THE

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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2014] 1 SRI L.R. - PART 2

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It was the contention of the Counsel for the defendant – appellants that there is no mandatory requirement under and in terms of the provisions contained in the subsection 86(3) of the Civil Procedure Code that supporting affidavit shall be affirmed by the petitioner himself who is making the application in terms of the said subsection 86(3) of the Civil Procedure Code.

Section 86(2) of the Civil Procedure Code reads as follows:-

"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes an application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."

Section 86(3) reads as follows:-

"Every application under this section shall be made by petition supported by affidavit."

In *Coomaraswamy V. Mariamma* [(1)] it was held that the requirements set out in section 86 (3) of the Civil Procedure Code are mandatory and non compliance with same necessarily results in failure of the application made under section 86(2).

In the instant case the defendant –appellant has made an application by way of petition and affidavit. The supporting affidavit obtained from the counsel who appeared on behalf of the defendant –appellant on the 26.06.1996 has been tendered with the said petition.

Under section 86 (2) it is the defaulting party who has to file an application and satisfy court that he had reasonable grounds for such default. Therefore what is stated in the petition has to be supported by an affidavit by the defaulting party. The defendant-appellants in this case had to satisfy court that they had reasonable grounds for such default. The defendant-appellants in their petition have not pleaded any ground for default as mandatorily required in the said section.

In *David Appuhamy Vs. Yassassi Thero*[2] it was held that:-

An *ex parte* order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default."

In *Chandrawathie v. Dharmaratne*[3] it was held that even if the affidavit filed by the plaintiff along with petition to have the order of dismissal vacated in terms of section 87 (3) of the Civil Procedure Code was defective yet, the affidavit of the registered attorney tendered along with the said petition should have been considered since it was sufficient to explain the facts relevant to the default.

In this case the defendant-appellants were not present in court when the case was taken up for trial. The counsel who appeared for them had sought for a postponement of the case but when that application was refused by court the Counsel had clearly stated to court that he cannot proceed to trial as the defendants are not present in court. Therefore the defendant-appellants are bound to give a good reason for not being present in court on the trial date. They have failed to do

so. I cannot accept the argument put forward by the counsel for the defendant-appellants that the said affidavit submitted by the counsel for the defendant-appellant is sufficient compliance of section 86(2).

The defendant-appellants have failed to urge any reason to justify their default in appearance as stipulated in section 86(2). It is clear, that the court can set aside an *ex parte* order only if the defendant has satisfied court that there were reasonable grounds for his default and in this case the defendants had failed to satisfy at the inquiry that reasonable grounds existed for their default. Therefore on the material available, the learned District Judge cannot be faulted for dismissing the application of the defendant-appellants, since they have failed to satisfy the trial Judge that reasonable grounds existed for their default. Therefore I see no reason to interfere with the order of the learned District Judge dismissing the defendant – appellants application made under section 86(2).

It was further contended by the Counsel for the Defendant-Appellants that on perusal of the judgment dated 26th June 1996 it revealed that the said judgment is not in compliance with the requirements contained in section 187 of the Civil Procedure Code and therefore it should be set aside.

The revisionary jurisdiction of the Court of Appeal in terms of Article 138 of the Constitution extends to reversing or varying an *ex parte* judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like.

In *Mrs Sirimavo Bandaranayake V. Times of Ceylon Limited*[4], it was held that the revisionary jurisdiction of the Court of Appeal in Article 138 of the Constitution extends to reversing or varying an *ex parte* judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on the merits in the Court of Appeal in revision, though not in appeal and not in the District Court itself.

For forgoing reasons I am inclined to hold the view that the findings of the learned District Judge in the impugned order are correct. The impugned order is hereby affirmed. The appeal is dismissed with costs.

Appeal dismissed.

SADI BANDA VS. OFFICER-IN CHARGE, POLICE STATION, NORTON BRIDGE

COURT OF APPEAL
ABDUS SALAM, J.
MALINIE GUNARATNE, J.
CA PHC 3/2013
HC NUWARA ELLIYA
HC/NE/ 48/2012 [REV]
MAGISTRATE'S COURT OF
HATTON – 57576/6/12
OCTOBER 1, 2013

Forest Ordinance – section 40, Section 40 [1] – Transport of timber without a permit – Accused pleading guilty – Vehicle confiscated after inquiry – Does the Court have a discretion? – Confiscation justifiable? Revision – Exceptional circumstances?

The four accused were convicted on their plea for transporting timber without a permit.

The Revision application in the High Court by the petitioner against the said order was dismissed on the basis that there were no exceptional circumstances.

