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12/1963

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

THE PRIVY COUNCIL

No. 53 of 1961

19 JUN 1964

25 RUSSELL SQUARE
LONDON, W.C.1.

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

74074

BETWEEN

HUSSAIMA, wife of Yoosuf Jallaldeen of No. 478,
Galle Road, Bambalapitiya.

MRS. HUZAIR SADIQ of Colombo.

A.M.M. NAZICK of Moor Road, Colombo, and

A.M.M. MARZOOK of Layards Road, Colombo,

10 (All substituted in place of 13th Defendant-
Appellant)

Defendants-Appellants.
PETITIONERS.

vs.

A.L.UMMU ZANEERA alias SHAMSUNNAHAR of
THIHARIYA, 20 Nittambuwa Plaintiff-Respondent.

- 1. A.L.SITHY AZEEMA alias Sithy Nafeesa wife
of M.I.M.Abdul Hanan of Maligawatte.
- 20 2. A.L.M. ARIFF of No. 29 Old Moor Street, Colombo.
- 3. RABIA UMMA of No.10/95, Mahawatte, Negombo
Road, Peliyagoda.
- 4. ZANEERA UMMA of No. 289, Darley Road, Colombo.
- 5. M.M. AYNUL WADOOD.
- 6. M.M. MOHAMED FOUZE.

(5th to 8th Defendants-Respondents are also substituted
in place of the 4th Defendant-deceased.)

- 30 9. Z.H. MOHAMED NIZAR of No. 222, Galle road,
Bambalapitiya.
- 11. A.T.M. MOHIDEEN of No. 28, 34th Lane, Wellawatte,
Colombo.
- 12. PUTHRI ZOHARA of No. 109, Nawala Road,
Rajagiriya.
- 14. M. R. ZAINUDEEN.
- 15. M. S. RIZAN.

- 22. S.M. FALILDEEN.
- 23. S. ISSADEEN, and
- 24. UMMU JEZIMA THASSIM, wife of M.S.M. Thassim,
all of No. 10, Fussel's Lane, Wellawatte,
(22nd to 24th Defendants-Respondents substituted in place
of the 3rd Defendant-deceased.)

17 JUN 1964

25 RUSSELL SQUARE
LONDON, W.C.1.

O N A P P E A L
FROM THE SUPREME COURT OF CEYLON

74074

B E T W E E N

HUSSAIMA, wife of Yoosuf Jallaldeen of No. 478,
Galle Road, Bambalapitiya.

MRS. HUZAIR SADIQ of Colombo.

A.M.M. NAZICK of Moor Road, Colombo, and

A.M.M. MARZOOK of Layards Road, Colombo,

10 (All substituted in place of 13th Defendant-
Appellant)

Defendants-Appellants.
PETITIONERS.

vs.

A.L.UMMU ZANEERA alias SHAMSUNNAHAR of
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1. A.L.SITHY AZEEMA alias Sithy Nafeesa wife
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5. M.M. AYNUL WADOOD.

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7. M.M. ABDUL MAJEED.

8. M.M. MOHAMED CASSIM all of No. 289, Darley
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Colombo.

12. PUTHRI ZOHARA of No. 109, Nawala Road,
Rajagiriya.

14. M. R. ZAINUDEEN.

15. M. S. RIZAN.

16. M.R. NOOR MASHOODA.

17. NOOR ZAHIRA all of No. 2 Kensington Gardens
Bambalapitiya (substituted in place of the
10th Defendant-Deceased)

Defendants-Respondents.
RESPONDENTS

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

RECORD

1. This is an Appeal from the Judgment of the Supreme Court of Ceylon decided on 11th December, 1959.

2. The main contests at the trial were :

(a) whether deed No. 260 dated 16th July, 1872 attested by J.W. Vendesstraasten created a Fidei Commisum which endured for four generations.

(b) whether the Plaintiff was entitled to a decree in his favour under Section 3 of the Prescription Ordinance as he had possessed the entire land since the year 1916

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3. The trial came up before Mr. G.N. de Silva, District Judge of Colombo.

4. The following issues were framed :-

(i) Did the Deed of Gift No. 260 of 16th July 1872 referred to in paragraph 3 of the plaint

(a) create any Fidei Commisum restricting it, or -

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(b) in any event, create any such restriction binding on any person other than Muttu Natchia?

(ii) Is the Gift, if any, created by the said deed No. 266 void and of no effect for want of acceptance by or on behalf of the fidei Commissaries.

(a) Did Muttu Natchia during her lifetime put the 13th Defendant in occupation of the premises in suit;

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(b) Has 13th Defendant been in exclusive possession of the premises thereafter and acquired a prescriptive title to the entirety or to the share of the Plaintiff and the 1st, 2nd, 5th, 6th, 7th, 8th, 11th and 12th

Defendants and the share of the
9th and 10th Defendants if any.

5. Has 13th Defendant in any event acquired prescriptive title to the entire property?

(a) Are the parties governed by Muslim Law?

6. If so, are the heirs of deceased persons and their shares not correctly set out in the plaint.

10 (a) Is Plaintiff a co-owner or has she any title to the property.

(b) If not can she maintain this action.

7. Does Deed No. 260 create any fidei commissum which ensures to the benefit of the Plaintiff?

8. If points 2, 3, 4, 5 or any of them be answered in the affirmative and or point 1, 6 and 7 or any of them be answered in the negative, can Plaintiff maintain the present action.

20 Mr. Weerasinghe accepts the points of contest.

Mr. Weeramanthry states that the point at issue is whether the 11th Defendant gets the share that has been allotted to him in the plaint, and frames the following point of contest:-

9. Is the 11th Defendant entitled to the 1/18th share allotted to him in the plaint as against the 9th and 10th Defendants.

