PATHMASIRI AND ANOTHER
VS
BABY AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA 160/90F DC KEGALLE No.: 22142/P
APRIL, 11 AND
JUNE 12, 2003 AND
OCTOBER 3, 2004

Partition Law, No. 21 of 1977 - Exclusion sought - Prescriptive possession - Co-owners possession - Acquiring of rights to a divided lot? - Adverse possession - Ouster

The plaintiff respondent instituted action to partition the land in question. The contesting 2nd and 3rd defendant appellants sought an exclusion of the lots they were in possession on the basis that the lots consist of a different land. The trial court held with the plaintiff respondent.

On appeal :

Held :

Mere possession of a specified portion of co-owned property for convenience cannot constitute an adverse possession although he possessed the specified portion for more than 50 years.

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to :

1. *Tilakaratne vs. Bastian - 21 NLR 114 (FB)*
2. *Corea vs Appuhamy - 15 NLR 65*
3. *Hamidu Lebbe vs Ganitha - 27 NLR 33*
4. *Simon Perera vs. Jayatunga - 71 NLR 338*
5. *Sediris Appuhamy vs. Jamis Appuhamy - 60 NLR 297*
6. *Gunawardena v Samara Koon - 60 NLR 481*

J.C. Boange for 2A and 3A defendant appellants.
Mahinda Nanayakkara for plaintiff respondent.

Cur. adv. vult.

October 03, 2003.

A.M. SOMAWANSA. J.

The plaintiff - respondent instituted the instant action in the District Court of Kegalle seeking a partition of the land called and known as "Badaheladeniya Hena" morefully described in the schedule to the plaint and depicted as lots 1 to 5 in plan No. 4056 dated 10.05.1979 prepared by C.K. Badewella marked X. The contesting 2nd and 3rd defendants appellants (now substituted) sought an exclusion of the lots 1 and 2 from the corpus on the basis that the said lots 1 and 2 consist of another land called and known as "Peellagawahena". They also averred that Siri, Meniki, Kudaduraya and Hapu mentioned in the plaint as the plaintiff-respondent s vendors by deed No. 42857 marked 2D2 conveyed this land to Sittiya the father of the 2nd and 3rd defendants - appellants and on the basis of exclusive possession by the said Sittiya and on his death by the 2nd and 3rd defendants -appellants that they have acquired prescriptive rights to lots 1 and 2 in plan marked X.

Parties went to trial on 11 points of contest and at the conclusion of the trial the learned District Judge by his judgment dated 22.02.90 held with the plaintiff - respondent. It is from the said judgment that the 2nd and 3rd defendants - appellants (now substituted) have preferred this appeal.

At the hearing of this appeal the counsel for the 2nd and 3rd defendants-appellants contended that the learned District Judge erred and misdirected himself when he stated that there is no evidence of execution of deeds or possession according to a plan and accordingly the land remains co-owned and so ordered a partition of the entire land. He submits that there

is no necessity to have cross deeds or a partition plan but the question of ouster has to be decided as a question of fact. That in the instant case there are distinct boundaries and long continued possession in addition another name, thus justifying an inference of ouster or that it is a separate land.

On an examination of the evidence led in this case it is to be seen that the only evidence available to show that lots 1 and 2 in plan marked x is a separate land called "Peelagawahena" is that of the 2nd defendant - appellant's evidence and the deed No. 42857 marked 2V2. It is to be noted that Peelagahawahena as described in the schedule to the statement of claim of the 2nd and 3rd defendants is bounded on the east by rock ridge of Badahaladeniya hena south by Rock of Dangollawatta west and north by ela. However the land described in the schedule to deed No. 42857 marked 2V2 does not tally with the boundaries given in the schedule to the statement of claims nor do they tally with the boundaries shown in the plan marked X. According to the schedule to the statement of claim Peelagawahena which is alleged to be depicted as lots 1 and 2 in plan marked X is bounded on the south by the Rock of Dangollawatta. However according to the plan marked X Dangollawatta is shown as the north eastern boundary of the corpus and certainly not shown as southern boundary of lots 1 and 2. The southern boundary of lots 1 and 2 are shown as Nugawelamulahena. Therefore it appears that when comparing the boundaries of Peelagahawahena as given in the schedule to the statement of claim as well as deed 2V2 and 2V3 with the boundaries shown in the preliminary plan marked X it is apparent that they do not tally.

It appears that the 2nd defendant-appellant under cross examination admits that northern and western boundaries given in the deeds pertaining to Badahaladeniya hena are correct. Another factor that came to light under cross examination is that the extent of the land described in the deeds marked 2V2 and 2V3 when compared with the extent of lots 1 and 2 in plan marked X there is a vast difference.

On a consideration of the evidence led in this case, It appears that the 2nd and 3rd defendants have failed to establish that lots 1 and 2 depicted in plan marked X do not form part of the corpus but is a separate land called Peelagawahena. The learned District Judge has addressed his mind to the issues at hand and I would say he has come to a correct finding that lots 1 and 2 are is not separate land but forms part of the corpus sought to be partitioned.

