SIYATHUHAMY AND OTHERS
v
PODIMENIKE AND OTHERS

COURT OF APPEAL
FERNANDO, J.
C.A. No. 112/88
D.C. Galle 19771/P
OCTOBER 10, 2003
NOVEMBER 24, 2003

Partition Law – Co-owned land – Exclusive possession – Ouster presumption – Adverse possession.

The plaintiff instituted action to partition the land in question. The contesting defendants contended that the corpus was exclusively possessed by them, and that the plaintiffs had no right to the corpus. The District Court rejected the contention of the defendants. On appeal.

HELD:

(i) It is common ground that the land is co-owned and had remained so for a very long period. The parties in 1949 in case No. 4192 agreed to hold the land in common. Thereafter any co-owner having possession held it in common on behalf of the other co-owners.

(ii) There cannot be prescription among co-owners unless a party is able to prove that there had been an act of ouster prior to the running of prescription.

(iii) There is evidence of the 3rd plaintiff-respondent that since his father's death in 1955, they did not possess the land and that they did not go to the land because they feared trouble. This does not amount to ouster.

Per Fernando, J.,

"The 4th defendant-appellant did not put his adverse possession in issue at the trial. His principle issue was whether K had separated off the corpus prior to 1909 – No issue had been raised whether he possessed it adversely to the other co-owners for over 10 years which is their claim now."

APPEAL from the Judgment of the District Court of Kegalle.

Cases referred to:

1. *Corea* v *Appuhamy et al* – 15 NLR 65
2. *Wickremaratne and others* v *Alpenis Perera* – 1986 1 Sri LR 150
3. *Thilakaratne* v *Bastian* – 21 NLR 1R
4. *Abdul Majeed* v *Umma Zaneela* – 61 NLR 361.
5. *Subramanium* v *Sivarasa* – 40 NLR 540

N.R.M. Daluwatte, P.C., with *Parakrama Agalawatte* for 4th defendant-appellant.

P.A.D. Samarasekera, P.C., with *R.Y.D. Jayasekera* for 2-5 plaintiff-respondents.

Rohan Sahabandu for 3rd, 10th and 11th, 12th and 17th defendant-respondent.

Dr. Jayantha Almeida Gunaratne for 23A defendant-respondent.

Cur. adv. vult.

Editor's Note:

See : *Karunawathie and two others* v *Gunadasa* 1996 – 2 Sri LR 406 - for identical case where the appeal was allowed, however, the Supreme Court set aside the order, as some of the parties were not represented and remitted the case to the Court of Appeal for re-hearing.

March 24, 2004

RAJA FERNANDO, J.

This action was filed by the plaintiff for the partition of the land called Thennapitahena (or watta) more fully described in the schedule to the plaint. It is common ground that the corpus consists of lots 1, 2 and 13 depicted in the preliminary plan No. 3079 dated 26.04.1977.

The 19th and 20th defendants have raised issue No. 19 claiming rights under Guttilahamy. The plaintiff has shown these rights in the plaint. The court has accepted those rights. The vital claims of all the other defendants have been answered against them. However none of them have appealed against the judgment.

The 4th, 16th and 22nd defendants raised issues 20-25.

The defendants' case was that Kusalhamy had prior to 1909 separated off for himself the entire corpus. This issue was answered against them. There was another issue whether 4th and 22nd defendants had acquired any rights by prescription. This issue too was answered in the negative.

Only 4th, 16th and 22nd defendants have appealed against the judgment.

At the trial the 4th defendant alone has given evidence on their behalf.

The learned Counsel for the plaintiffs-respondents contend that the principal issue of the defendants-appellants was issue No. 21, i.e. whether Kusalhamy had separated off the corpus prior to 1909. It is significant that this issue was not followed by a further issue whether he possessed adversely to other co-owners for over 10 years and whether he has prescribed to it. He further contends that there cannot be prescription among co-owners unless a party is able to prove that there had been an act of ouster prior to the running of prescription. According to the learned counsel for the plaintiffs-respondents no act of ouster has been pleaded or put in issue. He further states that although the 4th defendant has pleaded in the 2nd answer that Kusalhamy separated the land many years prior to 1909 and that by deed No. 3316 dated 27.07.1909 conveyed it to his two sons Kiribanda and Midiyanse, this deed does not disclose any claim by Kusalhamy that he separated off any extent of land and that he possessed it as his own. It it his contention that Kusalhamy merely recites inheritance from his father Mudalihamy. Mudalihamy had 4 children and there is no way in which Kusalhamy could have inherited the whole land when he had brothers and sisters. He points out that Kusalhamy's brother Appuhamy and Guttilahamy had inherited rights equally with Kusalhamy. Guttilahamy's children and Appuhamy's children had claimed those rights. The defendant's father Kiribanda and Mudiyanse became entitled to rights under the said deed No. 3316.

Kiribanda executed deed No. 886 dated 26.5.1909 (4D3) and he gave undivided shares to the 4th defendant and others out of his right title and interest to the land.

The learned counsel for the plaintiffs-respondents points out that this is a clear indication that even in 1909 Kiribanda was not claiming to be the owner of the entirety. It is his contention that Kiribanda gave the 4th defendant a share out of whatever he had and that is the reason why he used the words "right, title and interest."

