

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

*In the matter of an Appeal in terms of Article
128 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

S.C. Appeal No:
10/2016

Simithra Arachchige Dona Percy Rosmand
Gunawardena,
No. 22/1, Modara Wila Road,

SC (Spl) LA No:
50/2014

Nalluruwa, Panadura. (Deceased)

PLAINTIFF

Vs.

CA Appeal No:
402/99 (F)

1. Simithra Arachchige Dona Flora Agnes
Gunawardena,

DC Kuliypitiya No:
14657/P

No. 116, Kaduwela Road,
Battaramulla.

2. Muththettuwa Mudalige Dunsten Noel
Alexander Perera,
No. 1/161, Kiribathgala,
Kaduwela Road,
Malabe.

3. Simithra Arachchige Ranjith
Gunawardena,
No. 111, Newland, Kaduwela Road,
Battaramulla.

4. Simithra Arachchige Nishshanka
Gunawardena,
No. 2/8, Wijayaba Road, Kalubowila,
Dehiwala.

5. Simithra Arachchige Mallika
Gunawardena,
No. 116, Kaduwela Road,
Battaramulla.
6. Sisi Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
7. Simithra Arachchige Rohini Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
8. Simithra Arachchige Nalini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
9. Simithra Arachchige Mercy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
10. Simithra Arachchige Stanley
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
11. Simithra Arachchige Percy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
12. Simithra Arachchige Sherly
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
13. Simithra Arachchige Wasantha
Gunawardena,
No. 1277, Rajamalwatta Road, Battaramulla.

14. Simithra Arachchige Seetha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

DEFENDANTS

AND BETWEEN

6. Sisi Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla. (Deceased)

DEFENDANT-APPELLANT

6a. Simithra Arachchige Rohini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

6b. Simithra Arachchige Nalini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

6c. Simithra Arachchige Mercy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

6d. Simithra Arachchige Stanley
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

6e. Simithra Arachchige Percy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

- 6f. Simithra Arachchige Sherly
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6g. Simithra Arachchige Wasantha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6h. Simithra Arachchige Seetha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

SUBSTITUTED DEFENDANT-APPELLANTS

Vs.

Simithra Arachchige Dona Percy Rosmand
Gunawardena.
No. 22/1, Modara Wila Road,
Nalluruwa, Panadura. (Deceased)

PLAINTIFF-RESPONDENT

1. Simithra Arachchige Dona Flora Agnes
Gunawardena,
No. 116, Kaduwela Road,
Battaramulla.
- 1a. Kandana Kankanamlage Godfrey
Cecil Wasantha Perera,
22/1, Modara Wila Road,
Nalluruwa,
Pananadura.
- 1b. Kandana Kankanamlage Coldi
Hiranya Jayantha Perera,
58/2, Sagara Mawatha, Panadura.

1c. Kandana Kankanamlage Ganbar
Buddhisiri Perera,
58/2m, Sagara Mawatha,
Panadura.

1d. Kandana Kankanamlage Dudley
Lakshman Nihal Perera,
3rd Cross Street, Kumbutukuliya,
Janawas, Bangadeniya.

1e. Kandana Kankanamlage Sarath
Ivon Fredrik Perera,
Prison Officer's Quarters,
Mahara Prison,
Ragama. (Deceased)

1e. (i) Hewa Fonsekalage Seelet
Fonseka,

1e. (ii) Kandana Kankanamlage
Sameera Manjula Sampath
Perera.

Both of:

22/1, Modara Wila Road,
Nalluruwa,
Panadura.

SUBSTITUTED PLAINTIFF-RESPONDENTS

1. Simithra Arachchige Dona Flora
Agnes Gunawardena,
No. 116,
Kaduwela Road,
Battaramulla. (Deceased)

1a. Enoka Dilini Chirishanthi Mala
Jayawardena,
No. 45/36A, Aururn Place,
Dehiwala.

