

**WERAGODA AND OTHERS
V.
PEIRIS AND OTHERS**

COURT OF APPEAL
ANANDA COOMARASWAMY, J.
EDUSSURIYA, J.
C.A. 171/84(F)
D.C.NEGOMBO No. 1279/P
MAY 2, 1994, MAY 26, 1994
JUNE 15, 1994, JULY 4, 1994.

Partition – Proof that paper title pleaded applied to the Corpus – Prescription-Adverse Possession – Right of Limited Possession – Shedding of same – What is "ඵතා ඉක්කිය"

Plaintiff Respondent instituted partition action; pleading paper Title, the Defendant Appellants pleaded that they have acquired prescriptive Title. On the Evidence led, the District Court held with the Plaintiff.

Held:

Deeds 1D8 and 1D9 set out that 2 persons Predecessors-in-title of the Defendants were entitled to an undivided 1/3 share each on their "ඵතා ඉක්කිය" this means that they were claiming to be entitled to a 1/3 share each by virtue of their possession of the Plantation or by virtue of their possession of the undivided 1/3 share each to plant it. In either case, it acknowledges a right of ownership in some other person or persons.

Therefore until such time as they shed that right of limited possession, adverse possession will not commence.

Such a limited right of possession is not sufficient to acquire prescriptive Title.

AN APPEAL from the Judgement of the District Court of Negombo.

Faiz Mustapha P.C. for Appellant.

P.Somatilaken for Respondent.

Cur. adv. vult.

October 14th, 1994.

EDUSSURIYA, J.

The Plaintiff/Respondent instituted this action to partition the land described in the schedule to the plaint dated 29th June, 1973 and depicted in the preliminary plan No: 294 made by Licensed Surveyor M. Sathiapalan dated 26th October, 1973, (in extent 7 Acres - 2 Roods- 6 Perches) and marked 'X'.

The 1st and 19th Defendants claiming to be the owners of the entirety sought a dismissal of the action.

It was urged at the hearing of this appeal that (1) there is no proof that the paper title pleaded by the Respondents applied to the corpus, (2) there is no evidence that James D' Alwis was the original owner of the land sought to be partitioned and (3) the Appellants have acquired prescriptive title to the corpus.

The schedule to the amended plaint refers to the land sought to be partitioned as Millagahawatte alias Welisarawatte alias Welisara situated at Elapitawela in extent 7 Acres - 2 Roods- 6 Perches and shown in plan No: 6249 dated 7th November, 1946 made by M.B.de Silva Licensed Surveyor.

Surveyor Sathiapalan has superimposed Plan No: 6249(P45) on the preliminary plan X and stated that the land shown in Plan X is the same as that shown on Plan P45. Further, the 1st Defendant/Appellant's Deed 1D5 on which he claims title also refers to plan No: 6249 (P45). Hence, it is established that the land sought to be partitioned is that depicted in Plan No:6249.

In evidence the Plaintiff/Respondent's witnesses have referred to this land as the 7 Acre land and "Thunhauwla". The Plaintiff/Respondent has produced several letters written by one "Duke" de Saram to Ian Pieris the husband of the Plaintiff which refer to a "Seven Acre land" which should be partitioned amicably and therefore should be surveyed. Although the said correspondence refers to commissioning Surveyor Anthoniz to do the amicable partition it appears that the amicable partition plan was prepared by Surveyor M.B.J. de Silva and is marked P45. It is significant that the correspondence regarding the amicable partition is (P35, P36, P37, P38) during the second half of 1943 and P45 is dated 1946. The correspondence between "Duke" de Saram and Ian Pieris also show that at that time the produce from the 7 Acre land was shared by three persons each taking a 1/3rd. The three owners were Felix R. Dias, Ian Pieris and Duke de Saram. The inventory (P21) filed in the Testamentary case of Annie Lucy the wife of Felix. R. Dias and daughter of James D. Alwis refers to an undivided 1/3 share of a land at Welisara in extent 7 Acres (item 13). item 13 refers to a land in Welisara.

It was submitted that the land sought to be partitioned is situated at Elapitawela and not Welisara.

The Plaintiff has produced a Plan No: 1360 (P47A) dated 20th /29th August, 1918 which depicts a land of 111 Acres - 1 Rood -14 perches in four lots namely, A,B,C and D and lot C has been sub - divided into lots C1 to C6. P47A depicts a land belonging to the heirs of James D' Alwis. To the East of lot C3 is the property belonging to the Estate of the Hon. James Alwis. To the North of that land is the land of Mohotti Pinto, to the South is lot D.

It is common ground that the preliminary plan X, and plan P45 depicted the same land. To the North of the land depicted in P45 is the land of Francis Pinto and others, to the South is the land of S.J.F. Dias Bandaranaike and to the West is Crown Land. It is not disputed that the Welisara hospital is situated on the land immediately to the West of the land sought to be partitioned. P47A depicts a land which belonged to the heirs of James D Alwis, and S.J.F. Dias Bandaranaike was a son of Anne Lucy whose father was James D ' Alwis. So, the Southern boundary of the land shown in P45 was S.J.F. Dias Bandaranaike's land.

