

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

PATTINI KUTTIGE JOKEENU NONIS Plaintiff-
Appellant

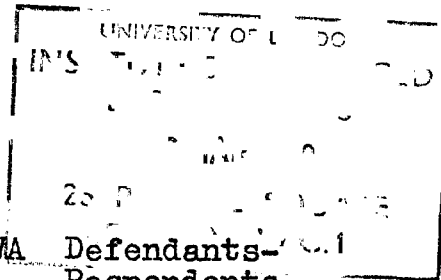
- and -

1. HORATALPEDI DURAYALAGE
PETHTHA alias PETHTHA VEDA

- and -

10 2. HORATALPEDI DURAYALAGE WATTUWA

Defendants-
Respondents



C A S E F O R T H E A P P E L L A N T

RECORD

1. This is an Appeal from the Judgment and decree dated the 18th July 1966 of the Supreme Court of Ceylon (Sri Skanda Rajah J. & Alles J.) dismissing with costs the Appeal of the Appellant from the Judgment and decree of the District Court of Kuliypitiya, dated the 28th May 1964. The District Court of Kuliypitiya held that the Appellant was not entitled to any share in, or to a decree for the partition of, the land called Galagawawatte, described in the schedule to the Plaint, as the 1st Respondent above named had acquired title by prescription to the entirety of the said land, to the exclusion of the Appellant and the 2nd Respondent above named. The learned District Judge held that the land was not owned in common by the Appellant and the two Respondents, and dismissed the Appellant's action with costs.

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2. The Appellant instituted this action against the 1st and 2nd Respondents by a Plaint dated the

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- 7th December 1962 praying for a declaration of title to an undivided $\frac{1}{3}$ share of the land called Galagawawatte described in the Plaint, for partition thereof and for the allotment to him of a divided and specific portion of the said land in lieu of his undivided share therein and to be put in possession thereof and for ancillary relief, in terms of the Partition Act No.16 of 1951 [Cap.697]. The Appellant claimed title to an undivided $\frac{1}{3}$ share of the said land through one Horatalpedi Durayalage Peruma, admittedly the original owner of the land in suit, who by deed of Gift No.2452 (P4) dated 15th July 1924, had gifted the same in equal undivided shares to his three children - the 1st Respondent, the 2nd Respondent and one Sekera, the Appellant's predecessor in title. The said Sekera transferred his $\frac{1}{3}$ share upon deed No.29662 of 18th March 1960 (P5) to one Sumanadasa, who by deed No. 820 of 26.7.62 (P6), transferred the same $\frac{1}{3}$ share to the Appellant.
- p.70 10
- p.80 20
- p.84 20
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- Thereafter the 'Lis pendens' was duly registered in Folio 224/213 in terms of the Partition Act No.16 of 1951, and a Commission was issued to a licensed Surveyor to survey the land in terms of the said Act, and his return was duly made in obedience to such Commission on the 6th November 1963. 30
- p.4
3. The 2nd Respondent stated in open court that he agreed to a partition in terms of the Plaint and thereby accepted the $\frac{1}{3}$ share conceded to him in the Plaint. He did not file a Statement nor contest the claims of the Appellant.
4. The 1st Respondent by his Statement dated the 17th July 1963, contested the claims of the Appellant and averred - 40
- (1) that the correct name of the land the subject matter of the action was Korameegahamulawatte.
 - (2) that the land in suit as well as several other separate lands were owned in common by the three brothers,

viz; 1st Respondent, 2nd Respondent and the said Sekera.

10 (3) that on the 26th June 1947, the three brothers referred to above, as a result of a family arrangement exchanged their interests in the different lands, and in lieu of their undivided interests in the properties, they agreed to possess different lands exclusively and adversely; in terms of that exchange 1st Respondent was allotted the entirety of the land in suit.

20 (4) that as a result of the exchange the three brothers possessed their separate lands exclusively and adversely to each other and the 1st Respondent acquired a prescriptive title to the land in suit by exclusive and adverse possession for over a period of ten years in term of sec.3 of the Prescription Ord. [Cap. 69].

(5) that when Sekera purported to transfer his 1/3 share to Sumanadasa by P5 on 18th March 1960 he had no title or interest in the said land and that as a result the Appellant obtained no title to the land in suit on deed No.820 (P6) from the said Sumanadasa.