In the appeal lodged in the Court of Appeal, the petitioner – appellant contended that, as the learned Magistrate in his order accepted this fact that the petitioner appellant did not have any knowledge about the transporting of timber without a permit and that in the circumstances the confiscation of the lorry is highly unreasonable and thereby had erred in law.

Held:

[1] Before making the order of confiscation the learned Magistrate should have taken into consideration, value of the timber transported, allegations prior to this incident that the lorry was being used for any illegal purpose – that the appellant and or the

accused are habitual offenders in this nature – and no previous convictions – and the acceptance of the fact that the petitioner –appellant did not have any knowledge about the transporting of timber without a permit. In the instant case confiscation of the lorry is not justifiable.

[2] Revisionary power of Court is a discretionary power. Existence of exceptional circumstances is the process by which the Court should select the cases in respect of which the extra-ordinary power of revision should be adopted.

The High Court Judge has not exercised his revisionary jurisdiction justifiably over the determination made by the learned Magistrate.

APPEAL from the judgment of the High Court of Nuwara Eliya.

Athula Perera with *Chathurani de Silva for appellant.*

Anoopa de Silva SSC for respondent.

Cur.adv.vult.

25th July 2014

MALINIE GUNARATNE, J.

In this matter four accused in the Magistrate Court of Hatton, appeared and pleaded guilty to a charge of illicit transport of timber. The offence under the Forest Ordinance was, without a permit the transportation of eight (08) logs of Tuna Timber worth Rupees Eight hundred and seventy six and cents forty two (Rs. 876/42).

The facts of this appeal were not disputed and it was common ground that the Norton Bridge Police had instituted proceedings in the Magistrate Court of Hatton against the four accused for transporting eight logs of Tuna timber valued at Re. 876/42, on 2012/02/04, without a lawful permit.

All four accused pleaded guilty, nevertheless the learned Magistrate convicted only the 1st and 2nd accused and fined Rs. 15,000/- each.

In addition to the fine imposed, the learned Magistrate has proceeded to confiscate the vehicle after an inquiry. Being aggrieved by the said Order the Petitioner moved the High Court of Nuwara Eliya in revision but the learned High Court Judge, by his Order dated 14.02.2013, dismissed the Petition of the Petitioner on the basis that there were no exceptional circumstances adduced before him. Being aggrieved by the said Order of the learned High Court Judge the Petitioner has filed the present Petition.

The Petitioner's Counsel contended in this Court that the learned Magistrate in his Order has accepted the fact that the Appellant did not have any knowledge about the transporting of timber without a permit. Further contended in such circumstances confiscation of the lorry is highly unreasonable and thereby had erred in law.

In the oral and written submissions of the learned Counsel for the Respondent, it has been stressed that there has in fact been a clear appreciation of the evidence lead in the Magistrate's Court together with a clear appreciation of the relevant law. Further submitted that the finding of the learned Magistrate and the High Court judge is in fact sound in law.

Further submitted, that in no where in the said inquiry proceedings find that the Appellant had acted within the requisites of Section 40; Section 40 (1) of the Forest Ordinance provides that:

"Provided that in any case the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no order of confiscation shall be made if such owner proves to the satisfaction of the Court

that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines as the case may be, for the commission of the offence".

Hence, it is the position of the Respondent, that the Appellant had failed to satisfy Court to the effect that he had acted in accordance to the requisites of Section 40 of the Forest Ordinance.

The learned Magistrate has considered the provision laid down in Section 40 of the Forest Ordinance as amended and had come to the conclusion that the Court has a discretion to confiscate the vehicle after an inquiry, on the basis that the registered owner had not been able to prove that he had taken all precautions to prevent the use of the vehicle for the commission of the offence. The learned High Court Judge also has taken the same view and affirmed the order of the learned Magistrate and dismissed the Revision Application.

I have to admit that no where in the said inquiry proceedings there is evidence, that the Appellant had taken all precautions to prevent the commission of the offence. However, at the inquiry the Appellant has given evidence and stated, he purchased the lorry on 26/02/2000 and gave it to his son to transport the tea leaves. Further stated, that he had no knowledge about transporting timber. The learned Magistrate in his Order has accepted the fact that the Appellant did not have any knowledge about the transporting of timber without permit.

Nevertheless the learned Magistrate has confiscated the lorry. I am of the view, before making the Order of confiscation learned Magistrate should have taken into consideration, value of the timber transported, no allegations prior to this incident that the lorry had been used for any illegal purpose, that the appellant and or the accused are habitual offenders in this nature and no previous convictions, and the

acceptance of the fact that the appellant did not have any knowledge about the transporting of timber without a permit. On these facts the Court is of the view that the confiscation of the lorry is not justifiable.