2. Muththettuwa Mudalige Dunsten Noel
Alexander Perera,
No. 1/161,
Kiribathgala,
Kaduwela Road, Malabe. (Deceased)
- 2a. Bulathhettige Chandralatha Perera,
No. 239/16,
Pittiyangawatte,
Dedigamuwa.
3. Simithra Arachchige Ranjith
Gunawardena,
No. 111, Newland, Kaduwela Road,
Battaramulla.
4. Simithra Arachchige Nishshanka
Gunawardena,
No. 2/8, Wijayaba Road, Kalubowila,
Dehiwala.
5. Simithra Arachchige Mallika
Gunawardena,
No. 116, Kaduwela Road,
Battaramulla.
- 5a. Enoka Dilini Chirishanthi Mala
Jayawardena,
No. 45/36A, Aururn Place,
Dehiwala.
7. Simithra Arachchige Rohini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
8. Simithra Arachchige Nalini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

9. Simithra Arachchige Mercy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
10. Simithra Arachchige Stanley
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
11. Simithra Arachchige Percy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
12. Simithra Arachchige Sherly
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
13. Simithra Arachchige Wasantha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla. (Deceased)
- 13a. Ajantha Dias Wickramanayake,
No. 1277, Rajamalwatta Road,
Battaramulla.
14. Simithra Arachchige Seetha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

- 6a. Simithra Arachchige Rohini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6b. Simithra Arachchige Nalini
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6c. Simithra Arachchige Mercy
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6d. Simithra Arachchige Stanley
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla. (Deceased)
- 6d(i). Walpala Koralage Gunawathi,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6d(ii). Simithra Arachchige Dona Dilhani
Kanchana Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6d(iii). Simithra Arachchige Dona Nilusha
Nisanthi Gunawardena,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
- 6d(iv). Simithra Arachchige Don Dinesh
Nalaka Gunawardena,
No. 1277/3, Rajamalwatta Road,
Battaramulla.

- 6e. Simithra Arachchige Percy Gunawardena
No. 1277, Rajamalwatta Road,
Battaramulla.
- 6f. Simithra Arachchige Sherly
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla. (Deceased)
- 6f(i). Simithra Arachchige Dona Geethani
Sepalika,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
- 6f(ii). Simithra Arachchige Don Buddhika
Sanjeewa Gunawardena,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
- 6f(iii). Simithra Arachchige Dona Ishara
Udayangani,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
- 6f(iv). Simithra Arachchige Dona Chathurika
Gayathrei Gunawardena,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
- 6g. Simithra Arachchige Wasantha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla. (Deceased)
- 6h. Simithra Arachchige Seetha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

SUBSTITUTED DEFENDANT-
APPELLANT-APPELLANTS

Vs.

1. Simithra Arachchige Dona Percy
Rosmand Gunawardena.
No. 22/1, Modara Wila Road,
Nalluruwa, Panadura. (Deceased)
- 1a. Kandana Kankanamlage Godfrey
Cecil Wasantha Perera,
22/1, Modara Wila Road,
Nalluruwa, Panadura. (Deceased)
- 1a1. Palliyaguruge Sujeewa Amaraweera,
22/1, Modara Wila Road,
Nalluruwa, Panadura.
- 1a2. Krishantha Sanjeewa Perera,
22/1, Modara Wila Road,
Nalluruwa, Panadura.
- 1a3. Pradeepa Lakmali Perera,
22/1, Modara Wila Road,
Nalluruwa, Panadura.
- 1a4. Manoja Dharshani Perera,
22/1, Modara Wila Road,
Nalluruwa, Panadura.
- 1b. Kandana Kankanamlage Coldi
Hiranya Jayantha Perera,
58/2, Sagara Mawatha, Panadura.
- 1c. Kandana Kankanamlage Ganbar
Buddhisiri Perera,
58/2m, Sagara Mawatha, Panadura.
- 1d. Kandana Kankanamlage Dudley
Lakshman Nihal Perera,
3rd Cross Street, Kumbutukuliya,
Janawas, Bangadeniya.

- 1e. Kandana Kankanamlage Sarath
Ivon Fredrik Perera,
Prison Officer's Quarters,
Mahara Prison,
Ragama. (Deceased)
- 1e. (i) Hewa Fonsekalage Seelet Fonseka,
- 1e. (ii) Kandana Kankanamlage
Sameera Manjula Sampath Perera.
Both of:
22/1, Modara Wila Road,
Nalluruwa, Panadura.