30 The 1st Respondent prayed that the action be dismissed with costs.

The 1st Respondent relied upon an informal written document D1, dated the 26th June 1947, as evidence in support of the alleged exchange. D1 was not notarially executed, but was an informal agreement signed by the three brothers. It provided inter alia -

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40 "We the undersigned Horatalpedi Durayalage Petta Veda, Sekera, and Wattuwa are the owners of the property mentioned below by right of inheritance, and agree to possess as possessed earlier until deeds are executed.

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To. 1. Petta Veda, the land called Korameegahamulawatte, where he resides.

2. (name of property)

3. "

4. "

To. 1. Sekera and Wattuwa the land called Wanepolawatte where they reside.

2. Galagawawatte.

10

3.

4.

5.

Do hereby agree to allow the said several persons the lands mentioned herein until deeds are executed."

5. At the trial the following issues were raised and accepted and at the conclusion of the trial were answered as follows:

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and
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1. Did Sekera referred to in the Plaint transfer his $\frac{1}{3}$ share on deed No.29662 of 18.3.60 and attested by S.D. Karunaratne N.P. to Sumanadasa.

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Ans. Yes, but no title passed.

2. Did the said Sumanadasa transfer his $\frac{1}{3}$ share on deed No. 820 dated 26.7.62, attested by A.B.M. de Alwis N.P. to the Plaintiff.

Ans. Yes, but no title passed.

3. If the above points of contest are answered in the affirmative, is the Plaintiff entitled to $\frac{1}{3}$ share of this land?

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Ans. No.

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4. Did Petta the 1st Defendant, Sekere and Wattuwa exchange their lands as described in Para. 5 of the Statements of the 1st Defendant?

Ans. Yes.

10 5. As a result of such exchange, are the premises in suit, in the exclusive possession of Petta the 1st Defendant?

Ans. Yes.

6. Prescriptive rights of parties.

Ans. The 1st Defendant has prescribed to this land exclusively.

20 7. If issues 1 - 3 are answered in the affirmative is the Plaintiff entitled to a partition as prayed for?

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Ans. - (This issue was not answered).

6. The learned District Judge held -

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30 (i) that the document D1 was evidence of an informal family arrangement for the division of the properties among the three brothers (1st Respondent, 2nd Respondent and Sekere), contemplating the separate possession by the three brothers of different lands, exclusively and adversely to each other.

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(ii) that the arrangement had been acted upon;

40 and(iii) that the 1st Respondent had possessed the land in suit exclusively and adversely as against his brothers, for a period of over 10 years, and

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therefore had acquired a prescriptive title to the said land.

and (iv) that the Appellant had not obtained any title to the land in suit upon deed No. 820 of 26.7.62.

The Appellant's action was dismissed with costs.

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7. The Appellant appealed to the Supreme Court of Ceylon against the said Judgment of the learned District Judge, by his Petition of Appeal dated 12.6.64. The Supreme Court dismissed the appeal, without giving reasons. 10

8. It is respectfully submitted that the learned District Judge and the Supreme Court were wrong in dismissing the Appellant's action and accepting the position of the 1st Respondent that he had acquired a title by prescription to the entirety of the land in suit.

9. It is a settled presumption in the law of co-ownership of property in Ceylon that when one co-owner enters into occupation of land in common, the character of his possession is always referable to his legal title as co-owner, and his possession is that of a Co-owner, on behalf of but not adverse to the other co-owners. If he, therefore alleges a possession adverse to the other co-owners, in order to support a claim of prescription, he is required to rebut the above presumption, and prove a change in the character of his original possession through unambiguous and cogent evidence of some ouster or overt act, clearly indicating the change in the character of his possession, and the commencement of adverse possession. 20 30

It is respectfully submitted that the learned District Judge failed to give sufficient weight to the above mentioned principles in assessing the evidence for the 1st Respondent. 40

The case for the 1st Respondent was that while, he the 2nd Respondent and the said Sekere (the predecessor in title of the

Appellant) were originally co-owners of the land in suit, and while he, prior to 1947, possessed the land in suit as co-owner, after the execution of the document D1 on 26.6.47, which recorded the 'exchange' of the lands, his possession became adverse to the other co-owners, and thereby he acquired a prescriptive title to the land to the exclusion of the other co-owners.