The learned High Court Judge has affirmed the learned Magistrate's Order and dismissed the Revision Application on the basis that there were no exceptional circumstances adduced before him.

The revisionary power of Court is a discretionary power. This is an extraordinary jurisdiction which is exercised by the Court and the grant of relief is entirely dependent on the discretion of the Court. The grant of such relief is of course a matter entirely in the discretion of the Court, and always be dependent on the circumstances of each case. Existence of exceptional circumstances is the process by which the Court should select the cases in respect of which the extraordinary power of revision should be adopted. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked.

In all the above circumstances, I take the view that the learned High Court Judge has not exercised his revisionary jurisdiction justifiably over the determination made by the learned Magistrate.

Taking all these into consideration I set aside the Order of the learned High Court Judge, dated 14.02.2013 and the Order of the learned Magistrate dated 12.13. 2012.

Appeal is allowed.

ABDUS SALAM J. - I agree.

KITHSIRI VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J [ACTING P/CA]
JAYATHILAKA, J.
CA 214/2008
HC WELIKADA 493/2006

Possession and trafficking of heroin – Rejection of evidence by trial Judge – Evaluation of evidence – Defence witness entitled to equal treatment with those of the prosecution – Reasonable doubt – Corroboration.

The accused – appellant was convicted for being in possession of 43.1 grams of heroin and trafficking the said amount, was imposed life imprisonment on both counts.

On appeal, it was contended that the heroin was foisted on him and that, the trial Judge has rejected the evidence of the accused without evaluating same.

Held:

[1] Courts in evaluating evidence should not look at the evidence of the accused person with a scant eye. Defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.

[2] There is no reason to reject the accused –appellant's evidence. This means that the evidence of the accused was capable of creating a reasonable doubt in the prosecution case. Evidence of main prosecution witness creates a reasonable doubt in his own evidence and corroborates the position taken up by the accused-appellant.

APPEAL from the judgment of the High Court, Welikada.

Cases referred to:-

(1) *Ariyadasa vs. Q* – 68 NLR 66

(2) *D. N. Pandey vs. State of Utarapradesh* AIR 1981 SC 911

Tenny Fernando for accused-appellant

Rohantha Abeysuriya DSG for AG.

11th February 2014

SISIRA J. DE ABREW, J.

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted for being in possession of 43.1 grams of heroin and trafficking the said amount. The learned trial Judge after trial, by his judgment dated 19.12.2008, imposed Life Imprisonment on both counts. Being aggrieved by the said convictions and the sentences, he has appealed to this Court. Facts of this case as narrated by the prosecution witnesses may be briefly summarized as follows. On 28.12.1998 around 9.30 – 10.00 in the morning I P Liyanage of Narcotics Bureau went in front of the accused's house. On seeing I P. Liyange the accused-appellant ran inside the house. Thereafter the police party when inside the house. I P. Liyanage found a parcel of heroin in the shirt pocket of the accused-appellant. The accused-appellant gave evidence in this case. The version of the accused-appellant is quite different from the version of the prosecution. The evidence of the accused-appellant may be briefly summarized as follows. On 28.12.1998 around 9.30 -10.00 when he was sleeping in his house, a person came and woke him up and took him to the front area of the

house. Thereafter the said person received a telephone call on his mobile. The said person whom he later identified as I P Liyanage instructed two officers who had come with him to jump over the wall which was behind the house of the accused-appellant. Little later the two officers brought a parcel. I P Liyanage thereafter questioned the accused-appellant as to the ownership of the parcel. When he denied any knowledge of the parcel. I P Liyanage assaulted him. When the wife of the accused-appellant shouted and told not to assault, I P Liyanage assaulted her with an antenna wire which was the antenna wire of the adjoining house. The accused-appellant, in his evidence, says that the two houses were very close to each other. Wife of the accused-appellant cursed the officers. This was the summary of the evidence of the accused-appellant. The most important question that must be decided in this case is whether heroin was found in the shirt pocket of the accused-appellant. If there is any reasonable doubt on this matter accused is entitled to be acquitted.

