WALPITA v. DHARMASENA AND OTHERS

COURT OF APPEAL
WIMALARATNE, J. (PRESIDENT COURT OF APPEAL) &
RODRIGO, J.
C.A. (S.C.) 79/73 (INTY) D.C. PANADURA 9625/P
JULY 23, 1980

Partition Action – Divided possession – Presumption of ouster.

The plaintiff claimed interests in one land about A.9 R.3 P25 in extent. Evidence disclosed that for 40 years prior to the date of action there had been divided possession of the property and several deeds executed on that basis.

Held:

Presumption of ouster could be drawn from long and continued possession for a period of well over 40 years. Plaintiff's action was correctly dismissed.

Cases referred to:

1. *Corea* v. *Iseris Appu* (1911) 15 NLR 65.
2. *Tillekeratne* v. *Bastian* (1918) 21 NLR 12.
3. *Sideris* v. *Simon* (1945) 46 NLR 273.
4. *Abdul Majeed* v. *Umma Zameera* (1956) 61 NLR 361 at 373.

APPEAL from the Order of the District Court of Panadura

H. W. Jayewardene Q.C. with *Cyril Cooray* and *Laksman Perera* for plaintiff – appellant..

Kithsiri P. Guneratne with *Eric Basnayaka* for 1st and 2nd defendant respondents.

Cur adv vult.

23rd July, 1980.
WIMALARATNE, J. (President/Court of Appeal)

This is an appeal from the judgment of the District Judge dismissing the Plaintiff's action for the partition of a land called Kandawela Kumbura in extent About A9. R3. P25, and depicted as lots 1 to 8 in preliminary plan X. The plaintiff's case was that the original owners were three persons, namely, Baddege Samuel, Walpitage Babappu and Walpitage Coronis, each to a one third share. He claimed title from the heirs of three of the five children of Samuel (3/5 of 1/3) and by inheritence from Agoris, one of the four children of Babappu (1/4 of 1/3). He thus claimed title to 17/60 shares of the corpus.

The first set of contesting defendants are the 1st and 2nd defendants-respondents who are the successors in title of Baddage Singho Appu, a son of Samuel. They say that by long and prescriptive possession Singho Appu was the owner of a land of about 3 acres, depicted as lots 2A, 3, 4A and 5 in plan 1D2, and contended that these lots should be excluded.

The second set of contesting defendants are the 9th defendant and his wife and children as well as his brothers son the 12th defendant. According to them the original owner of lot 1, the northern portions of lots 2 and 4 and lot 8 in plan X, in extent about 4 acres, was by long and prescriptive possession, Walpitage Themanis, a son of Babappu. They claim through Themanis, and sought exclusion of those lots.

If the lots claimed by the contesting defendants are excluded, one is left with an extent of about 2 acres of the land of 9 acres or so described in the schedule to the plaint, and a claim to that portion had been made by the successors in title of Walpitage Coronis. They are 23rd to 29th, 31st, 32nd and possibly the 30th defendant.

The plaintiff's averment that Samuel, Badappu and Coronis were the original owners is based upon documents P10 and P1. P10 is an extract from a statement of offers made to the crown at the Colombo Kachcheri on 9.9.1989 for the purchase of a portion of a land called Kandawela Kumbura in extent A9.RO.P24. The names of the purchasers are given as Walpitage Johannes, Walpitage Coronis and Baddage Samuel of Uduwa. The number of the plan is given as 2466; and P1 is that plan made after a survey in 1868. Johanes admittedly was a son of Babappu. In the absence of a conveyance in their favour P10 and P1 were quite inadequate to vest the three persons with title to the land.

Let us see how the land has thereafter been dealt with. The earliest deed is 30D1 of 24.1.1874. Walpitage Coronis has, by that deed gifted to his daughter on the occasion of her marriage, a half share of his interests in a land of 9 acres called Kandawela Kumbura, to which he recited title by **paternal inheritance**. There is no reciting of title by a crown grant of 1869 or of any other year. The next deed is 1D3 of 6.10.1898, by which Baddage Singho Appu (son of Samuel) and his wife have gifted to their daughter on the occasion of her marriage, a land called Kandawela Kumbura of about six bushels paddy sowing, held and possessed by Singho Appu by **right of purchase at a fiscals sale** held, under writ issued in D. C. Kalutara case No. 1189. The third deed in 9D6 of 1.10.1908, by which Walpitage Themanis (son of Babappu) and his wife have gifted Kandawela Kumbura, a land of about five bushels paddy sowing to their five sons, reciting title **by assweddumisation and long and prescriptive possession.**

