MARIA FERNANDO AND ANOTHER
v.
ANTHONY FERNANDO

COURT OF APPEAL.
WIGNESWARAN, J.,
C.A. NO. 700/85(F).
D.C. NEGOMBO NO. 1666/P.
OCTOBER 21, 1997.

Partition – Prescriptive possession between co-owners.

Long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse party, a party, preparing plan and building house on land and renting it are not enough to establish prescription among co-owners in the absence of an overt act of ouster. A secret intention to prescribe may not amount to ouster.

APPEAL from the District Court of Negombo.

Cases referred to:

1. *Ponnampalam v. Vaithialingam and Another* [1978-79] Sri. L.R. 166.
2. *Tillekeratne et. al. v. Bastian et. al.* – 21 NLR 12.
3. *Sideris et. al. v. Simon et. al.* – 46 NLR 273.
4. *Don James Walpita v. Athukoralage Dharmasena* Bar Association Law Journal 1984 – Vol. I Part 4, P9 145.
5. *Corea v. Appuhamy* – 15 NLR 65.

6. *Abdul Majeed v. Ummu Zaneera et. al.* – 61 NLR 361.
7. *Hussaima (wife of Yoosuf Jallaldeen) and Other v. Ummu Zaneera (alias Shamsunnahar)* 65 NLR 125.
8. *Wickremaratne and Others v. Alpenis Perera* [1986] 1 Sri. L.R. 190.
9. *Brito v. Muttunayagam* 20 NLR 327.
10. *I. L. M. Cadija Umma and Others v. S. Don Manis Appu and Others* 40 NLR 392.
11. *Cooray v. Perera* – 45 NLR 455.
12. *Fernando v. Fernando* – 44 NLR 65.
13. *Girigoris Appuhamy v. Maria Nona* – 60 NLR 330.
14. *Danton Obeysekere v. W. Endoris and Others* – 66 NLR 457.
15. *Fernando v. Fernando* 27 CLW 71.
16. *Siyadoris v. Simon* – 30 CLW 50.
17. *Hevawitharane v. Dangan Rubber Co. Ltd.*, 17 NLR 49.
18. *Rockland Distilleries v. Azeez* 52 NLR 490.
19. *Dias Abeysinghe v. Dias Abeysinghe* – 34 CLW 69.

J. W., Subasinghe, P.C. with *J. A. J. Udawatte* for defendant-appellants.

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

Cur. adv. vult.

February 07, 1997
WIGNESWARAN, J.

There is no dispute in this partition case with regard to pedigree nor identity of the corpus.

The plaintiff and the deceased 1st defendant were cousins. The 2nd defendant was the wife of the deceased 1st defendant. The corpus belonged to a common ancestor Warnakulasuriya Dominicco Fernando who donated the said corpus in extent 1 Rood 4 Perches with the buildings standing thereon by Deed No. 1042 dated 24.06.1919 (P1) to his daughters Anna Maria and Phelomena. Anna Maria with her husband Romel Fernando transferred her half share to her son Cyril and daughter-in-law Maria the deceased the 1st and the 2nd defendant-appellants respectively abovenamed in equal shares by deed No. 1636 dated 24.10.1958 (D1). The deed referred to her

half share of the soil and plantations and the entirety of the house bearing Asst. No. 74/1, Lewis Place.

The abovesaid Phelomena by deed No. 1390 dated 10.02.1969 transferred her half share to her son Antony Wilfred the plaintiff-respondent abovenamed (P2). This deed referred to half share of the buildings and plantations bearing Assessment. No. 74/1.

In this partition case No. 1666/P thus brought between the plaintiff-respondent and the 1st and 2nd defendant-respondents the District Judge of Negombo by his judgment dated 03.04.1985 allotted undivided 1/2 share of the land to the plaintiff-respondent, undivided 1/4th to the 1st defendant-appellant and the balance undivided 1/4th share to 2nd defendant-appellant. The buildings and plantations on the land were allotted in terms of "X1". That is, two houses and well marked 1, 2 and 3 together with four 15 years old coconut trees, one mango tree about 15 years' old, three young coconut palms were all claimed by the 1st defendant and they were allotted to him.

