

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal against the Judgment of the Provincial High Court of Western Province dated 26/08/2013 in the Case No. WP/HCCA/GPH/113/2008(F), DC Gampaha Case No. 39800/P.

Chandra Warusapperuma,
No. 280,
Temple Road,
Wabada.

Plaintiff

SC Appeal No: 77/2014
SC/HCCA/LA No. 390/2013
WP/HCCA/GPH/113/2008/F
DC Gampaha Case No. 39800/P

Vs.

A.H. Alice Nona,
Dolekade,
Wabada-South.

Defendant

BETWEEN

A.H. Alice Nona,
Dolekade,
Wabada-South.

Defendant-Appellant

Vs.

Chandra Warusapperuma,
No. 280,
Temple Road,
Wabada.

Plaintiff-Respondent

AND NOW BETWEEN

A.H. Alice Nona,
Dolekade,
Wabada-South.

Defendant-Appellant-Appellant

Vs.

Chandra Warusapperuma,
No. 280,
Temple Road,
Wabada. **(Deceased)**

Plaintiff-Respondent-Respondent

1(A). Abeysinghe Arachchige Chaminda Upul
Shantha

1(B). Lakshman Sri Mangalika

1(C). Shrimathie Mangalika

1(D). Vikum Sri Jayantha

All of No. 280,
Temple Road, Wabada.

**Substituted 1A, 1B, 1C & 1D Plaintiff-
Respondent-Respondents**

Before: Justice P. Padman Surasena
Justice Kumudini Wickremasinghe
Justice A.L. Shiran Gooneratne

Counsel: Sudarshani Coorey for the **Defendant-Appellant-Appellant.**

Saman Liyanage with Janaka Gamage for the **Plaintiff-Respondent-
Respondents** instructed by Harshika Godamulla.

Argued on: 25/05/2023

Decided on: 02/11/2023

A.L. Shiran Gooneratne J.

By Plaint dated 08/07/1996, the Plaintiff-Respondent-Respondent (hereinafter referred to as the “Plaintiff-Respondent”) filed Case bearing No. D.C. Gampaha 39800/P against the Defendant-Appellant-Appellant (“the Defendant-Appellant”), and sought a declaration that the Plaintiff-Respondent and the Defendant-Appellant are each entitled to half share, to the land to be partitioned called Gonnagahawatta *alias* Batadombagahawatta, in extent, 1A and 6P depicted in Village Plan No. 849/P, dated 26/07/1957, made by M.S. Perera, Licensed Surveyor, More fully described in the schedule to the Plaint.

In paragraph 7 of the said Plaint the Plaintiff-Respondent states that the said land sought to be partitioned is Lot No. 4, an unallotted portion of land in the Final Plan dated 26/07/1957, in Gampaha District Court Case No. 4095/P, of the land called Gonnagahawatta *alias* Batadombagahawatta, in extent, 1A OR 6P, more fully described in the schedule to the Plaint. Admittedly, the land sought to be partitioned is depicted as Lot No. 4 in the said Plan No. 849/P dated 26/07/1957, is an unallotted portion of land in partition Case No. 4095/P of the District Court of Gampaha.

In the Amended Statement of Claim dated 29/11/2000, the Defendant-Appellant contends *inter alia*, that she and her predecessors in title possessed the unallotted Lot No. 3 in extent of 2R and 8.20P, depicted in Preliminary Plan No. 1175/P, dated 30/07/1998, made by A.C.P. Gunasena, Licensed Surveyor, for a period of over 60 years and thereby acquired prescriptive title to the said Lot No.3 in the said Plan No. 1175/P. On that basis, the Defendant-Appellant contends that presently, she is in possession and has prescribed to in excess of half share of the land to be partitioned.

Having considered the oral and the documentary evidence led by the respective parties, the learned Additional District Judge by Judgment dated 24/09/2008, held that the

Plaintiff-Respondent and the Defendant-Appellant are each entitled to a half share of the unallotted portion of land as depicted in the Preliminary Plan No. 1175/P, dated 30/07/1998, made by licensed surveyor A.C.P. Gunasena. The Court also held that the Defendant-Appellants claim based on prescriptive possession to a portion in excess of half share of the unallotted portion was not proved and accordingly, the Court granted relief to the Plaintiff-Respondent as prayed for.

