitled to 1/4 share of the land and 1/4 share of the house and plantation thereon.
(9) Yes
(10) Not proved
(11) No
(12) The defendants are jointly entitled to 3/4 shares of the land and 3/4 shares of the house and the plantation thereon.

The Learned District Judge of Embilipitiya is hereby directed to enter judgment and the interlocutory decree in conformity with this judgment. In the circumstances of this case we make no order as to the costs of this appeal.

IMAM J. — *I agree.*

Appeal allowed.