It is against this judgment dated 03.04.85 this appeal was preferred.

It was the contention of the 1st and 2nd defendants that they had prescribed to the entire land and premises. In support of this contention the following matters were placed before Court by the learned President's Counsel appearing for the 1st and 2nd defendant-appellants:–

(i) Since 1919 (when P1 was executed) it was Anna Maria and her family who resided on the land, first in a cadjan thatched house which came down in 1948 and then rebuilt, and later in a tiled house built around 1954. Another house too was built thereafter. Phelomena left in 1942 and never came back.

(ii) D4 showed that Municipal rates and taxes were paid from 1941 up to 1979 by Anna Maria. Her name alone was registered as owner.

(iii) Plaintiff did not have possession of the land at any time. Even on the basis of the evidence led on behalf of the plaintiff no nuts were plucked nor any produce taken from the land at least for 13 years from 1966 to 1979. Defendants have always acted as sole owners.

(iv) The defendants filed case No. 610/L in the District Court of Negombo on 11.07.1963 for a right of foot path of necessity for the land in question against 3rd parties qua owners. They never recognised any others as co-owners. Phelomena was then alive but was not made a party.

(v) The defendants made a plan for their land qua owners on 21.07.1967 (Plan No. 565 - D2). According to the superimposition report D3, Plan 565 and preliminary plan X refer to the same land.

(vi) A new house was constructed in or around 1976 without any claim or objections being made by the plaintiff. It was given on rent by the defendants without any protest from Phelomena (who died only in 1979) nor the plaintiff. Their silence was an acknowledgment of the sole ownership of the property by the 1st and 2nd defendants.

(vii) The reference to undivided shares by Anna Maria in D1 was the outcome of the Notary following the earlier title deed by which Anna Maria and Phelomena were given undivided half shares. This did not reflect the position in reality and therefore could not militate against the position taken up by the defendants. *Ponnampalam v. Vaithialingam and Another.*[1]

(viii) W. Hubert Fernando who had known the land for over 50 years giving evidence on behalf of the plaintiff had stated that though nuts were earlier plucked from the coconut trees on the land and divided among co-owners the plaintiff does not pluck any now since there are no bearing trees. He further stated that nuts were plucked by Phelomena and Wilfred only in earlier days. Therefore it is to be presumed that the plaintiff did not have possession at any time.

The learned President's Counsel on behalf of the defendant-appellants therefore argued that all these facts should have been taken together and the learned District Judge should have concluded that there was adverse possession by the 1st and 2nd defendants which gave them prescriptive title to the entire land.

The following cases were mentioned: *Tillekeratne et. al. v. Bastian et.al.,*[2] *Sideris et. al. v. Simon et. al.,*[3] *Don James Walpita v. Athukoralage Dharmasena.*[4]

Learned President's Counsel on behalf of the plaintiff-respondent on the other hand contended that the facts enumerated did not prove adverse possession among co-owners since there was no proof of ouster. He supported the decision of the learned District Judge. He referred to the following references:

(1) *Corea v. Appuhamy.*[5]
(2) *Abdul Majeed v. Ummu Zaneera et. al.*[6]
(3) *Hussaima (wife of Yoosuf Jallaldeen and Others v. Ummu Zaneera (alias Shamsunnahar).*[7]
(4) *Wickremaratne and Others v. Alpenis Perera.*[8]

He also pointed out that D4 which was an extract from the assessment register was not a document of title. He pointed out further that D1 referred to half share of the soil and plantations and entirety of the house thereon.

All these matters would now be examined.