The learned counsel for the plaintiff-respondent submits that in 1945 a case bearing No. 4192 was filed where the question of prescription to several lands between the same parties was examined. The correct position admitted by all parties had been recorded in that case. He says that the 4th defendant's father Kiribanda was the 14th defendant and the plaintiff's father Burampy Appuhamy (named as Brampi Singho in that case) being the 11th defendant in that case. He contends that the 4th defendant and the plaintiffs being the successors of the aforesaid Kiribanda and Brampi Appuhamy are bound by the admission and settlement recorded in that case. In that case it is recorded what lands are held in common by the co-owners. He says that in that list Thennapitahenawatta is now the subject matter of the instant action.

The learned counsel for the plaintiffs-respondents contend that this settlement does not show that Kusalhamy a son of Mudalihamy had separated off the corpus of the present action 80 years prior to 1909. It is further contended that the 4th defendant or other defendants do not refer to any event which brought about a termination of the common ownership which Mudalihamy had admitted in 1949. It is settled law that a co-owner's possession is in law the possession of all other 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 (*Corea* v *Appuhamy*[1] *et.al.*)

The same principle has been repeated in *Wickremaratne and others* v *Alpenis Perera.*[2]

It was contended on behalf of the defendant-appellants that there could be a presumption of ouster from long continued possession as was laid down in the case of *Thilakaratne* v *Bastian.*[3]

The position of the learned counsel for the plaintiffs-respondents is that this case dealt with a property which was used for plumbago mining and one co-owner was taking out all the valuable plumbago from the land and appropriating it to himself without any objections from the other co-owners.

The applicability of the principle of presumption of ouster was considered by a Bench of three judges. *Abdul Majeed* v *Umma Zaneela*(4).In that case it was held that the principle of presumption of ouster is an exception to the General Rule which has to be applied with great care. However the learned counsel for the defendants-appellants cites the case of *Subramanim* v *Sivarasa*(5) where one co-owner has been in possession for a long time. In that case all the co-owners lived in the neighbourhood of the premises in dispute. The co-owners in possession took the produce from the land exclusively.

The plaintiffs evidence that he cut green leaves from the land once in 3 years was rejected. The court held that in that case where one enters and takes the profits exclusively and continuously for a very long period of time under circumstances which indicates a denial of a right in any other to receive them as by not accounting with the acquiescence of the other co-owners an ouster may be presumed.

In that case the Court held that the proper inference on the facts is that the defendant has acquired a prescriptive title to the land in question and dismissed the plaintiff's action.

The learned counsel for the defendant-appellants submits that the evidence of the 3rd plaintiff shows that Podinona is possessing the plantations. He refers to the item of evidence of the 3rd plaintiff that they did not possess after their father's death in 1955. In answer to Court he said that the defendant caused trouble. He has also stated that from 1955 these people did not give possession.

The learned counsel for the defendant-appellants submits that the third plaintiff has specifically stated that the fourth defendant possessed the land in suit by force. He further states that the original owners Mudalihamy, Yahapathhamy and Tikiri Appu exchanged lands on a word of mouth arrangement and on that basis Mudalihamy possessed Thennapitahena (i.e. the *corpus* in suit).

Mudalihamy is the predecessor in title to the 4th defendant the father of Mudalihamy who transferred the land in suit to Kiribanda and Mudiyanse by 4VI of 1909. Kiribanda is the father of the 4th defendant and 16th defendants. On Mudiyanse's death he became the sole owner.

According to the learned counsel for the defendant-appellants the 3rd plaintiff has given further evidence to show that lands were exchanged by Mudalihamy,Yahapathhamy and Tikiri Appu by word of mouth and he was specific that they exchanged the lands intending to possess as sole owners. The learned counsel for the defendant-appellants submit that notwithstanding the settlement in Court in 1949 Bramy Appuhamy and his children did not upset the long standing possession of Podi Nona her father and grand-father.

The learned District Judge has concluded in his judgment that the defendants have not discharged their burden of proving that they prescribed to the land in suit.

It is common ground that the land in suit is co-owned and had remained so for a very long period. The parties have in 1949 in case No. 4192 agreed to hold the land Thennapitahenawatta the subject matter of the present case in common. Thereafter any co-owner having possession held it in common on behalf of the other co-owners. The issue then is since 1955 after the death of the 3rd plaintiff-respondent's father the 4th defendant-appellant possessed the property adversely and to the exclusion of the other co-owners.

There is the evidence of the 3rd plaintiff-respondent that since his father's death in 1955, they did not not possess the land and that they did not go to the land because they feared trouble. Does this amount to an ouster and adverse possession by the 4th defendant-appellant. At the point one has to consider the position taken up by the 4th respondent-appellant before the Surveyor. According to the surveyor's report marked XI the 4th defendant who was present had claimed the bud rubber plantation in lot 2 and all the other plantations have been claimed in common by the parties. This would amount to the 4th defendant-appellant admitting that other than lot 2 the rubber plantation the rest of the plantation belonged in common.

Another factor that has to be considered is that the 4th defendant-appellant did not put their adverse possession in issue at the trial. The 4th defendant-appellant's principal issue was issue 21 which read "whether Kusalhamy had separated off the corpus prior to 1909." But no issue has been raised whether he possessed it adversely to the other co-owners for over 10 years which is their claim now. Issue No. 21 has correctly been answered in the negative in view of the settlement entered between the parties (their predecessors) in D.C. 4192 on 14.2.1949.

In all the circumstances of this case I do not see any error in the findings of the learned trial judge. Therefore the appeal of the 4th, 16th and 22A defendants-appellants is dismissed. I make no order for costs.

Appeal dismissed.

[As Edirisuriya has since retired parties agree that judgement be delivered by Raja Fernando J.]