SUBSTITUTED PLAINTIFF-
RESPONDENT-RESPONDENTS

1. Simithra Arachchige Dona Flora
Agnes Gunawardena,
No. 116, Kaduwela Road,
Battaramulla. (Deceased)
- 1a. Enoka Dilini Chirishanthi Mala
Jayawardena,
No. 45/36A, Aururn Place,
Dehiwala.
2. Muththettuwa Mudalige Dunsten Noel
Alexander Perera,
No. 1/161, Kiribathgala,
Kaduwela Road, Malabe. (Deceased)
- 2a. Bulathhettige Chandralatha Perera,
No. 239/16, Pittiyangawatte,
Dedigamuwa.
- 2a. (1) Muththettuwa Mudalige Noel Sugath
Palitha Perera,
No. 259/16, Pittiyangawatte,
Dedigamuwa.

- 2a. (2) Muththettuwa Mudalige Goege Ranil
Nalaka Perera,
No. 259/16, Pittiyangawatte,
Dedigamuwa.
- 2a. (3) Kalapugamage Don Chandrika
Priyangani,
No. 259/16, Pittiyangawatte,
Dedigamuwa.
3. Simithra Arachchige Ranjith
Gunawardena,
No. 111, Newland, Kaduwela Road,
Battaramulla.
- 3a. Noeline Chrishanthi Wijesinghe nee
Gunawardena,
No. 380B/4, Korathota North,
Kaduwela.
4. Simithra Arachchige Nishshanka
Gunawardena,
No. 2/8, Wijayaba Road, Kalubowila,
Dehiwala.
5. Simithra Arachchige Mallika
Gunawardena,
No. 116, Kaduwela Road,
Battaramulla.
- 5a. Enoka Dilini Chirishanthi Mala
Jayawardena,
No. 45/36A, Aururn Place,
Dehiwala.
7. Simithra Arachchige Rohini
Gunawardena,
No. 1277, Rajamalwatta Road,
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Gunawardena,
No. 1277, Rajamalwatta Road,
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9. Simithra Arachchige Mercy
Gunawardena,
No. 1277, Rajamalwatta Road,
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10. Simithra Arachchige Stanley
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla. (Deceased)
- 10a. Walpala Koralage Gunawathi,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 10b. Simithra Arachchige Dona Dilhani
Kanchana Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.
- 10c. Simithra Arachchige Dona Nilusha
Nisanthi Gunawardena,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
- 10d. Simithra Arachchige Don Dinesh
Nalaka Gunawardena,
No. 1277/3, Rajamalwatta Road,
Battaramulla.
11. Simithra Arachchige Percy
Gunawardena,
No. 1277, Rajamalwatta Road,
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12. Simithra Arachchige Sherly
Gunawardena,
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13. Simithra Arachchige Wasantha
Gunawardena,
No. 1277, Rajamalwatta Road,
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- 13a. Ajantha Dias Wickramanayake,
No. 1277, Rajamalwatta Road,
Battaramulla.
14. Simithra Arachchige Seetha
Gunawardena,
No. 1277, Rajamalwatta Road,
Battaramulla.

DEFENDANT-RESPONDENT-RESPONDENTS

Before

- : A.L. Shiran Gooneratne, J.
- : Menaka Wijesundera, J.
- : Sampath B. Abayakoon, J.

Counsel

- : Rohan Sahabandu, P.C., with Thishya Weragoda
and Chamodi Wijeweera instructed by Thasmila
Dilrukshi for the Appellants.
- : Harsha Soza, P.C. with Zahara Hassim instructed
by Dilshan Fernando for the Substituted 1a and
5a Defendant-Respondent-Respondents.
- : Sudarshani Coorey instructed by Diana Stephanie
Rodrigo for the 2a(1) and 2a(3) Substituted
Defendant-Respondent-Respondents.

: Amaranath Fernando with Thisura Hewawasam
instructed by Niluka Welgama for the 3a
Substituted Defendant-Respondent-Respondent.

