ANGELA FERNANDO
VS.
DEVADEEPTHI FERNANDO AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J.
WEERASURIYA. J.
FERNANDO, J.
SC 48/2003.
CA 98/94 (F).
DC MT. LAVINIA 1236/P.
DECEMBER 02, 2004.
MARCH 02, 2005.
SEPTEMBER 21, 2005.

Partition Law, No. 21 of 1977, sections 2(1) and 25(1) - If land is not commonly owned is investigation of title necessary? - Ouster - Possession becoming adverse - Long continued possession by a co - owner? - Counter presumption of ouster.

Plaintiff's action to partition the corpus was dismissed as the parties who were said to be entitled to rights in the corpus in fact had separately possessed with clear and permanent boundaries the Lots depicted in the preliminary plan for a long period of time. The Court of Appeal reversed the judgment on the grounds—

(a) that the District Court has failed to investigate title.
(b) that the parties had failed to prove ouster to claim prescription.

HELD:

(1) It is imperative that the investigation of title must be proceeded by a careful examination of the preliminary issue, whether the land sought to be partitioned is commonly owned as required under section 2 (1). The District Judge having carefully examined the question had correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties which in the circumstances was lawful and justified.

Held further:

(2) Adverse possession as between co-owners may arise by absolute exclusion of one of the co-owners or by conversion of undivided shares into divided shares in an informal manner.

(3) Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances where exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence

that at a specific point of time in the distant part there was in fact a denial of the rights of the other co-owners.

Per Weerasuriya, J.

"The decision in *Tilakaratne vs. Bastian* recognizes an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period".

(4) The presumption that possession is never considered adverse if it can be referable to a lawful title may sometimes be displaced by the counter presumption of ouster in appropriate circumstances.

(5) The Court of Appeal failed to appreciate the salient feature in the evidence adverted to by the District Judge in respect of the corpus and their relevancy on the question of ouster.

APPEAL from the judgment of the Court of Appeal.

Cases referred to :-

1. *Corea vs. Iseris Appuhamy* – 1911 15 NLR 65 (PC)
2. *Tilakaratne vs. Bastian* – 21 NLR 12
3. *Orderis vs. Mendis* – 1910 13 NLR at 315, 316
4. *William Singho vs. Ran Naide* 1915 1 CWR 92
5. *Mailvaganam vs. Kandiah* 1915 1 CWR 175
6. *ASP vs. Cassim* 1914 2 Bal Notes 40
7. *Kapuruhami vs. Appu Singho* 3 NLR 144
8. *Ran Menike vs. Ran Manike* 2 SCC 153
9. *Selenchi Appuhamy vs. Luvinia* 9 NLR 59
10. *Obeysekera vs. Endoris* 66 NLR 457
11. *Simon Perera vs. Jayatunga* 71 NLR 338
12. *Nonis vs. Peththa* 73 NLR 1
13. *Abdul Majeed vs. Umma Zaneera* 61 NLR 361 at 374

Rohan Sahabandu for substituted 10A defendant respondent –appellant.
N. B. D. S Wijesekara for substituted plaintiff appellant – respondent.

Cur. adv. vult.

May 04, 2006.

WEERASURIYA, J.

The (deceased) plaintiff by his amended plaint dated 28.03.1988 sought to partition the land called Lot E of Badullagahawatta *alias* Kahatagahawatta situated at Karagampitiya within the Dehiwala-Mount Lavinia Municipal Council limits, in Palle Pattu of Salpiti Korale of the Colombo District in the Western Province and depicted as a divided lot in plan No. 191 dated 20.12.1905 made by Licensed Surveyor H. G. Dias, containing in extent 1 Acre and 36 perches less 23.73 perches to the North.

The trial in this case which commenced before the District Court of Mount Lavinia on 15.09.1992 was concluded on 30.11.1993 and the learned District Judge by his judgment dated 11.02.1994 dismissed the action with costs. Thereafter the substituted plaintiff appealed from the aforesaid judgment to the Court of Appeal and this appeal was taken up for hearing on 19.08.2002. On 08.11.2002 the Court of Appeal delivered the judgment allowing the appeal and directed that a fresh trial be held.