Being aggrieved by the said Judgment, the Defendant-Appellant, by Petition of Appeal dated 21/11/2008, appealed to the High Court of the Western Province exercising civil appellate jurisdiction holden in Gampaha (“the Civil Appeal High Court”). The Civil Appeal High Court, after hearing also considering the question of title of the Plaintiff-Respondent and the claim of prescriptive possession acquired by the Defendant-Appellant to the relevant portion, by Judgment dated 22/08/2013, held that;

- a) the Defendant-Appellant is entitled only to a half of the unallotted land and that the Defendant-Appellant has failed to establish any amount in excess of such or established prescriptive title to any portion of the said land.
- b) the Plaintiff-Respondent had purchased the rights of the 7 children of Punchi Singho and his wife.
- c) the Plaintiff-Respondent has established the rights which devolved from Punchi Singho to the Plaintiff-Respondent.
- d) the Deeds marked V1, V2 and V3 produced at the trial before the District Court by the Defendant-Appellant were not in conformity with the extent of the land which was claimed by the Defendant-Appellant.
- e) the Defendant-Appellant failed to establish prescriptive title to a defined portion of the corpus.
- f) the Defendant-Appellant is entitled only to a half share of the corpus.

Accordingly, the Civil Appeal High Court affirmed the said Judgment of the Additional District Judge dated 24/09/2008, and dismissed the appeal.

The Plaintiff-Appellant, by Petition dated 04/10/2013 is before this Court, to set aside the said Judgment dated 22/08/2013, delivered by the Civil Appeal High Court.

By Order dated 21/06/2019, this Court granted leave to appeal on the following questions of law;

- 1) Whether the Plaintiff has established title to a half share of the corpus?
- 2) If the answer to the above question of law is in the negative, what is the share that the Plaintiff is entitled to?
- 3) Whether the Defendant-Appellant-Appellant was allocated the shares according to the evidence and the documents led at the trial?

At the commencement of the trial before the District Court, both parties admitted that the land described in the schedule to the Plaint is the same land as depicted in the Preliminary Plan No. 1175/P, prepared by licensed surveyor A.C.P. Gunasena. They also admitted that Patikiri Arachchige Simon Singho and Patikiri Arachchige Andi Singho were the original owners of the land to be partitioned and were each entitled to an equal share. At the trial, only the Plaintiff-Respondent and the Defendant-Appellant testified before the District Court.

The Plaintiff-Respondent's position was that both the Plaintiff-Respondent and the Defendant-Appellant be declared entitled to a half share each to the land described in the said Preliminary Plan No. 1175/P, dated 30/07/1998.

It is in evidence that Patikiri Arachchige Simon Singho, one of the original owners, by Deed No. 15767 dated 17/01/1945, marked 'P2', transferred his undivided half share to Patikiri Arachchige Punchi Singho. When the said Punchi Singho died, his share

devolved on his widow Mahavithanage Helenahamy and their six children according to inheritance under the pedigree. One child died issueless and his share devolved on Helenahamy and the rest of the siblings. The said Helenahamy, by Deed No. 23247 marked 'P3', transferred all her rights to the Plaintiff-Respondent, and the rest of the children also transferred their rights to the Plaintiff-Respondent by Deeds No. 25483 marked 'P7', and No. 24132 marked 'P4', respectively. Accordingly, the Plaintiff-Respondent purchased the undivided half share of Patikiri Arachchige Punchi Singho which devolved on his wife Helenahamy and their seven children, thereby claimed entitlement to half share to the said land.