Argued on : 24-06-2025

Written Submissions : 27-04-2016 (By the Substituted Plaintiff-
Respondent-Respondents)
: 03-03-2016 (By the 6a, 6b, 6c, 6d, 6e, 6f, 6g
Substituted Defendant-Appellant-Appellants)
: 28-07-2022 (By Substituted 1a and 5a Defendant-
Respondent-Respondents)
: 26-04-2016 (By 2a and 5a Substituted Defendant-
Respondent-Respondents)

Decided on : 19-09-2025

Sampath B. Abayakoon, J.

This is an appeal preferred by 6a, 6b, 6c, 6d, 6e, 6f and 6h substituted-defendant-appellant-appellants (hereinafter sometimes referred to as the 6th defendant) on the basis of being aggrieved of the judgment pronounced by the Court of Appeal on 20-02-2014, whereby the appeal preferred by them was dismissed and the judgment pronounced by the learned District Judge of Colombo on 16-04-1999 was affirmed.

When this matter was supported for Special Leave to Appeal on 21-01-2016, this Court, by a majority decision, granted Leave to Appeal on the questions of law as set out in paragraph 19.2, 19.3, 19.4, and 19.5 of the petition dated 02-04-2014.

The said questions of law read as follows,

1. Has His Lordship erred in law by failing to consider the principle of ouster in relation to prescription as clearly established by the evidence in the case, showing that the 6th defendant had in fact established such ouster and undisturbed possession of more than 10 years of the land in suit.
2. Has His Lordship erred in law by not correctly applying the principles laid down in the cases of *Corea Vs. Appuhami* 15 NLR 65, *Brito Vs. Mithunayagam* 20 NLR 327, *Thilakaratne Vs. Bastian* 21 NLR 12, *Gunasekara Vs. Thissera* (1994) 3 SLR 245, *Siyathuhami Vs. Podi Manike* (2004) 2 SLR 325, *Rajapakshe Vs. Hendrick Singho* 61 NLR 32 and *Karunawathie Vs. Gunadasa* (1996) 2 SLR 406.
3. Has His Lordship erred in law by not accepting the finding of the learned District Judge that there was a dispute regarding the survey of the land by the respondents in the year 1972.
4. Has His Lordship erred in law by disturbing the findings of the learned District Judge of Colombo when in fact the respondents had not sought to appeal the said findings of the learned District Judge.

At the hearing of this appeal, this Court had the benefit of listening to the submissions of the learned President's Counsel who represented the substituted 6th defendant and the learned President's Counsel who represented the substituted 1a and 5a defendant-respondent-respondents. This Court heard the submissions of the learned Counsel who represented 2a(1) and 2a(3) substituted defendant-respondent-respondents and 3a substituted defendant-respondent-respondent as well.

This Court also had the privilege of considering the written submissions tendered by the parties as to their respective stands.

This is a case where the plaintiff of the action before the District Court instituted proceedings under the Partition Law to partition the lands morefully described in the 2nd and 3rd schedule of the plaint dated 16-09-

1987 between the plaintiffs and the defendants mentioned in the plaint. The above mentioned two lands are lands situated adjacent to each other and admittedly held and possessed by the original owner under whom the plaintiff before the District Court has pleaded title as one single unit. In her plaint, the plaintiff has allocated an undivided 1/8th share of the corpus to the 6th defendant of the action.

At the trial, there had been no dispute between the parties as to the corpus to be partitioned and also the undivided rights of the parties as pleaded by the plaintiff in her plaint. However, the 6th defendant of the action has claimed title as against the rights of the other co-owners of the land for the entire corpus sought to be partitioned on the basis of prescription.

According to the evidence led before the trial Court and as correctly determined by the learned trial Judge who pronounced the judgment, the admitted original owner of the two lands had transferred his rights by deed No. 111 (P-04) dated 10-07-1932, to Fedrick Alfred Victor Gunawardena, Don Elsie Gurtrude Gunawardena, Don Flora Agnes Gunawardena (1st defendant) and Don Percy Rosmund Gunawardena (plaintiff).