The substituted 10A Defendant-Respondent-Appellant sought special leave to appeal from the aforesaid judgment of the Court of Appeal and this Court granted special leave to appeal on the following questions of law:

(i) Did the Court of Appeal err in holding that the District Court has not investigated title?
(ii) Did the Court of Appeal err in holding that the defendants had not proved ouster?
(iii) Did the Court of Appeal misinterpret section 25(1) of the Partition Law when in fact on a question of fact the District Court had held that the plaintiff has not proved his title or that the property is co-owned?
(iv) Did the Court of Appeal err in law in ordering a trial *de novo* and also permitting the plaintiff to institute a fresh action which is contradictory?
(v) Did the Court of Appeal err in coming to the conclusion that the District Court erred in law and in fact?
(vi) Is the judgment of the Court of Appeal valid and legal?
(vii) In the circumstances of this case is the judgment of the District Court lawful, valid and according to law?
(viii) Could the Court of Appeal interfere with the judgment of the District Court which was based on a question of fact when the judgment is not perverse?
(ix) As the partition action has been instituted in 1981, is it just and reasonable to order a retrial after 21 years when most of the parties and witnesses are dead and gone and further as it is admitted that the contesting defendants have been in possession/occupation for over 50 years now?

Learned District Judge had dismissed the action on two grounds namely that the corpus was not commonly owned and that the parties had acquired prescriptive rights to the lots they possess.

The Court of Appeal has reversed the judgment of the District Court on the following grounds:-

(1) that the District Court had failed to investigate the title of the parties and

(2) that the parties had failed to prove ouster to claim prescription.

Therefore this appeal raises the question of prescription among co-owners which had received careful and exhaustive consideration both by the Supreme Court and the Privy Council in previous cases.

Investigation of Title (Question No. 1)

Section 25(1) of the Partition law provides that "On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed, or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in sub section 26 should be made".

In terms of this section, it is obligatory on the District Court to carefully investigate title of all the parties in the action at the trial and decide on their rights. The binding and conclusive character of a partition decree makes it imperative that the investigation of the title by Court must be full and exhaustive.

It will not be possible for a plaintiff to prove his title by the mere production of several deeds and to merely rely on the shares which the deeds purport to convey. It is significant that there must be clear proof as to how the executant of a deed was entitled to the share which the deed purports to convey. It is not uncommon in this country for a deed of conveyance to purport to convey interests either more or less than what the vendor is entitled to.

Learned District Judge in the course of his judgment had made specific reference to the inconclusive and uncertain nature of the evidence of the 16th defendant who chose to testify on behalf of the plaintiff in respect of the pedigree pleaded by him. It was revealed that the 16th defendant in the course of his evidence had adverted to the disposing of the rights of some persons twice without realizing that with the first transaction all their rights would have been exhausted. In certain instances he had failed to state as to how some persons were entitled to the shares which they purport to claim.

It was conceded that the 16th defendant had no claim to soil rights but was pursuing a claim for a roadway over Lot 9 in the preliminary plan. On a careful examination of the totality of his evidence learned District Judge was justified in stating that his evidence was inconclusive and devoid of certainty and clarity in regard to the question of devolution of title.

The inability of the 16th defendant to give conclusive evidence on the pedigree pleaded by the plaintiff stems mainly from the fact that he was an outsider insofar as the pedigree pleaded by the plaintiff is concerned. His evidence which consisted mainly of bare assertions as to the relationship and other matters of pedigree, reflected his lack of personal knowledge in respect of such matters.

It is a prerequisite to every partition action that the land sought to be partitioned must be held in common as seen from the provisions of section 2(1) of the Partition Law. What is understood as common ownership is where persons do not hold on separate and distinct titles or where land is not held as separate and divided lots. When land is not held in common but exclusively by a party even though under prescriptive title, no action can be maintained to partition such land.

It is imperative that the investigation of title must be preceded by a careful examination of the preliminary issue whether the land sought to be partitoned is commonly owned as required by section 2 (1) of the Partition Law. Learned District Judge having carefully examined this question had correctly held that the land was dividedly possessed as from 1938 and proceeded to dismiss the action without resorting to a full and exhaustive investigation as to the rights of the parties, which in the circumstances was lawful and justified.

Ouster and the Judgments of the District Court and the Court of Appeal

(Questions (ii), (iii), (v), (vi), (vii) and (viii))

The general principle recognized by our law in respect of co-owners is that the possession of one co-owner is in law the possession of other co-owners as well.