The Defendant-Appellants position is that;

- a) By the Deeds marked P1 to P8, the Plaintiff-Respondent gets title to the said land only on Deed Nos. 25483 (P7) and 24277 (P8), referred to in the Plaintiff and accordingly, would be entitled only to 9/20 share and not half share, as claimed.
- b) having possessed the said divided Lot No.3 depicted in Preliminary Plan No. 1175/P dated 30/07/1998, for over 10 years, the Defendant-Appellant has acquired prescriptive title to a divided and a defined portion of the said land.
- c) when the Defendant-Appellant obtained title to the said land by Deed No. 2690 dated 01/06/1973, marked 'V1', a fence was in existence, as shown in Plan No. 1705 dated 30/11/1973, marked 'V4' (not referred to in the said title Deed No. 2690), which establish that the Defendant-Appellant possessed and prescribed to the said Lot 3 of the said Plan No. 1175/P.
- d) Patikiri Arachchige Amarasena is also a child of Patikiri Arachchige Punchi Singho and therefore, the Plaintiff-Respondent's pedigree is challenged on the basis that Patikiri Arachchige Punchi Singho had seven children and not six as revealed in the Plaintiff and the name of Patikiri Arachchige Amarasena has been completely left out from the Plaintiff.

As noted earlier, Deed No. 2690 from which the Defendant-Appellant claims title to her land, makes no reference to the said Plan No. 1705 dated 30/11/1973. In evidence, the Defendant-Appellant states that the said plan was made after the land was purchased by the said Deed No. 2690. It is claimed that the fence depicted in the said Plan No. 1705 is the same fence shown in the Preliminary Plan No. 1175/P, and that the said fence was in existence for over 20 years by which prescriptive rights were acquired over Lot 3 of Plan No. 1175/P.

However, based on Plan No. 849/P dated 26/07/1957, produced in the District Court Case No. 4095/P, the Plaintiff-Respondent denies the above position on the basis that in 1957, there was no fence across Lot 4, and therefore, not seen in the said Plan No. 849/P.

The land to be partitioned was shown by the parties to the surveyor, and the Preliminary Plan No. 1175/P was prepared by superimposing Lot 4 of Plan No. 849/P. Surveyor A.C.P. Gunasena was not called to give evidence. However, according to the surveyor report dated 15/09/1998, the Defendant Appellant has been in possession of 00.26P towards the western boundary of Lot 4 of Plan No. 849/P. The said report also speaks of a fence in existence, as claimed by the Defendant Appellant. It is claimed that putting up of the fence had been the cause for dispute between the parties. However, it is pertinent to note that, there is no fence depicted in Plan No. 849/P.

Now I will deal with the question, whether the Defendant-Appellant was allocated shares according to inheritance under the pedigree and the evidence led at the trial.

It was the contention of the Plaintiff-Respondent that the Deeds submitted by the Defendant-Appellant claiming title to 95P does not relate to the land in question but another land, and therefore is not entitled to an extent of 95P of the corpus, but in fact

is entitled only to half share, the remaining half of Lot 3 in Plan No. 1175/P, as mentioned above.

As observed earlier, Patikiri Arachchige Andi Singo and Patikiri Arachchige Simon Singho were the original co-owners of the land to be partitioned, each entitled to half share of an undivided land. It is undisputed that the said original owners possessed half share each of the said land depicted as Lot 3 in Plan No. 1175/P, dated 30/11/1973. Patikiri Arachchige Simon Singho, by Deed No. 15767 dated 17/01/1945 (P2), transferred his half share to Patikiri Arachchige Punchi Singho. Punchi Singho died intestate leaving his wife, Mahavithanage Helenahami, and 7 children.

As noted earlier the Defendant-Appellant questions the inheritance under the pedigree of the Plaintiff-Respondent on the basis that Mahavithanage Helenahami had seven children and not 6 namely, Sriyawathie, Chandradasa, Dayarathna, Dharmasena, Steven, Senevirathne, and Amarasena. It is contended that Amarasena is not disclosed in the Plaint as one of the children of Helenahami.

The Plaintiff-Respondent's position is that the said Helenahami and Dayaratna transferred their rights to the Plaintiff-Respondent by Deed No. 23247 dated 02/04/1980, marked 'P3'. Senevirathne died issueless, restoring his inherited rights back to his mother Helenahami and by Deed No. 194 dated 01/02/1997, marked 'P5', the said Helenahami and Sriyawathie transferred their rights to the Plaintiff-Respondent. Dayarathna, Dharmasena, and Steven have also transferred their rights to the Plaintiff-Respondent by Deed No. 24132 dated 13/02/1981 marked 'P4'. Amarasena and Chandradasa transferred their rights by Deed Nos. 24168 dated 27/02/1981 marked 'P6', and Deed No. 24277 dated 28/03/1981 marked 'P8', respectively, in favour of the Plaintiff-Respondent. Sriyawathie transferred her rights to the Plaintiff-Respondent by Deed No. 25483 dated 05/06/1982, marked 'P7'.