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10 It is respectfully submitted that D1 was not intended to be, and cannot be construed as, a family arrangement in the nature of an amicable partition of property, whereby the various lands to be 'exchanged', were thereafter to be possessed exclusively and adversely by each of the co-owners, in lieu of their undivided shares. The document D1 states that the three brothers are "..... owners of the properties mentioned by inheritance" and that they "..... agree to possess as possessed earlier until deeds are executed". It is respectfully submitted that on a reasonable interpretation of the said document there is a clear assertion (i) that all three parties are still co-owners of the lands referred to in the document, and (ii) that until deeds are written (the evidence in the case disclosed that no deeds as contemplated had ever been executed)

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30 the parties were to continue to possess the various lands in the character of their original possession; i.e. as co-owners. It is submitted that the document D1 merely recorded a non-material and therefore unenforceable, agreement for a future exchange or partition of the lands on the basis of cross-conveyances; pending which the original co-ownership was to continue.

40 It is therefore respectfully submitted that the learned District Judge was wrong in deciding that D1 contained a family arrangement to take effect as an 'exchange' of lands, and was therefore evidence of the commencement of adverse and exclusive possession by the 1st Respondent.

For these reasons it is respectfully submitted that the 1st Respondent has failed to prove an ouster or some overt

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act by clear and unambiguous evidence, indicating a change in the character of his original possession as a co-owner.

10. The learned District Judge also decided that the document D1 was acted upon by the parties as an 'exchange', whereby the land in suit was to be possessed and enjoyed exclusively by the 1st Respondent and the other lands to be enjoyed exclusively by the other co-owners. He relied very heavily for this finding on the fact that the 1st Respondent had executed a Mortgage Bond (D5) on 27.7.47 in respect of the land in suit, soon after the agreement D1.

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It was respectfully submitted that the learned District Judge was wrong in coming to this conclusion. The said Mortgage Bond D5 was in respect of and referred to a land called Korameegahamulawatte, and is registered in Folio F447/153; whereas the premises sought to be partitioned is called Galagawawatte and is registered in Folio F224/213. The 1st Respondent had never objected to, or contended that the lis pendens in the present action was registered in the wrong folio. It is therefore submitted that it had not been proved that the Mortgage Bond D5 was in respect of the land in suit.

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In any event, in view of the fact that the document D1, cannot be construed as contemplating an 'exchange' of lands giving rise to exclusive and adverse possession, the mere execution of a mortgage bond cannot by itself, in the absence of any evidence that the other co-owners had knowledge of such a transaction and acquiesced in its exercise, be construed as proof of adverse possession.

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11. In any event, even assuming that D1, contemplated an 'exchange' of lands, as averred by the 1st Respondent, it is submitted that the 1st Respondent has failed to prove that the land in suit was allotted to him in terms of the agreement contained in D1.

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10 D1 allots to the 1st Respondent inter alia a land called Korameegahamulawatte, which the 1st Respondent has alleged to be the correct name for the land in dispute. But the action was instituted in respect of the land called Galagawawatte which is registered in Folio F224/213. The land called Korameegahamulawatte is however registered in Folio F447/153. The 1st Respondent had not objected that the lis pendens has been registered in the wrong Folio. On the other hand D1 allots a land called Galagawawatte to the 2nd Respondent and the said Sekere, the Appellant's predecessor in title.

20 12. It is respectfully submitted that this appeal should be allowed with costs throughout, and the Judgment of the District Court of Kuliypititya and the Supreme Court of Ceylon be reversed, and that the Appellant be declared entitled to an undivided $\frac{1}{3}$ share of the land in suit and that the land be partitioned as prayed for in the Plaint for the following

R E A S O N S

1. BECAUSE the 1st Respondent has failed to prove prescriptive title to the entire land in suit to the exclusion of the other co-owners.
- 30 2. BECAUSE Sekere had validly conveyed his $\frac{1}{3}$ share of the land in suit to one Sumanadasa upon deed No. 29662 of the 18.3.60.
3. BECAUSE Sumanadasa validly conveyed the same $\frac{1}{3}$ share to the Appellant upon deed No. 820 dated 26.7.62.
4. BECAUSE the Appellant has proved that he has a valid title to an undivided $\frac{1}{3}$ share of the land in suit.
5. BECAUSE the learned District Judge was wrong in dismissing the Appellant's action.

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6. BECAUSE the Judgments of the District Judge and of the Supreme Court were wrong and ought to be reversed.

E.F.N. GRATIAEN

D.C. AMERASINGHE

No. 32 of 1968

IN THE PRIVY COUNCIL

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BETWEEN :-

PATTINI KUTTIGE
JOKEENU NONIS Plaintiff-Appellant

- and -

1. HORATALPEDI
DURAYALAGE PETHTHA
alias PETHTHA VEDA

- and -

2. HORATALPEDI
DURAYALAGE WATTUWA
Defendants-Respondents

CASE FOR THE APPELLANT

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