In *Corea vs. Iseris Appuhamy*[1] - the Privy Council laid down (a) that every co-owner is presumed to be possessing in the capacity of a co-owner (b) that it was not possible for a co-owner to put an end to such possession by a secret intention in his mind and (c) that nothing short of an ouster or something equivalent to ouster could bring about that result.

Thereafter in 1918 a Full Bench of the Supreme Court in the case of *Tillekaratne vs Bastian* - [2] was called upon to apply the principles laid down in *Corea Vs Iseris Appuhamy (supra)* and to consider the meaning and the application of the English law principle of presumption of ouster, and it was held (a) that it is open to the court from 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 and (b) that 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 the institution of the action.

On the facts of *Tillekaratne vs. Bastian (supra)* the Court was able to distinguish the decision in *Corea vs. Iseris Appuhamy (supra)* and to hold that the co-owner in physical control of the land had 'ousted' the other co-owners by a series of overt unequivocal acts.

At page 21 of the judgment Bertram C. J. observed that "where it is found that presumption of law leads to an artificial result it will generally be found that law itself provides for such a situation by means of counter presumption" In these circumstances the presumption in regard to the continuity of common possession may be effectually negatived by a counter presumption of ouster.

In *Corea vs. Iseris Appuhamy (supra)* the Privy Council made reference to this principle but did not declare that it must be considered as being applicable in Sri Lanka as a corollary of the general principle as to continuity of common possession of the undivided property by co-owners. Nevertheless a principle analogous and indistinguishable from the doctrine relating to ouster was explicitly recognized by *Middleton J in Odiris vs. Mendis*[3] - at 315 and 316 even before the decision in *Corea vs. Iseris Appuhamy (supra)* and thereafter it was consistently applied in a series of judgments of the Supreme Court (*Vide William Singho vs. Ran Naide)*[4] *Mailvaganam vs. Kandiya*[5] - *A. S. P. vs. Cassim.*[6]

In certain circumstances adverse possession as between co-owners may arise either by absolute exclusion of one of the co-owners or by conversion of undivided shares into divided shares in an informal manner.

This approach had been adopted in the case of *Kapuruhami vs. Appusinno*[7] - which was decided in 1898. In that case Bonser C. J. observed that where co-owners had verbally agreed among themselves to hold the common property in divided shares, each co-owner may prescribe in respect of his own divided share and that such possession will give him an absolute title against the other co-owners to the divided shares held separately by him.

In *Ran Menika vs. Ran Menika*[8] - the Supreme Court reiterated the general rule that the possession of a co-owner is not adverse but a common concurrent possession in that the original title being the same, the possession of one is the possession of all. However, it was pointed out in the judgment that exclusive possession referable to the consent of the co-owners may sometimes by change of circumstances become a holding

adverse to and independent of other co-owners and such a holding may by lapse of time give rise to a prescriptive right. *Selenchi Appuhamy vs. Luvinia*[9] - was a similar case where it was held that the partition suit was not maintainable since there was no common possession between the two co-owners, each party having acquired a prescriptive right to a divided portion of the land. In all the cases referred to in this page, it was apparent that Court considered the attendant circumstances would warrant an inference to be drawn as to ouster.

It is a common occurrence that co-owners possess specific portions of land in lieu of their undivided extents in a larger corpus. This type of possession attributable to an express or classic division of family property among the heirs is sufficient to prove an ouster provided that the division is regarded as binding by all the co-owners and not looked upon solely as an arrangement of convenience. This position was accepted and acted upon in *Mailvaganam vs. Kandiaya*[10] - *Obeysekera vs. Endoris*[11] - *Simon Perera vs. Jayatunga*[12] - and *Nonis vs. Peththa*[13].

Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners.

It has to be reiterated that the decision in *Tillakeratne vs. Bastian (supra)* recognizes an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period.

The presumption that possession is never considered adverse if it can be referable to a lawful title may sometimes be displaced by the counter presumption of ouster in appropriate circumstances. Nevertheless this counter presumption should not be invoked lightly. "It should be applied if, and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time in the distant past the possession became adverse to the rights of the co-owners". (*vide Abdul Majeed vs. Ummu Zaneera*[14] - at 374.

Having regard to the principles set out above I shall now proceed to consider, the findings by the trial judge that the corpus sought to be partitioned was dividedly possessed for a long period of time and therefore it had ceased to be owned in common and that the parties had prescribed to the lots they possess before the plaintiff instituted this action.