On this analysis it seems clear that neither Coronis, nor Singho Appu nor Themanis, when executing these earliest deeds, recognised or acknowledged their title upon a crown grant. No such crown grant having been produced by the plaintiff, the whole foundation of his title collapses. He claimed that on deeds P4 and P5 of 1915 some of the grandchildren of Samuel sold their right, title and interest to Walpitage Girigoris; that Girigoris by his first marriage had a daughter Alice after whose death, husband Siyadoris Ekanayake and son Somasiri on deed P8 of 5.9.64 sold their interests to him; that Girigoris married a second time, and after his death his second wife Jane Nona inherited his interests; that she died leaving two

brothers Abraham and Simon as her heirs, whose children on deed P9 of 8.9.64 sold their interests to him. The plaintiff also claimed that Babappu's one third share was inherited by his four sons, one of whom was Agoris; that Agoris died leaving Girigoris, Peiris and his father Carolis; that Girigoris possessed the interests of Peiris. Carolis as well; and that on P6 and P9 these interests too devolved on him. As the plaintiff has failed to establish the title of Samuel and Babappu, it is clear that he gets no rights by virtue of P4, P5, P8 and P9.

Assuming, however, that the title of Samuel and Babappu has been established, it is necessary to consider whether at some stage the successors in title of the three co-owners put an end to their common interests and possessed dividedly. The learned District Judge has held that for over 40 years prior to the date of action in 1965 there had been a division of property in terms of which Singho Appu, a son of Samuel possessed the southern one third; Simon Kotalawela, purchaser on 30D2 of 1883 from the heirs of Coronis possessed the centre portion; and Themanis, son of Babappu possessed the northern portion. In conveying on 30D2 of 1883 the children of Coronis conveyed their interests in a three acre (and not a nine acre) land. Likewise, Singho Appu son of Babappu conveyed on 1D3 of 1898 a six bushel land. These interests in a 6 bushel land devolved on the 1st and 2nd defendants by virtue of 7D4, 1D5 and 1D6. Hendrick and Podinona, predecessors in title of the 1st and 2nd defendants, made the plan 1D1 in 1932 for their southern 3 acre 2 rood land. There was no controversy at the trial that no one else possessed that portion. That same portion was mortgaged by Hendrick and Podinona on 1D7 of 1934. The subsequent deeds 1D8 and 1D9 dealt with the same 6 bushel land. The District Judge has held that this southern portion was possessed by Singho Appu and his successors in title adversely to all others and that 1st and 2nd defendants have acquired a prescriptive title thereto.

As regards the northern one third, the finding of the District Judge is that only Themanis and his successors in title alone possessed. When Themanis conveyed on 9D6 of 1908 he conveyed a five bushel land, describing the southern boundary as the land of Kiriniris. Now Kiriniris was a son of Ceronis, subsequent deeds 9D7 to 9D17 executed between 1923 and 1964 give the same description. Usufructory mortgage bond 9D19 and lease bond 9D20 also support the exclusive possession of 'Themanis' successors in title.

The District Judge has accepted the evidence of the former *vel vidane* Wegiris Perera regarding the exclusive possession of the southern six bushel land by the 1st defendant. He had known this

field for about 30 years. The *huwandiran* payment of 1/64 share was always given by the 1st defendant through his cultivator Lewis. This portion was separated from the land to the south by a ridge much broader than the normal ridges in a paddy field, in fact three feet broader. During the war years paddy could be removed from the *kamata* only on a permit, and the permit was issued in the name of the 1st defendant. Likewise the northern five bushels field was cultivated by the 9th defendant Carolis. To his knowledge no one other than the 1st and 9th defendants cultivated those portions. The District Judge has disbelieved the evidence of Methias Jayatilleke, called on behalf of the plaintiff to state that he removed paddy on behalf of Siyadoris Ekanayake.