The 2nd defendant named in the plaint is the heir of Elsie Gurtrude Gunawardena, who became entitled to an undivided 1/4th share of the land while 3rd, 4th and 5th defendants mentioned in the plaint had been the children of Victor Gunawardena, who also became entitled to an undivided 1/4th share. They are the children born out of the 1st marriage of the said Victor Gunawardena. The 6th defendant had been the 2nd married wife of Victor Gunawardena, while the 7th to 14th defendants are the children born out of the 2nd marriage of the said Victor Gunawardena.

It is also in evidence that the plaintiff who received a 1/4th undivided share of the corpus from its original owner is the sister of Victor Gunawardena under whom the 6th defendant derives rights as the wife of him.

At the trial, the contention of the 6th defendant has been that the plaintiff and the other co-owners never possessed the land sought to be partitioned for over 50 years and it was she along with her children and husband who

held it. The mentioned Victor Gunawardena has died in the year 1966. It is on that basis she has claimed prescriptive title.

In his judgment, the learned District Judge has considered as to how a co-owner of a land can acquire prescriptive title and has looked whether there is sufficient evidence to come to a finding that the 6th defendant has proved the ouster of other co-owners in order to establish her claimed prescription. Having analysed the evidence led before the Court, the learned District Judge had come to a finding that the 6th defendant has failed to prove her claim of prescription, and accordingly, has ordered the partitioning of the land sought to be partitioned between the plaintiff and the defendants of the action as stated in the judgment.

At the hearing of the appeal preferred by the 6th defendant challenging the judgment of the learned District Judge before the Court of Appeal, the 6th defendant has maintained the same stand that it is she who should be declared entitled to the corpus sought to be partitioned on the basis that she has proved prescriptive title to the same.

I find that His Lordship of the Court of Appeal who pronounced the appellate judgment on 20-02-2014 has considered whether it has been established that the 6th defendant, being a co-owner, held and possessed the land for over 10 years adversely to the rights of the other co-owners after having those other co-owners ousted from the land to be partitioned.

Having considered the relevant facts and circumstances and the law in relation to several decided cases of our Superior Courts in that regard, His Lordship of the Court of Appeal has decided to dismiss the appeal for want of any merit.

However, it clearly appears that while considering the evidence placed before the trial Courts as to an admission by the 6th defendant in her evidence in relation to an attempt between the co-owners of the land to amicably partition the land which was a matter considered by the learned District Judge as well, it has been determined that the said attempt has been made between the parties in the year 1977 as borne out by evidence.

This suggests that His Lordship has not agreed with the determination of the learned District Judge that although the 6th defendant's evidence which stated that the year was 1977, it should have been the year 1972. His Lordship has also considered the fact that the 10th and the 12th defendants of the action being persons who have built houses within the corpus have not challenged the District Court judgment, where they have been allocated shares. It has been viewed that although they are the children of the 6th defendant, the rights already granted to them will also be affected if the claim of prescription to the whole land by the 6th defendant is allowed.

Accordingly, the appeal preferred by the 6th defendant has been dismissed without costs.

At the hearing of this appeal, it was strenuously contended by the learned President's Counsel on behalf of the 6th defendant, having cited several judgments considered by the Court of Appeal, that the 6th defendant has sufficiently proved her prescriptive claim. It was contended that the Court of Appeal as well as the District Court has failed to give due consideration to the relevant case law and the principles laid down as to the ouster and prescription among co-owners when the case was decided in favour of the plaintiff, where there was ample evidence before the Court for such a presumption in favour of the 6th defendant.

The essence of the submissions of the learned President's Counsel who represented the 1A and the 5A substituted defendant-respondents and the other learned Counsel who represented the 2A and 3A substituted defendant-respondents was that, the prescription among the co-owners is a matter that has to be established by the party who claimed prescription by strong evidence of ouster and possession against the rights and interests of other co-owners for over ten years. It was submitted that the mode of proof depends on the facts and the circumstances of each case and there cannot be a strict yardstick in that regard. It was his position that since both the District Court, as well as the Court of Appeal, have well considered the relevant circumstances and the law in the respective determinations, the appeal should stand dismissed.