It is appropriate to mention at this juncture that in P42 written by Felix R. Dias to Ian Pieris, Felix R. Dias states that in order to survey their land he could give a surveyor the Welisara Estate Plan. This means that the 7 acre block was in close proximity to the Welisara Estate, and Velun Singho has stated in evidence that Welisarawatte on which the hospital now stands was a larger land which adjoined the 7 Acre block of land. From all this, it is seen that Elapitawela adjoins Welisara.

Quite apart from this, Suveyor Sameer who gave evidence has superimposed Plan P45 on Plan P47A and shown that the land depicted in P45 is situated immediately to the East of lot 3 in Plan P47A.

The Plaintiff has produced marked P51 Surveyor General's Plan of 23rd September, 1937 which refers to the land immediately to the East of the land shown in P47A as "Akkarahata" (7 Acres) coconut garden claimed by the heirs of Peter de Saram and others. Peter de Saram figures in the pedigree referred to by the Plaintiff in this case and was the father of Duke de Saram.

All these facts corroborate the oral evidence that the land was at one time owned by James D'Alwis.

We are therefore of the view that the Plaintiff has established that James D' Alwis was at one time the owner of the land sought to be partitioned.

The evidence of devolution of title by inheritance from James D' Alwis has not been disputed by the Appellants.

Regarding the possession there is the evidence of Velun Singho that he worked for W.J.Pieris the husband of the Plaintiff and was the conductor of the 7 Acre block at Welisara upto 1939 and this evidence is corroborated by P29 letter written by Duke de Saram to Ian Pieris dated 11/05/1940 in which he refers to "your Kangany Vellun".

Besides, the 1st Defendant/ Appellant and one Stanley Weragoda have purchased an undivided 1/3 share from S.J.F. Dias Bandaranaike who was a grandson of James D' Alwis.

The Appellants whilst denying that S.J.F. Dias Bandaranaike was a co-owner of the land (sought to be partitioned) by inheritance from Anne Lucy his mother, claimed in their Answer that S.J.F. Dias Bandaranaike, one Agostine Silva and one Paulu Silva were the co-owners of the land sought to be partitioned by prescriptive possession. That S.J.F. Dias Bandaranaike conveyed his 1/3 share to the 1st Defendant one Stanley Weragoda by 1D5 and by 1D6 Stanley Weragoda had conveyed his 1/6 share to the 1st Defendant. That by 1D7 Agostine Silva conveyed an undivided 1/3 to Sebastian Appuhamy who in turn conveyed the said 1/3 to the 19th Defendant by 1D8. Then by 1D9 Paulu Silva conveyed an undivided 1/3 to the 19th Defendant. Thus the 1st Defendant claims an undivided 1/3 whilst the 19th Defendant claims an undivided 2/3.

Both deeds 1DB and 1D9 set out that Agostine Silva and Paulu Silva are entitled to an undivided 1/3 share each, on their "වගා ඉක්මිට". This could mean that they were claiming to be entitled to a 1/3 share each by virtue of their possession of the plantation or by virtue of their possession of an undivided 1/3 share each to plant it. In either case it acknowledges a right of ownership in some other person or persons. If they possessed the plantation, then, they acknowledge that the land or soil belonged to another or others. If on the other hand they possessed an undivided 2/3 to plant it, still they acknowledge that their possession was for the limited purpose of planting it. Therefore until such time as they shed that right of limited possession, adverse possession will not commence. Since, they have stated on 21st December, 1965 and 2nd September, 1963 in deeds 1D8 and 1D9 that it is only a limited right of possession ("වගා ඉක්මිට") they had, there was no adverse possession by them as against the title holders of the 2/3 share upto that date. Such a limited right of possession is not sufficient to acquire prescriptive title. So that deeds 1D8 and 1D9 cannot and do not convey any title. This action was instituted on 29th June, 1973 within ten years from 2nd September, 1963.

Both Agostine Silva and Paulu Silva did not give evidence. Had they given evidence they would have been hard put to explain what rights they had to convey and also would have had to explain who gave them the right to plant.

Although, documents 1D1 to 1D4 refer to Agostine Silva and Paulu Silva as owners, in view of what they have stated in deeds 1D8 and 1D9 regarding their right of possession 1D1 to 1D4 do not mean that they had adverse possession (besides they are letters written by some one else).

By P43 dated 3rd October, 1946 Duke de Saram has informed Ian Pieris that "Sammy" will in future look after their 2/3 share. "Sammy" is undoubtedly a reference to Samuel F.J. Dias Bandaranaike from whom the 1st Defendant allegedly purchased the undivided 1/3. It therefore appears that Agostine and Paulu came on the land to plant it with the permission of S.J.F. Dias Bandaranaike who was looking after an undivided 2/3 share on behalf of Duke de Saram and Ian Pieris.

For the above mentioned reasons we see no cause to interfere with the judgement of the learned District Judge.

We therefore, dismiss the appeal and affirm the judgement of the learned District Judge, with costs fixed at Rs. 3150/=.

ANANDACOOMARASWAMY, J. – I agree.

Appeal dismissed.