The trial Judge had found that the parties who are said to be entitled to rights in the corpus in fact had separately possessed with clear and permanent boundaries the lots depicted in the preliminary plan for a long period of time. He had observed further that the land sought to be partitioned and depicted in preliminary plan (X) at a glance seems to be the land shown in plan No. 2153 made by A. M. Fernando, Licensed Surveyor on 23.08.1938.

This observation by the learned Trial Judge has some significance on this question despite the discrepancy in respect of the extent by nearly 27 perches. It will be relevant to note that the extent of land described as an allotment of land called Badullagahawatta in Fiscal conveyance bearing No. 19755 dated 26.04.1944 is a divided portion towards the West of the larger land called Badullagahawatta which was in extent 2 Acres 3 Roods and 27 Perches.

This Fiscal conveyance had been executed on 26.04.1944 in favour of Carolis Fernando after his purchase of the land at the public sale held by the Fiscal in execution of the writ issued by the District Court of Colombo in Case No. L293 against *Seemon Peiris*, :*Piyaseeli Peiris* and *Karunapali Peiris* in place of the deceased plaintiff Rosalin Fernando in the above case.

It is noteworthy that the operative plan for the Fiscal conveyance was Plan No. 625 dated 11.02.1944 made by Licensed Surveyor R. S. Dissanayake. Nevertheless the Fiscal had chosen to describe it in accordance with the earlier plan made in 1938 for purposes of correct description of the land.

The deceased plaintiff too had described this land in the schedule to the plaint as a divided lot towards the West of the larger land called Badullagahawatta and shown as lot E in the plan bearing No. 191 made by Licensed Surveyor H. G. Dias dated 20.12.1905.

On the above material it is clear that Carolis Fernando by Fiscal conveyance (P8) had secured title to a divided portion towards the West of the land called Badullagahawatta in extent 1 Acre 9.87 perches and depicted in Plan No. 625 (P8X) as Lots A, B, and C. Therefore as from 1938 this land was considered a divided and distinct land separated off from the larger land as evident from the Fiscal conveyance.

The division of the larger land prior to the execution of the writ in case No. L 293 as evident from the plan No. 2153 made in the year 1938 and the subsequent survey of the land just prior to the execution of the Fiscal Conveyance on 26.04.1944 for the operative plan 625, would be a clear indication to all the co-owners that the undivided shares of Rosalin Fernando had undergone a change to become divided shares before the execution

of the Fiscal Conveyance. The evidence of the contesting defendants in this case were to the effect that this land ceased to be commonly owned with the purchase of the interests of Rosalin Fernando by Carolis Fernando on account of the execution of the writ against her by order of the District Court of Colombo.

As discussed in the earlier paragraph the presumption of ouster of the co-owners in respect of this corpus could be drawn by the additional factor which had taken effect with the seizure and execution of the writ after ascertaining the rights of Rosalin Fernando in lieu of her undivided rights. The 16th defendant in his testimony before the District Court did not allege that plans bearing Nos. 2153 made in 1938 and 625 made in 1944 referred to in the Fiscal Conveyance had been made and the divisions had been effected without the knowledge and acquiescence of other co-owners. It is to be noted that Carolis Fernando thereafter by deed marked (P9) dealt with property as a divided portion solely owned by him and that subsequently this land had undergone further sub-divisions at the instance of the parties.

In the light of the above material, I hold that the learned District Judge had correctly arrived at a finding that the corpus had ceased to be commonly owned before the plaintiff instituted this action. The Court of Appeal had failed to appreciate the salient features in the evidence adverted to by the District Judge in respect of the corpus and their relevancy on the question of ouster.

Questions Nos. (iv) and (ix)

In view of the conclusions drawn in the foregoing paragraphs in respect of the issues involved in questions (i), (ii), (iii), (v), (vi), (vii) and (viii) it would be futile to discuss matters pertaining to these two questions.

For the aforesaid reasons, I set aside the judgment of the Court of Appeal dated 08.11.2002 and allow this appeal.

Having considered all the circumstances of this case, I make no order as to costs.

SHIRANI BANDARANAYAKE, J. – *I agree.*

RAJA FERNANDO, J. – *I agree.*

Appeal allowed.