Accordingly, by the said Deeds, the Plaintiff-Respondent claims to have acquired the rights to the land from the said Helenahami and her children.

The dispute regarding the number of children Helenahami had surfaced in evidence given by the Defendant-Appellant. As mentioned earlier, it was claimed that Punchi Singho and Helenahami had 7 children and not 6, namely, Sriyawathie, Chandradasa, Dayarathna, Dharmasena, Steven, Senevirathne, and Amarasena. The Civil Appeal High Court in its Judgement dated 26/08/2013, dealt with the said issue in the following manner.

“It refers to Patikiri Arachchige Amarasena as the Vender and he alienated the rights derived from Punchi Singho as paternal inheritance. The quibble of the Defendant is that the name Amarasena is not referred to in the plaint. In those circumstances, though the Plaintiff does not refer to seven children of the said Punchi Singho there is no doubt that the Plaintiff has purchased rights of 7 children of Punchi Singho and his wife.”

Both parties admitted that the land depicted in Plan No. 1175/P is the land sought to be partitioned. As noted earlier, Sriyawathie and Helenahami transferred their rights by Deed No. 194 dated 01/02/1997, to the Plaintiff-Respondent. It is also observed that Sriyawathie, by Deed No. 25483 dated 05/06/1982, marked ‘P7’ had independently transferred her rights to the Plaintiff-Respondent. However, Sriyawathie could not have transferred any right in excess of what she inherited through Helenahami. Therefore, it is safe to conclude that in any event, by the said Deed No. 25483, anything in excess of half share of the corpus would not have transferred to the Plaintiff-Respondent.

Furthermore, the said Deeds were produced in evidence at the trial without a contest, which makes the Plaintiff-Respondent’s claim that both parties to this action were equally entitled to half share each, that much stronger. Therefore, through the said

documents, the Plaintiff-Respondent has clearly established inheritance under the pedigree acquiring the rights of all 7 children of Punchi Singho and his wife Helenahami.

Therefore, the Civil Appeal High Court was correct in deciding that, after the death of Punchi Singho his rights devolved on Helenahami and their seven children.

For all the reasons stated above, I am of the view that the Plaintiff-Respondent purchased half share of an undivided land from the Plaintiff-Respondent's predecessors in title.

On this issue, the District Court and the Civil Appeal High Court were of the same view that the Plaintiff-Respondent had purchased all the rights of Helenahami and her seven children. Having considered the evidence placed before Court, I do not see any reason to disturb the said findings.

Therefore, I answer the 1st question of law in the affirmative.

Accordingly, the 2nd question of law on which leave to appeal to this Court has been granted need not be considered.

The Defendant-Appellant tendered in evidence Deed No. 2690 dated 01/06/1973, as 'V1', Deed No. 14288 dated 22/03/1971, as 'V2', Deed No. 952 dated 06/04/1964, as 'V3', to establish inheritance under the pedigree from Patikiri Arachchige Andi Singo.

The Defendant-Appellant claims title to a portion in extent 95P by Deed No. 2690 dated 01/06/1973, marked 'V1' (the said claim is not supported by the said Deed No. 2690). Plan No. 1705 dated 30/11/1973 marked 'V4', shows the total extent of land in Lot 4 as '95P'. In evidence before the District Court, the Defendant-Appellant stated that by Deed No 14288, a divided portion in extent, 2R 15P was transferred to her in 1973, and during that time the Defendant-Appellant with the consent of the Plaintiff-Respondent

had put up a barbed wire fence to demarcate the boundary line between Lots 1 and 3 of Preliminary Plan No. 1705. It is observed that by the said Deed No. 14288, the Defendant-Appellant was entitled to an undivided portion of land in extent 2R 15P of a larger land, approximately in extent of 2A.