According to the evidence of I P Liyanage, heroin was found in the shirt pocket of the accused-appellant who was trying to jump over the wall which was behind the accused-appellant's house. If this evidence is true, then there was no necessity for I P Liyanage to go to the adjoining land. However, I P Liyanage, at page 129 of the brief, admitted that he went to the adjoining land. This was the land, according to the accused-appellant, that the two officers went, after I P Liyange received a telephone call. I P Liyanage, in his evidence, admits that he went to the adjoining land and observed the height of the wall. According to him, the height of the wall from the adjoining land is three feet and the height of the wall from the accused's land is six feet. This shows that I P Liyanage had gone to the adjoining land. If the heroin was found inside the shirt pocket of the accused-appellant

as claimed by I P Liyange and the police party, there was no necessity for I P Liyanage to go to the adjoining land. This evidence of I P Liyanage therefore, creates a reasonable doubt in the version taken up by him. Further, this evidence corroborates the position taken up by the accused-appellant in his evidence. The accused-appellant says that two officers went to the adjoining land probably after jumping over the wall and thereafter the two officers brought a parcel in which heroin was found. The accused-appellant claims that this parcel of heroin was foisted on him. Learned Deputy Solicitor General upholding the best traditions of the Attorney General 's Department informed Court that he too is unable to understand as to why I P Liyanage went to the adjoining land.

It is interesting to find out the reason for the rejection of the evidence of the accused-appellant by the learned trial judge. When I P Liyanage was giving evidence, learned defence counsel suggested to him that I P Liyanage used a wire to assault the wife of the accused-appellant. But when accused-appellant was giving evidence he stated that I P Liyanage used an antenna wire to assault his wife. The learned trial Judge observed the difference between the wire and the antenna wire and proceeded to reject the evidence of the accused-appellant. This was one of the grounds to reject the evidence of the accused appellant by the learned trial Judge. The above ground, in our view, is not a ground to reject the evidence of the accused-appellant. Learned D.S.G. too submits that he is unable to agree with the said ground to reject the accused appellant's evidence. We are pleased with this submission of the learned D. S. G. . I will not consider the other ground adduced by the learned trial Judge to reject the accused appellant's evidence. When I P Liyanage was giving evidence, learned defence counsel suggested to him that he came from the adjoining land. But, when accused-appellant was giving evidence, he took up the position that while I P Liyanage was questioning him. he (I P Liyanage)

instructed two officers to go to the adjoining land and they brought a parcel. Therefore, it appears there is a discrepancy between the suggesting and the evidence of the accused appellant. This was one of the grounds to reject the accused – appellant's evidence. When we consider the accused appellant's evidence, it appears that he had given consistent evidence on this point. He says that I P Liyanage instructed two officers to go to the other land and little later the two officers brought a parcel. We have gone through the evidence of the accused-appellant. He has been subjected to lengthy cross-examination. But in our view his evidence has not been shaken by the cross-examination. When I consider the evidence of the accused – appellant, I hold the view that there is no reason to reject the accused appellant's evidence. Learned trial Judge without properly evaluating the accused-appellant's evidence rejected his evidence on the above two grounds. The accused-appellant, in his evidence, admitted that he was a heroin addict. It appears that he had honestly admitted that he had two previous convictions where he was fined Rs. 4000/- (four thousand rupees). Accused-appellant, in his evidence, stated that when he was taken to the Police Narcotic Bureau he was suffering from the withdrawal of heroin and I P Liyanage gave him six packets of heroin. It appears that he has honestly admitted all these facts before the learned trial Judge. When we consider his evidence, we hold that there is no reason to reject the evidence of the accused-appellant. Learned trial Judge, in our view, was wrong when he rejected the accused appellant's evidence. What is the position if the Court believe the evidence of the accused appellant or is of the opinion that the evidence of the accused appellant creates a reasonable doubt in the prosecution case? In this connection I would like to consider the Judgment of His Lordship Justice T. S. Fernando in *Ariyadasa Vs. Queen*[1]. His Lordship in the said judgment held thus:

1. If the jury believed the accused's evidence he is entitled to be acquitted.

2. Accused is also entitled to be acquitted even if his evidence though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt.

It appears that the learned trial Judge has not followed the said principles, Courts, in evaluating evidence, should not look at the evidence of an accused person with a squint eye. This view is supported by the Judgment of the Indian Supreme Court in *D. N. Pandey Vs. State of Uttarapradesh*[2]. Indian Supreme Court in the said case held thus: "Defence witnesses are entitled to equal treatment with those of the prosecution and, Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses." It is the bounden duty of the trial Judge who has the opportunity of observing the demeanor and deportment of witnesses to come to the conclusion whether witnesses speak the truth or not. As I pointed out earlier, there is no reason to reject the accused appellant's evidence. This means that the evidence of the accused-appellant was capable of creating a reasonable doubt in the prosecution case. As I pointed out earlier, the evidence of I P Liyanage creates a reasonable doubt in his own evidence and corroborates the position taken up by the accused – appellant. When I consider the above matters, I feel that it is unsafe to allow the conviction to stand. For these reasons, I set aside both convictions and the sentences and acquit the accused appellant of both charges.