The documentary evidence shows that Maria and Phelomena were co-owners. In *Corea v. Appuhamy (supra)* the principle was formulated that the possession of one co-owner could not be held as adverse to that of the other co-owner. In spite of over 30 years' continued possession the defendant's title by prescription was not upheld in that case. The settled law presently in Sri Lanka is that the possession of one co-owner is in law the possession of all the co-owners. Every co-owner is thus presumed to be possessing the property in his capacity as a co-owner. It is not possible for one co-owner to put an end to such possession by any secret intention in his mind. It is only "ouster" or something equivalent to "ouster" which could bring about that result. *Brito v. Muttunayagam,*[9] *I. L. M. Cadija Umma and Others v. S. Don Manis Appu and Others,* [10] *Cooray v. Perera,*[11] *Fernando v. Fernando,*[12] *Girigoris Appuhamy v. Maria Nona,*[13] *Danton Obeysekere v. W. Endoris and Others,*[14] *Fernando v. Fernando,*[15] *Sideris v. Simon* (*supra*), *Wickremaratne and Others v. Alpenis Perera* (*supra*).

The question therefore arises in this case whether long possession by the 1st and 2nd dependants amounted to ouster. Whether ouster may be presumed from long, continued, undisturbed, and uninterrupted possession depends on all the circumstances in each case. (vide *Siyadoris v. Simon).*[16]

Justice G. P. S. de Silva (as he then was) in *Wickremaratne v. Alpenis Perera (supra)* looked in that case for an overt act on the part of the person claiming prescription which could have brought to the notice of the other co-owners that such a person was denying the other co-owners' rights to the corpus. Thus an overt act is considered necessary to prove ouster since any secret intention to prescribe may not amount to ouster.

The acts on the part of the 1st and 2nd defendants referred to by the learned President's Counsel for the defendant-appellants to prove adverse possession are:

(i) Long possession.

(ii) Payment of rates and taxes.

(iii) Enjoyment of produce though not really admitted by the plaintiff-respondent.

(iv) Case No. 618/L was filed by the 1st and 2nd defendant-appellants qua owners without making the plaintiff-respondent a party.

(v) A plan (D2) was prepared for the entire land by the defendant-appellants qua owners.

(vi) New house built on the land and given on rent without any objection being raised by the plaintiff-respondent.

None of these acts seem to connote an outward, overt act which informed the plaintiff-respondent that the 1st and 2nd defendant-appellants were bent on adversely possessing the land and premises.

(i) **Long possession**

The long continued undisturbed and uninterrupted possession by a co-owner has been held to be insufficient to counter the presumption of one co-owner possessing for the benefit of all other co-owners. It was held in *Fernando v. Fernando (supra)* that apart from such long possession to prove prescription it was necessary to lead evidence that the co-owners who were not in possession had knowledge of the dealings of the person in possession. Let us examine such dealings in this case.

(ii) **Payment of rates and taxes**

The payment of rates and taxes by a co-owner in possession is not an act unexpected from a co-owner. It must be remembered that Maria's name continued in the assessment register even after the execution of D1 in 1958 until 1976. The plaintiff-respondent had therefore no reason to change his aunt's name in the assessment register. In any event the registration of a person's name in the assessment register does not make that person an owner of the premises. D4, it must be remembered was not a document of title. It merely contained the name of the person given to the local authority at a particular point of time (in 1941) carried over in the assessment register for several years (until 1981) even after she divested of her ownership to the 1st and 2nd defendant-appellants.

(iii) **Enjoyment of produce**

There is a difference in evidence with regard to the enjoyment of the produce by parties in this case. Even if one co-owner continued to enjoy the produce at the expense of another co-owner that by itself does not prove adverse possession unless for example one co-owner claimed the produce and the person in possession refused to give any part of the produce and claimed total ownership. There is no such evidence in this case.

(iv) **Case No. 610/L**

The plaintiff-respondent stated in evidence that his mother Phelomena did not become a party to the "right of way case" (No. 610/L) since at the time of the institution of the said action she had got a stroke and was paralysed. This position was supported by witness Hubert Fernando. It was said that when she recovered she attended Court in connection with the case. In any event a co-owner can institute an action against a third party who interferes with the lawful user of the co-owner's rights in a co-owned and (Vide *Hevawitharane v. Dangan Rubber Co. Ltd.*,[17] and *Rockland Distilleries v. Azeez.*[18]) Therefore the 1st and 2nd defendants filing Case No. 610/L in 1963 without making Phelomena a party does not amount to an overt act capable of conveying the message to

Phelomena that those in possession were desirous of asserting title to her half share.