The other matter that needs consideration is the prescriptive rights of the 2nd and 3rd defendants - appellants to lots 1 and 2 depicted in plan marked X. However it appears that the only evidence available on this claim of acquiring prescriptive title to lots 1 and 2 in plan marked X is the *ipse dixit* of the 2nd defendant - appellant who said that on the death of his father in 1962 he alone took the produce and possessed lots 1 and 2. As stated above, lots 1 and 2 form part of the corpus and it is admitted by the plaintiff respondent that the 2nd and 3rd defendants - appellants are entitled to certain shares in the land in view of certain deeds which convey rights to the 2nd and 3rd defendants - appellants. Therefore it follows that the 2nd and 3rd defendants - appellants are co-owners to the land sought to be partitioned. Except for the *ipse dixit* evidence of the 2nd defendant - appellant there was no other evidence forthcoming to establish that he had prescribed to these two lots. It is very relevant to note that no suggestions and for that matter no questions were put to the plaintiff-respondent or the 1st defendant - appellant on the basis of prescriptive rights claimed by the 2nd and 3rd defendants - appellants.

In the case of *Tillekeratne* vs. *Bastian* [1] full Bench of the Supreme Court considered the meaning of "adverse possession" in an exhaustive manner. Possession by one of the co-owners is presumed as the possession on behalf of all the co-owners however much the length of time. For one co-owner to acquire prescriptive title against the other co-owners. he shall prove ten years exclusive possession after changing the nature of the possession to one adverse to the title of others.

The leading case on the question of prescriptive possession by co-owners is that of *Corea* vs. *Appuhamy*[2]in which the Privy Council held that possession by a co-heir ensures to the benefit of his co-heirs. It was further held that;

> "A co-owner 's possession is in law the possession of his co-owners, It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. The whole law of limitation is now contained in Ordinance, No. 22 of 1871."

In that case the property was belonging to four co-owners jointly. One Elias Appuhamy who was the owner of certain lands died in July 1878. He

was not married and died intestate. His heirs were his brother Iseris and three sisters. His brother Iseris also joined him when he was 10 years old to look after the interest of property of the deceased. After the death of some of the sisters of Elais their shares were devolved on their children. Thereafter when an action was filed to partition the land among co-owners. Iseris Appuhamy claimed prescriptive title to the subject matter. His claim was upheld by the District Court and Supreme Court.

But the Privy Council set aside the judgment and directed to enter decree for the partition of the land.

Lord Mac Naghten pronouncing the opinion of the Privy Council held as follows :

"Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, the question remains, Has he given proof as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias, his heirs had unity of title as well as unity of possession. Then comes the question, Was the possession of Iseris adverse? The District Judge held that Iseris "entered in the character of sole heir or plunderer. Whichever it was, says the learned Judge, "so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title. " It is difficult to understand why it should be suggested that Iseris may have entered as "plunderer." He was not without his faults. He is described by the learned Judge who decided in his favour as " a convicted forger and thief", and "expert not only in crime and incarceration, but also in perjury". But it is perhaps going too far to hold that he was so fond of crooked ways and doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit, and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His must have enured for the benefit of his co-proprietors. The principle recognized by Wood V.C. in Thomas Vs. Thomas holds good : " possession is never considered adverse if it can be referred to a lawful title."

In the case of *Hamidu Lebbe* vs. *Ganitha*[3] which was a case filed by the plaintiff for a declaration of title to a half share of a particular land, which originally belonged to one Kirihatana and in the course of the case he died leaving two sons, the defendant Ganitha and Suddana. Suddana had two children Rankira and Ukku, who in 1921 sold to the plaintiff. Trial Judge dismissed the plaintiff's action on the basis that plaintiff's claim must fail on the issue of prescription.

In appeal to the Supreme Court Ennis A.C.J. said that :

"Where a co-owner of a land seeks to establish prescriptive title against another by reason of long- continued exclusive possession it depends on the circumstances of each case where it is reasonable to presume an ouster from such exclusive possession."

In the written submissions tendered on behalf of the 2nd and 3rd defendants - appellants counsel has brought to our notice the decision in *Simon Perera* vs. *Jayatunga*[4] the head note reads as follows :

"The question whether a co-owner has acquired prescriptive title to a divided lot as against the other co-owners is one of fact and has to be determined by the circumstances of each case."

The facts were:

" A land was owned in common by members of one family. An undivided one third share of it was purchased by one B, an outsider, who was already the owner of an adjoining land. Thereafter, without execution of any deeds there was an amicable division among the co-owners in pursuance of which B possessed a divided lot exclusively for nearly thirty years in lieu of her undivided share. She had not only annexed this lot to her own adjoining land but had also separated it off from the rest of the common land by erecting a parapet wall of a permanent nature."

It was held :

" That there was sufficient evidence of ouster and that B had acquired, as against the other co-owners, prescriptive title from the time of ouster in respect of the lot which she possessed exclusively in pursuance of the amicable division."

That case can be distinguished from the instant case for in the instant action other than the bare statement of the 2nd defendant - appellant that he possessed and took the produce. There is no other evidence like in that case where a permanent parapet wall had been erected.

In *Sediris Appuhamy* vs. *James Appuhamy*[5] Sinnathamby, J went on to affirm the position that the mere possession of a specific portion of co-owned property for convenience cannot constitute an adverse possession although he possessed the specific portion for more than fifty years. A similar principle was followed in *Gunawardene* vs. *Samarakoon*[6]

I must say that unlike me the learned District Judge had the greater advantage of seeing, hearing and observing the demeanour of the witnesses who gave evidence. Having analysed and evaluated the evidence led, it appears to me that on a balance of probability he has come to a correct finding.

In view of the above reasons, I would dismiss the appeal with costs fixed at Rs. 5,000.

The Registrar is directed to send the case record to the appropriate District Court forthwith.

DISSANAYAKE, J. - I agree,

Appeal dismissed.