Appeal allowed

P. W. D. C. JAYATHILAKA, J – I agree.

ARIYASENA AND ANOTHER VS. ALEN

COURT OF APPEAL
ABDUS SALAM, J (P/CA)
CA 1104/96
DC KALUTARA 4259/P
JULY 24, 2014

Partition Law – Section 25, Section 26 – Failure of the trial Judge to indicate the undivided interest of each party in the interlocutory decree – Is it fatal?

The trial Judge having decided that the parties should be allotted undivided shares failed to give exactly the shares each party will be entitled to in the judgment. The trial Judge without specifying the undivided rights of the parties had stated that the plaintiff should tender a schedule of shares and if the schedule so tendered is consistent with the judgment it should be accepted as part and parcel of his judgment.

In appeal it was contended that the judgment is totally violative of the provisions of the Partition Law.

Held:

[1] The failure of the District Judge to indicate the undivided interest of each party in the interlocutory decree is a fatal irregularity.

[2] It is settled law that in a partition action the trial Judge must decide the nature and extent of the interest each party is entitled to upon an examination of title – Section 25.

Per Abdus Salam, J

> "I am of the view that the impugned judgment cannot be allowed to stand as it is totally inconsistent with the provisions of the Partition Law.

Case referred to:-

(1) *Memanis vs. Eide* – 59 CLW at 46

Asoka Fernando with *A. R. R. Siriwardane* for 1st, 4th, 16th and 78th defendant – appellants.

Champeka Ladduwahetty for respondent.

Cur.adv. vult.

06th August 2014

A. W. A. SALAM, J. (P/CA)

This is a partition action. The judgment and the interlocutory decree impugned in this appeal are dated 21.06.1996. The learned District Judge having decided that the parties should be allotted undivided shares failed to give exactly the shares each party will be entitled to in the judgment. The learned District Judge in that judgment states without specifying the undivided rights of the parties that the plaintiff should tender a schedule of shares and if the schedule of shares so tendered is consistent with the judgment it should be accepted as part and parcel of his judgment.

This judgment of the learned District Judge is totally violative of the provisions of the Partition Law. The judgment in the strict sense of the law cannot be regarded as a proper judgment in view of the direction given by the learned District Judge that the schedule of shares directed to be tendered by the plaintiff should be accepted as part and parcel of his judgment. This being plainly obnoxious to the provisions of the Partition Law I have no alternative but to hold that the learned District Judge has failed to discharge the elementary duty of discharging the most important aspect in the case. It is settled law that in a partition action the trial judge must decide the nature and extent of the interest each party is entitled to upon an examination of the title in terms of Section 25 of the Partition Law.

In C. A. 116 and 1167/96(F) it was held that the failure of the District Judge to indicate the undivided interest of each

party in the interlocutory decree is a fatal irregularity which gives rights to the judgment and interlocutory decree having to be set aside. It is appropriate at this stage to refer to the decision in *Memanis Vs. Eide*[1] at 46. H/L Basnayake, C.J. with H. N.G. Fernando concurring laid down the proposition that it is imperative to include the undivided interest of each party in the interlocutory decree. The relevant passage of the said judgment is quoted below.

> *"In his judgment the learned district judge says; "plaintiff's proctor will file a schedule of shares which when filed will form part and parcel of this judgment" and there is a schedule of shares filed which he has adopted in entering the interlocutory decree. Section 25 of the Partition Act, provides that the judge 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 to, of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made. In the instant case there has been no determination of the shares of the parties as required by the Partition Act. It is the shares so determined by the judge that the court is required to enter in the interlocutory decree. The course taken by the learned district judge is contrary to the provisions of section 28 of the Partition Act."*

Based on the above two decisions I am of the view that the impugned judgement cannot be allowed to stand as it is totally inconsistent with the provisions of the Partition Law.

In the circumstances the impugned judgment is set aside and the case send back for re-trial.

Appeal allowed.

Case sent back for re-trial.

SISSIE GUNAWARDANE VS. ROSMAND GUNAWARDANE AND OTHERS

COURT OF APPEAL
CHITRASIRI, J.
CA 402/99
DC COLOMBO 14657/P
SEPTEMBER 20, 2013

Partition action – Co-owner claiming prescriptive rights – Ouster – When there exists adverse possession for a very long period of time – Is it necessary to establish a particular overt act?

Held:

[1] It is the burden of the person who claims prescriptive title to a land subjected to a partition action to establish an act of ouster or an overt act exercised by him ousting the other co-owners from the land to which he claims prescriptive rights in addition to establishing adverse and uninterrupted possession for more than 16 years.

[2] 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.

[3] The 6th defendant-appellant had acted accepting the rights of the other co-owners. Such acceptance of the rights of the other co-owners stand in the way to establish the prescriptive claim she made since it will cut across the adversity which is a pre-requisite when claiming prescription.