(v) & (vi) **Preparing Plan D2 and building new house**

The same observation could be made with regard to the preparation of a plan for the entire land and also building a house and giving it on rent. These are acts co-owners do resort to and at a partition case these matters are resolved by either allowing the house built by one co-owner being allotted to that same co-owner or others paying owelty or compensation and taking over such houses. In *Dias Abeysinghe v. Dias Abeysinghe,*[19] it was held that erection of a new building on the common land and exclusive possession thereof for over 10 years did not give rise to a prescriptive title to the building and the soil on which it stood as against the other co-owners.

Thus none of these acts contain an overt act of refusal to recognise the title in the plaintiff-respondent and his predecessor in title. Even if all these acts are taken together as items of adverse possession as stated by Mr. Subasinghe they are off-set by the recognition of Phelomena's title by Maria in 1958 (D1) when her deed referred to "half share of the soil and plantations and the entirety of the house bearing Asst No. 74/1, Lewis Place". These were not words used by the Notary arbitrarily merely following earlier deed No. 1042 (P1). The Notary could not have referred to the entirety of the house as opposed to half share of the soil and plantations unless he was so instructed to prepare the deed. Therefore the reference to half share of the soil and plantation was a deliberate reference which showed the intention of Maria to recognise Phelomena's ownership of half share. Under these circumstances the decision in *Ponnambalam v. Vaithialingam and Another (supra)* has no relevance to the facts of this case.

W. Hubert Fernando's evidence cannot be said to have helped the defendant-appellant's case as asserted by her learned President's Counsel. The evidence of W. Hubert Fernando at page 92 of the brief is as follows:

ප්‍ර: ඒ අය යන්නට ගියාට පස්සේ මෙම ඉඩමට ආවාද?

උ: පොල් කඩන්නට ආවා.

ප්‍ර: කවුද, ආවේ?
උ: පිලිමිනා.

ප්‍ර පිලිමිනාත්, විල්ප්‍රඩිත් ආවා?
උ: ඔව්.

ප්‍ර: වෙන කවුද ආවේ?
උ: කවුරුවත් නැහැ.

පොල් කඩලා ඒ අය විත්තිකරුවන් සමඟ බඳාගෙන යන්නේ. බඳාගෙන ඒ අයගේ පොල් සේරම ලෙලි ගහලා, කුඩෙක දමාගෙන අරන් යනවා.

At page 93 and 94 the evidence runs this:–

ඉස්සර මට පැමිණිලිකාරයා කියලා තියෙනවා විත්තිකාරයන් හමුවී පැමිණිලිකාරයාගේ ඉඩම් කොටස වෙනුවෙන් සල්ලි ඉල්ලා ගෙන එන්නටයි කියලා. මම මේ බව විත්තිකරුවන්ට කීවා. සිරිල් කැමතියි එකට. නමුත් 2 වෙනි විත්තිකාරිය කැමති වුනේ නැහැ. ඒ සම්බන්ධයෙන් මට ගානක් කීවේ නැහැ. මම කීවා සල්ලි ටිකක් අරන් අත්සන් කර ගන්නට කියලා. මම තමයි ඒ සම්බන්ධයෙන් මැදිහත් වෙලා කටයුතු කලේ.

The fact that old coconut trees had come down and new ones were still not bearing cannot be a ground to show either that the plaintiff had given up his claim to co-ownership or that the defendants had asserted their right to the plaintiff's half share. It appears that while Cyril was prepared to purchase the plaintiff's share recognising the plaintiff's rights, Maria the wife was trying to claim title to the plaintiff's share.

Such secret intentions of greed or desire in one's mind cannot put an end to the title of another co-owner. That is why "an ouster or something equivalent to an ouster" has been recognised by law as being necessary to make long, continued, uninterrupted and undisturbed possession by a co-owner turn adverse.

This Court therefore sees no reason to interfere with the judgment of the learned District Judge dated 03.04.85. The appeal is dismissed with taxed costs payable by the appellants to the respondent.

Appeal dismissed.