Having heard the submissions made by the respective parties as to their stands and the relevant law in mind, I will now proceed to consider whether there is merit in the appeal before the Court.

In that context, I find it appropriate to consider the questions of law no. 1 and 11 together as they relate to the question of prescription among co-owners.

The learned President's Counsel heavily relied on the cases of **Corea Vs. Appuhami (Supra)**, **Thilakaratne Vs. Bastian (Supra)** and several other cases which favour his contention of prescription among co-owners.

Although the case of **Corea Vs. Appuhami (Supra)** was a case where it was held that the claimant of prescription had succeeded in his claim; it was a case where the basic principles as to prescription among co-owners had been laid down.

It was held:

Possession by a co-heir ensures to the benefit of its 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 his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.

In the case of **Thilakaratne Vs. Batian (supra)**, it was observed;

It is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

“It is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than 10 years before action brought.”

Held further,

*“What then, is the real effect of the decision in **Corea Vs. Appuhami** upon the interpretation of the word ‘adverse’ with reference to cases of co-ownership? It is, as I understand it, that for the purpose of these cases the word ‘adverse’ must, in its application to any particular case be interpreted in the light of three principles of law:-*

- (i) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.*
- (ii) Where the circumstances are such that a man’s possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.*
- (iii) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity.”*

In the case of **Karunawathie and Others Vs. Gunadasa (1996) 2 SLR 406**, it was held;

There was overwhelming evidence that the defendants since 1955 took the produce to the exclusion of the plaintiffs and their predecessors in title and gave him no share of the produce or paid them a share of the profits nor any rent and did no act from which as acknowledgement of a right existing and there would fairly naturally be inferred.

Per Senanayake, J.,

“In considering whether or not a presumption of ouster should be drawn by reason of long continued possession alone, of the property owned in common, it is relevant to consider

- (a) the income derived from the property*

(b) the value of the property

(c) the relationship of the co-owners and where they reside in relation to the situation of the corpus.”

The above considered judgments as well as a plethora of other judgments of our Superior Courts have clearly settled the law in relation to the question of prescription among co-owners, determining that it is a matter that depends on facts and circumstances unique to each case.

When considering the facts of the case under appeal, it is clear that the house situated on the land which has been identified as ‘6’ in the preliminary plan marked ‘X’ has been the ancestral house of the persons who received rights to the land from the deed marked P-04, being the children of the original owner. They have been living in the house until they left the ancestral house due to various events of their life, such as marriage, settling and starting of their own families elsewhere, etc. It is the husband of the 6th defendant, namely, Victor Gunawardena who has continued to live in the house and the land although his other siblings had left the land.

The 6th defendant has been the 2nd wife of said Victor Gunawardena, one of the children who received rights through P-04.

It has been the position of the 6th defendant that the 1st defendant left the property after her marriage in the year 1961 and after the death of the mother of the 2nd defendant, who was one of the children of the original owner, it is she who held and possessed that land since 1963 without allowing the co-owners to possess it.

Admittedly, the husband of the 6th defendant has died in the year 1966, which means if at all, she can only claim prescription against the other co-owners from the death of her husband. It has been in evidence that although the brothers and sisters of the husband of the 6th defendant have left the house and the property, they have maintained their affiliation to the ancestral house and their brother until his death.

When it comes to the ouster that needs to be established by a co-owner who claims prescription against the other co-owners, it is well settled law that by possessing a land, a co-owner cannot claim prescription, but it has to be a possession that amounts to an ouster of other co-owners.

According to the evidence of the 6th defendant, anything that can be considered as a thing equivalent to an ouster has occurred only in the year 1977. The 6th defendant has spoken in her evidence about a discussion the parties to the partition action had in order to divide the land among them, and of an incident where a surveyor has come to the land in order to survey the land (page 103, 104, 105 of the appeal brief). The essence of her evidence shows that the amicable partition has not gone through, because her children opposed such a partition and because of the fact that she was in possession since 1944, which was her year of marriage to Victor Gunawardena.