APPEAL from the judgment of the District Court of Colombo.

Case referred to:-

(1) *Corea vs. Appuhamy* – 15 NLR at 65

(2) *Brito vs. Muthunayagam* – 20 NLR at 237

(3) *Thilakaratne vs. Bastian* - 21 NLR at 12

(4) *Gunasekara vs. Thisera* – 1994 – 3 Sri LR at 245

(5) *Siyathihamy vs. Podi Manike* – 2004 0 2 Sri LT at 323

(6) *Rajapakse vs. Hendrick Singho* – 61 NLR 32 [distinguished]

(7) *Karunawathie vs. Gunadasa* – 1996 – 2 Sri LR 426

Jagath Wickremanayake for 5th defendant-appellant

Shiral Laktilaka for substituted plaintiff-respondent

Lal Matarage for substituted 1st and 5th defendant-respondent

Athula Ratnayake for substituted 2nd defendant-respondent

Niranjan de Silva – 7th – 12th and substituted 13th defendant-respondent.

Cur.adv. vult.

20th February 2014

CHITRASIRI, J.

This is an appeal preferred by the 6th defendant-appellant (hereinafter referred to as the 6th defendant) seeking to set aside the judgment dated 19.04.1999 of the learned District Judge of Colombo. The only issue raised in the petition of appeal as well as at the argument stage is the refusal of the prescriptive claim advanced by the 6th defendant. Hence, it is first necessary to refer to the facts of this case at least briefly.

Deceased plaintiff- respondent (hereinafter referred to as the plaintiff) filed this action by her plaint dated 16.09.1987 to partition the two lands referred to in the Second and the Third Schedules to the plaints. Those two lands are situated adjacent to each other and it was possessed by the original

owner as a one unit. There had been no dispute as to the land sought to be partitioned in this case.

The plaintiff in her plaint dated 16th September 1987, having set out the pedigree has narrated the way in which the rights of the parties were devolved. In that plaint, it is stated that Simithra Arachchige Don Fredrick Gunawardene was the original owner of the two lands referred to in the said 2nd and the 3rd Schedules to the plaint. Indeed, the original owner of the land sought to be partitioned was not in dispute. His title had devolved on to the plaintiff and three remaining children of the said Don Fredrick Gunawardane. 1st and the 2nd defendants and the late husband of the 6th defendant namely Don Fredrick Alfred Victor Gunawardane were the said three remaining children of the original owner Fredrick Gunawardane. 6th defendant and her children who are Fredrick Alfred Victor Gunawardana. According to the plaint, the 7th to 14th defendants are the second wife and her children of the late the 6th defendant becomes entitled to 1/8th share of the land whilst the balance 1/8th entitlement of her deceased husband Don Fredrick Alfred Victor Gunawardane is to devolve equally, among his eight children who are the 3rd to 5th and 7th to 14th defendant respondents. The aforesaid devolution of title had been accepted by the learned District Judge since there was no dispute as to the said devolution.

However, the 6th defendant has taken up the position that she had been in possession of this land continuously, adverse to the rights of all other respondents including the plaintiff, who were entitled to the land by inheritance. This claim of the 6th defendant was rejected by the learned District Judge. Being aggrieved by the said decision, the 6th defendant

preferred this appeal challenging the refusal to accept her prescriptive claim. Therefore, as referred to above, the only issue in this case is to determine whether the learned District Judge is correct when he refused the prescriptive claim of the 6th defendant.

The fact that the 6th defendant is the second wife of one of the children of the original owner Don Fredrick Gunawardane was not in dispute. Therefore, she being a co-owner to the land by inheritance will have to establish that she possessed the land continuously for over a period of ten years, adverse to the rights of the other co-owners having those other co-owners ousted from the land sought to be partitioned.

The aforesaid position in law had been clearly established in the cases including that of:

Corea vs. Appuhamy(1) at 65
Brito vs. Muthunayagam(2) at 327
Thilakaratne vs. Bastian(3) at 12
Gunasekera vs. Thissera(4) at 245
Siyathuhamy vs. Podimenike(5) at 323

In *Corea vs. Iseris Appuhamy (supra)* the Privy Council having comprehensively dealt with the issue of prescription among co-owners was of the view that:

> *"Possession by a co-heir ensures to the benefit of his co-heirs.*
>
> *A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in this mind. Nothing short of ouster or something equivalent to ouster could bring about that result."*

In *Siyathuhamy vs. Podimenike (supra)* if was held thus:

"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."