The finding of the District Judge that this land has been dividedly possessed for a very long period of time is fully supported by the evidence. But Mr. Jayawardena's contention is that long continued possession of separate portions by some of the co-owners without something more is insufficient to vest those co-owners with title to the separate portions. Possession of one co-owner is also the possession of his other co-owners and it is not possible to put an end to that possession by a secret intention in his mind and nothing short of ouster or something equivalent to ouster could put an end to that possession. An invitation to presume ouster from Iseris' long continued possession was rejected by the Privy Council in *Corea v. Iseris Appu*[1]. In *Tillekeratne v. Bastian*[2], a Bench of three Judges decided that it was open to the Court, from lapse of time in conjunction with the other circumstances of the case, to presume that a possession originally that of a co-owner had since become adverse. In *Sideris v. Simon*[3] one Henchappu, who was the original owner of a paddy land, died leaving four sons and three daughters. It was conceded that the sons possessed for a period of 38 years (from 1904 to 1942) to the exclusion of the daughters and their successors. Their possession was continued, undisturbed and uninterrupted. Deeds were executed by the sons on the basis that they were the only co-owners. There was no evidence that the daughters of Henchappu knew about the execution of these deeds. Howard C.J. took the view that there was nothing more than a secret intention in the mind of the transferors and lessors to initiate a prescriptive title and to put an end to the co-owner's co-possession and that was not sufficient to constitute ouster.

A "presumption" may be defined as an inference drawn as to the truth of a fact alleged, of which there is no direct proof, from facts so far established by direct evidence that it is safe to treat them as the ground work upon which the inference may be built up. **Willis on Circumstantial evidence** (7th Edition) p. 20. A presumption of

ouster is thus an inference drawn of an ouster, of which there is no direct proof. Ouster may sometimes be proved by direct evidence. But there may be cases in which it is not possible to prove ouster by direct evidence, as where it had taken place in the distant past and where there are no witnesses living who could speak to it. K. D. de Silva, J. put it succinctly in these words:-

> "The presumption of ouster is drawn, in certain circumstances, when the 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. The duration of exclusive possession being so long it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the case comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster."
> – *Abdul Majeed v. Umma Zameera*[4].

In that case the party who claimed to have originated the adverse possession was the 13th defendant who was alive at the time of the trial, and there was thus no necessity to draw a presumption of ouster. In the instant case, however, divided possession appears to have been from about the year 1881.The Grain Tax Commutation Register for the year 1881 (9D3) shows that Walpitage Themanis' name is entered as owner under inquiry No.39. The Grain Tax Register entered in the year 1887 (P11) gives the names of three persons, Beddege Samuel Appu, under inquiry No. 36, Don Simon Kotelawala under inquiry No. 37, and Walpitage Themanis under inquiry No. 38. Themanis died about 1922. The 9th defendant Carolis was born about 1898, and could not possibly speak to an ouster which would have taken place in 1881. Atukorale Hamine is a witness who comes on the pedigree of Singho Appu. She was born about 1909. Her mother was Sopihamy, (donee on 1D3) who was a daughter of Singho Appu. It would therefore not be reasonable to expect her to testify to an ouster by Singho Appu. This is therefore a case where a presumption of ouster could be drawn from long continued possession for a period of well over 40 years.

Before parting with this judgment it is necessary to advert to one other matter. The District Judge delivered judgment on 25.5.73. On 20.9.73 Mr. K. W. E. Perera, appearing on behalf of the 4th

defendant, brought it to the notice of Court that the 14th and 63rd defendants had died during the pendency of the action and moved that the judgment be set aside. Mr. K. W. E. Perera had appeared for the plaintiff throughout the trial, and not for the 4th defendant. The 14th defendant was Walpitage Punyawathie, but she had on 9D11 of 1951 gifted all her interests to her brother the 12th defendant. The 63rd defendant was Wijesekera Aratchige Siyadoris, whose name transpired in the statement of claim filed by the 62nd defendant; according to which W. Samuel died leaving four children of whom one was Leihany, and her interests devolved on 62 to 65 defendants. But the plaintiff's case was that they had conveyed all their interests on deed p.5 to Girigoris, from whom the plaintiff claimed. The dismissal of this partition action will therefore not prejudice the interests, if any, of the 14th and 63rd defendants.

I would accordingly dismiss this appeal with costs.

RODRIGO, J. – I agree.

Appeal dismissed.