At the commencement of the trial both parties admitted that the land to be partitioned is depicted in Plan No. 1175/P, more fully described in the schedule to the Plaint. Therefore, the question arises as to whether the land described in Deeds marked 'V1', 'V2', and 'V3' and the said Plan No. 849/P dated 26/07/1957, produced in evidence in the District Court Case No. 4095/P, relate to the same land that is sought to be partitioned. The documents submitted by the Defendant-Appellant refers to a land in extent of 2A. However, according to the final decree based on the previous partition Plan No 849/P, filed of record in the District Court Gampaha Case No. 4095/P, the extent of land to be partitioned, in the instant action, is in extent, 1A and 6P, which is evidenced by document marked 'P9'. Even though the Defendant-Appellant claims that a lawful consideration was paid for 95P, and therefore is entitled to a portion in excess of half share, in evidence in examination in chief, the Defendant-Appellant was not certain of the extent of land which she claims and thereby failed to justify such claim. In that context, it is important to note the learned District Judge's observation that the schedules to the survey plans submitted by the Defendant-Appellant too, does not identify the corpus sufficiently and therefore failed to prove the extent of land, as claimed.

It is also noted that the Deeds marked 'V1', 'V2', and 'V3' relied upon by the Defendant-Appellant in order to prove entitlement in excess of a half share, does not sufficiently indicate a precise extent of land, as claimed by the Defendant-Appellant. Accordingly, the findings of the learned District Judge and the Civil Appeal High Court,

to the effect that the existence of a discrepancy in the extents given in the documents relied upon by the Defendant-Appellant, cannot be faulted.

In the said background, it was the contention of the Plaintiff-Respondent that the Deeds submitted by the Defendant-Appellant claiming title to 95P from an undivided portion of land does not relate to the corpus sought to be partitioned and therefore the Defendant-Appellant is not entitled to an extent of 95P, but in fact is entitled only to a half share, which is the remaining half of Lot 3 of Plan No. 1175/P.

Therefore, from the documents tendered to Court and for the reasons stated above, I am of the view that the Defendant-Appellant is entitled only to a half share of the land, that is the remaining half of Lot 3 in Plan No. 1175/P.

The Plaintiff-Respondent has also made extensive submissions in this regard, in the written submissions filed in this Court, that the relief sought by the Defendant-Appellant is untenable in Law, with which I agree.

Therefore, the 3rd question of law is answered in the affirmative.

Apart from the three questions on which leave to appeal to this Court have been granted, it was also the contention of the Defendant-Appellant, that the Civil Appeal High Court disregarded her claim on prescriptive rights. She claims that the said prescriptive rights are based on an identifiable fence depicted in Plan No. 1705 dated 14/10/1973, also visible in the preliminary Plan No. 1175/P dated 30/07/1998, which she claims to be in existence for the past 20 years. The Defendant-Appellant contends that she obtained the consent of Helenahami to construct the said fence and thereby has prescribed to the said portion of land in Lot 3 in the said Plan No. 1175/P.

The said stand is totally denied by the Plaintiff-Respondent.

In the written submissions, dated the 15/06/2023, the Plaintiff-Respondent refers to the case of *Corea Vs. Appuhamy*, a Judgment delivered by the Privy Council reported in (1911) 15 NLR 65, which states in the head note that-

“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 his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.”

In *Sirajudeen and two others vs. Abbas (1994) 2 SLR 365*, G.P.S. De Silva C.J. stated;

“as regards the mode of proof of prescriptive possession, mere general statements of witnesses that the Plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by thereupon by Court”

In the course of the Judgment in this case, the Supreme Court observed that this principle was best stated in the words of Gratiaen J. in *Chelliah Vs. Wijenathan 54 NLR 337* in the following terms.

“where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights”

In view of the above and from what has been stated earlier in this Judgement, it is clear that in order to prove prescriptive title, the Defendant-Appellant has failed to fulfill the obligations and duties in duly discharging the burden of proof, in order to set up an

uninterrupted and an adverse possession against the Plaintiff-Respondent by necessary evidence and therefore has failed to establish prescriptive title.

In these reasons, the Judgement dated 24/09/2008 of the Additional District Judge and the Judgement dated 26/08/2013, of the Civil Appeal High Court are hereby affirmed and this Appeal is dismissed. No order for Costs.

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

Kumudini Wickremasinghe, J

I agree

Judge of the Supreme Court