The authorities referred to above, show that it is the burden of the person who claims prescriptive title to a land subjected to a partition action, to establish an act of ouster or an overt act exercised by him/her ousting the other co-owners from the land to which he/she claims prescriptive rights in addition to establishing adverse and uninterrupted possession for more than ten years. Accordingly, I will now turn to consider whether the learned District Judge has properly looked at the evidence as to the claim of prescription advanced by the 6th defendant in determining her rights.

The evidence reveals that the 6th defendant married the late Don Alfred Victor Gunawardane in the year 1959. It was his second marriage. Since then she had been living on this land with her family members. They were living in the house marked "6" shown in the preliminary plan marked "X". *(vide proceedings at page 164 in the appeal brief)*. At that point of time, the plaintiff also had been living on that land. The 6th defendant herself has admitted that the 1st defendant too, until she married, was living in the ancestral house found on this land and has left the same upon her marriage in the year 1961. *(vide proceedings at page 190 in the appeal brief)*. Having said so, the 6th defendant has categorically stated that she along with her children possessed this land since the year 1963 during which year the 2nd defendant's mother who was one of the children of the original owner, passed away. (vide proceedings at page 194 in the appeal brief). Accordingly,

the 6th defendant has taken up the position that she possessed this land since the year 1963 up to the time she gave evidence without allowing the other co-owners to possess.

However, it must be noted that there is no evidence forthcoming as to an act of ouster of the other co-owners by the 6th defendant which is a requirement under the law as mentioned in the judgments referred to hereinbefore. Indeed, the learned Counsel for the 6th defendant-appellant did not advert to this aspect either in his oral submissions or in the written submissions filed on behalf of the appellant. Instead, he has referred to two decisions in which it was held that long standing and continuous possession of one co-owner without allowing the others to possess the land would presume to have established an overt act against the other co-owners. Hence, the position taken up on behalf of the 6th defendant is that it is not necessary to establish a particular overt act when there exist adverse possession for a very long period of time as decided in the cases of *Rajapakse vs. Hendrick Singho*(8) and *Karunawathie vs. Gunadasa*(9) at 406

In the case of *Rajapakse vs. Hendrick Singho (supra)* Lord Kenyon C. J. held thus:

> *"I have no hesitation in saying where the line of adverse possession begins and where it ends. Prima facie the possession of one tenant in common is that of another, every case and dictum in the books is to that effect. But you may show that one of them has been in possession and received the rents and profits to his own sole use, without, account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under*

all the circumstances to presume an actual ouster of the companion. And there the lines of presumption ends."

In the case of *Karunawathie v. Gunadasa, (supra)* Senanayake J with Edussuriya J. agreeing with him held thus:

"According to the evidence of the 4th defendant the entire produce from the coconut and other were enjoyed by the 4th defendant. The 4th defendant had challenged the report "X1" and in her statement of claim and in her evidence she had claimed the entire plantation of lot '1' and lot '2'. In the instant case there was overwhelming evidence that the Defendants since the year 1955 took the produce to the exclusion of the Plaintiffs and their predecessors in title and gave them no share of the produce or paid them a share of the profits from the rubber not any rent and did not act from which an acknowledgment of a right existing in there would fairly and naturally be inferred". (at page 409)

"If the income that the properly yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which would weigh heavily in favour of adverse possession on the part of the co-owner". (at Page 411)

In the above two cases referred to by the learned Counsel for the appellant, Their Lordships have considered the circumstances under which an ouster of the other co-owners could be presumed in the absence of physical ouster of the other co-owners. Accordingly, it is their view that such an instance would depend on the circumstances of each and

every case. It was thus held by *Senanayake J in Karunawathie v. Gunadasa (supra)* and it reads as follows;

> *"Each case has to be viewed on its own facts. In this case there is very clear and strong evidence of ouster the Plaintiff's own evidence was at least from 1955 the 4th Defendant-appellant was forcefully possessing the said lots the possession was adverse and this was not a separate possession on grounds of convenience."* [at page 412]

In the case of *Rajapakse vs. Hendrick Singho (supra)* there had been evidence of receiving rents and profits by the person who claimed prescriptive title without account to the other co-owners for a period of more than 31 years. Those facts were never in dispute in that case. In the case of *Karunawathie v. Gunadasa (supra)* there had been clear evidence to show that the claimant took the produce of the land exclusively. In that case, for a period of more than 23 years, no share of the produce was given or paid a share of the profits, neither the income from the rubber plantation nor any rent for the same was paid, to the other co-owners. Those are the circumstances under which those two decisions were arrived at, in order to presume that there had been an ouster of the co-owners.