Although the learned District Judge while analysing the evidence has determined that the said event has taken place in the year 1972, I find no basis for such a conclusion. Though the daughter of the 6th defendant who has given evidence in this action has claimed that the said attempt to partition the land took place in the year 1972, I find no basis to accept her evidence as against the evidence of the 6th defendant who is the person who actually claimed prescriptive rights to the entire corpus. In her evidence, she has stated unambiguously that the said event took place in the year 1977.

Although the events that have taken place thereafter, according to the evidence led before the Court, are suggestive of adverse possession and ouster, in my view, since the partition action was initiated in the year 1987, there was no basis before the trial Court to conclude that the 6th defendant held and possessed the corpus of the action by ousting the other co-owners for more than 10 years for her to claim prescriptive rights to the entire corpus. What is also clear to me is that the learned District Judge has correctly considered the evidence of the 6th defendant as to the said year as 1977 in the correct perspective while taking the evidence in its totality to

determine that the required 10-year period has not been established from the said date.

I find that His Lordship who pronounced the judgment in the Court of Appeal has well considered the facts as well as the relevant law in affirming the judgment of the learned District Judge. His Lordship has correctly determined the ouster, if at all, has taken place after the year 1977 based on the evidence of the 6th defendant herself and therefore her prescriptive claim shall fail. It has been correctly held that the long-standing possession would not in itself amount to establishing prescriptive rights in a co-owned land.

In the above context, I will now proceed to consider whether the 3rd and the 4th questions of law, where it was argued that His Lordship of the Court of Appeal erred by disturbing the finding of the learned District Judge, that dispute in relation to the surveying of the land occurred in the year 1972.

The Article 138 of the Constitution is the provision where the jurisdiction of the Court of Appeal has been conferred upon. The relevant Article 138(1) reads as follows,

138. (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, and appellate jurisdiction for the correction of all errors in fact or in law which shall be (committed by the High Court in the exercise of its appellate or original jurisdiction or by any Court of first instance), tribunal or other institution and sole and exclusive cognisance, by way of appeal, revision and restitutio in integrum, of all courses, suits, actions, prosecutions, matters and things (of which such High Court, Court of first instance), tribunal or other institution may have taken cognisance. (The emphasis is mine).

The above Constitutional provision clearly provides for the Court of Appeal to correct a factual matter that needs to be corrected when determining an appeal in that regard. Hence, I find no basis for the 3rd and 4th questions of law as urged on behalf of the 6th defendant.

Another matter that needs to be emphasized is that this is a trial where apart from recording the points of contest, the entire evidence has been led before the same learned District Judge who has pronounced the judgment where the partitioning of lands sought to be partitioned between the co-owners was ordered.

It is well settled law that under such circumstances, appellate Courts will be very slow to interfere with a judgment pronounced by a trial Judge as it is the trial Judge who has the benefit of hearing and determining the demeanour and deportment, and also the other relevant matters of evidence unless the said judgment is not according to the law or can be termed as a judgment that has not been supported by evidence, and therefore, perverse.

Mahinda Samayawardhena, J. having considered several case laws on this matter, in the case of **Rev. E.H. Palitha and Others Vs. K. Kingsley Perera SC/Appeal/30/2022 decided on 31-01-2024** observed,

“It is trite law that the findings of fact of the trial Judge who has the priceless advantage of seeing and hearing witnesses giving evidence, thereby getting the opportunity to observe inter alia the demeanour and deportment of witnesses, are regarded as sacrosanct and should not be lightly disturbed unless there are compelling reasons. There are no live witnesses before the appellate Court but only printed evidence. It is important to bear in mind that the trial Judge has the benefit of assessing the evidence in its overall context to reach the final decision, unlike the piece meal approach adopted in presenting the case before the appellate Court.”

Having considered the relevant facts and the circumstances, I am of the view that the appellate judgment of His Lordship of the Court of Appeal is a judgment that needs no interference, as it has been reached after having well considered the facts and the circumstances, and also the relevant law in its correct perspective.

Accordingly, I answer the four questions of law in the negative and dismiss the appeal for want of any merit.

The parties shall bear their own costs.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree.

Judge of the Supreme Court