Having adverted to the facts of the two cases referred to by the learned Counsel for the appellant. I will now look at the evidence in this case to ascertain whether the 6th defendant was successful in establishing a position similar to those. Indeed, there exists overwhelming, evidence to show that the 6th defendant with his children had been living on this land since the year 1963. Other co-owners were not in *de facto* possession of the land sought to be partitioned though they

have visited this place for special events such as alms giving and the like. Therefore, it is to be noted that there is clear evidence to show that the 6th defendant had been in possession of the land sought to be partitioned for well over 20 years prior to the filing of the action. As mentioned above, submission of the learned Counsel for the appellant is that such period of possession is capable of presuming the ouster of the respondents in this appeal. In the circumstances, it is now necessary to ascertain whether the 6th defendant could successfully claim the benefit of those authorities in establishing prescriptive rights to the land sought to be partitioned.

When looking at this issue, it is necessary to refer to the findings of the learned District Judge as well. His decision to reject the claim of prescription is basically defended upon two events, namely an action filed by the 6th defendant in the District Court of Colombo and an attempt made in the year 1977 to have an amicable partition in respect of this land. His findings on this aspect are as follows:-

> "6 වන විත්තිකාරියගේ සාක්ෂිය අනුව නඩු ප්‍රතිඵලය ගැන ඇය කියා ඇත්තේ "නඩුකාර හාමුදුරුවෝ නඩුව විසි කලා. අයිතියක් තියෙනවා නම් බෙදුම් නඩුවක් දා ගන්න කිව්වා" යනුවෙනි. මෙම වාචික සාක්ෂියෙන් පෙනී යන්නේ ප්‍රශ්නගත එම නඩුව පැහැදිලිව බෙදුම් නඩුවක් නොවන බවයි. නඩුව පැවරීමට හේතුව වශයෙන් ඇය කියා ඇත්තේ නඩුව පැවරුවේ "මහගෙට එන්න" යනුවෙනි. එසේ නම් නඩුව මෙම දේවල ඇති ගෙයක් සම්බන්ධව පවරන ලද නඩුවකි. වත්මන් නඩුව ගෙයක් සම්බන්ධව නොව සම්පූර්ණ ඉඩම බෙදා වෙන් කිරීම සම්බන්ධයෙනි.
>
> පැමිණිලි පක්ෂය හා 1, 2 විත්තිකරුවන් නඩුවට අදාළ දේපල සමාදානයෙන් වෙන් කර ගැනීමට උත්සාහ කල බවක් එයට පැමිණිල්ලේ නඩුව තරග කරන විත්තිකරුවන් ඉඩ නොදුන් බවත් මෙම සිද්ධියද පිටමන් කිරීමේ ක්‍රියාවක් බවත් තරග කරන විත්තිකරුවන් ප්‍රකාශ කර ඇත.

සාමදානයෙන් ඉඩම මැන බෙදා වෙන් කර ගැනීමට උත්සාහ දරා ඇත්තේ පැමිණිලි පක්ෂයේ මූලිකත්වයෙනි. මෙම උත්සාහය 1977 වසරේ දරන ලද්දක් බව 6 විත්තිකාරිය පවසා ඇතත් එය ඇත්ත වශයෙන්ම සිදු වී ඇත්තේ 1972 වසරේ පමණය.

6 විත්තිකාරියගේ සාක්ෂිය මෙම "සමාදානයෙන් බෙදා ගැනීමේ උත්සාහය" සම්බන්ධයෙන් සලකා බැලීමේ දී පෙනී යන්නේ 6 විත්තිකාරිය ද එක් අවස්ථාවකදී එයට විරුද්ධ ව නොමැති බවයි."

The aforesaid findings of the learned District – Judge show that the 6th defendant has acted, accepting the rights of the other co-owners on those two instances. The 6th defendant in her evidence also has stated that an action was filed against her husband in the year 1960 by the mother of the 2nd defendant and that action was dismissed in the year 1963. (vide proceedings at pages 193 & 194 in the appeal brief).

The evidence of the 6th defendant in connection with the incident that took place in order to have an amicable partition amongst the other co – owners in the year 1977 is as follows:

ප්‍ර : තමාට මතක ද යම්කිසි කාලයක මේ ඉඩම බෙදා ගන්න සාකච්ඡාවක් කළාද?

උ : ඔව්.

ප්‍ර: ඉඩම කා අතර බෙදා ගන්න ද සාකච්ඡාවක් තිබුණේ?

උ : අපිටත්, ඒ ගොල්ලන්ටත්. මේ නඩුවේ පාර්ශවකරුවන් ඔක්කෝටම ඉඩම බෙදා ගන්න.

ප්‍ර : ඒ සාකච්ඡාව තිබුණේ කොයි කාලයේ ද?

උ : 1977 දී