30 Mr. Uvais adds the following point of contest:

10. On the death of Lahira does his share devolve on the 9th and 10th Defendants only?

Mr. Weeramanthry says that the point of contest framed by him may be dropped in view of what has been raised by counsel for the 9th and 10th Defendants.

11. The material issues were :-

(i) Did the Deed of Gift No. 260 of 16th

July 1872 referred to in paragraph
3 of the plaint

- (a) create any fidei Commissum
restricting it or
- (b) In any event, create any such
binding on any person other
than Muttu Natchia?
- (c) Did Muttu Natchia during her
life time put the 13th Defendant
in occupation of the premises
in suit? 10
- (d) Has the 13th Defendant been in
exclusive possession of the
premises thereafter and acquired
a prescriptive title to the
entirety or to the share of the
Plaintiff and the 1st, 2nd, 3rd,
6th, 7th, 11th and 12th
Defendants and the share of the
9th and 10th Defendants if any? 20
- (e) Has 13th Defendant in any event
acquired prescriptive title to
the entire property?
- (f) Is Plaintiff a co-owner or has
she any title to the property?
- (g) If not, can she maintain this
action?

12. If points 2, 3, 4 or any of them be
answered in the affirmative and or points 1, 5, 6
or any of them be answered in the negative, can
Plaintiff maintain the present action? 30

The evidence led in support of the claim
of the Plaintiff was :

A.L.M. Ariff - 32, Insurance Agent,
122, New Moor Street, Colombo (20).

I am the 2nd Defendant, a brother of the
Plaintiff. The land sought to be partitioned is
depicted in Plan No. 511 dated 6th January 1954
filed of record and marked X. By deed No. 1082
of 3rd December 1869 marked P1, Ibrahim Lebbe
Ahamado Lebbe became entitled to the premises
sought to be partitioned. At that time it bore
assessment No. 50 and now it bears assessment 40

No. 88 and 90. Ibrahim Lebbe Ahamado Lebbe by deed No. 260 of 16th July 1872 marked P.2 gifted the said property to his wife Muttu Natchia, subject to the conditions therein mentioned.

10 Muttu Natchia died leaving her children by the said Ibrahim Lebbe Ahamado Lebbe-Candumma, Ansa Umma and Abdul Rahiman, Candumma died leaving 4 children Ahamed, Abdul Cader, Mariam and Rahamathuma, of whom Ahamed and Mariam died unmarried leaving their shares over. Abdul Cader died somewhere in 1916 leaving 3 children, Rabia Umma the 3rd Defendant, Rameena Umma my mother and Mohammed Anver. Mohammed Anver died somewhere in December 1934 without children.

20 Rameena Umma died on 18th November 1939. I produce the death certificate marked P.3 - leaving as her heirs 3 children - myself, Ummu Zaneera the Plaintiff, and Sithy Azeema the 1st Defendant. I produce marked P.4 the birth certificate of the Plaintiff which shows that she was born on 2nd June 1932. I also produce marked P.5 the birth certificate of Sithy Azeema my sister the 1st Defendant born on the 30th January 1925. I have not been able to get my birth certificate but I was born in 1923.

30 Rahamathuma, one of the children of Candumma died leaving two children Umma Shifa and Zaneera Umma the 4th Defendant Umma Shifa died leaving 4 children, Aynul Wadood the 5th Defendant Mohammed Fouze the 6th Defendant Abdul Majeed the 7th Defendant and Mohammed Cassim the 8th Defendant.

40 Ansa Umma the daughter of Muttu Natchia died leaving 3 children, Mohammed Nizer the 9th Defendant Mohammed Riza the 10th Defendant and Mohammed Razeen. Mohammed Razeen died leaving an only child Noor Lahira who died leaving her husband A.T.A. Mohideen the 11th Defendant and her mother Puthra Zohara the 12th Defendant and her paternal uncles Mohammed Nizer the 9th Defendant and Mohammed Riza the 10th Defendant.

The last child of Muttu Natchia, Abdul Rahiman, died leaving an only child Abdul Majeed the 13th Defendant. All the Defendants, support the Plaintiff except the 13th Defendant.

Common ownership is impossible and I want a partition of the property. There is a building on the land. I state that this property cannot be

partitioned and must be sold. The building is in common.

13. The 13th Defendant-Appellant's position is set out in the cross examination by Mr. Coomarasamy as follows :-

XXD. (By Mr. Coomarasamy):

I am married. I married in August 1954. Plaintiff is not married. 1st Defendant married somewhere in 1949.

Q. You know who is occupying these premises? 10

A. A.R. Abdul Majeed the 13th Defendant is occupying these premises.

Q. Has he not rented it out to anybody?

A. He has rented it out and he is collecting the entire rent.

From the time I became aware of things he has been collecting the rent.

And more specifically Plaintiff admits that from 1916 the 13th Defendant collected the rents.

14. The 11th and 12th Defendants' position is stated by Mr. Weeramanthry as the same as that of the Plaintiff, and that he is entitled to costs. He says the 11th and 12th Defendants, his clients, would get their shares free of the fidei commissum as they are in the fourth degree of succession. He says he would associate himself with what Mr. Weerasinghe would submit. 20

15. On the issue of prescription the position of Mr. Weerasinghe's clients is as follows :-

Re: prescription: Plaintiff was born on 2-6-32 and the 1st Defendant was born on 30-1-25. The 13th Defendant could not have prescribed against the Plaintiff or the 1st Defendant. Vide also P.3 the death certificate of the mother. Even if the Court holds that there is no fidel commissum, the 10th Defendant is a co-owner. His possession is referable to lawful title. He is entitled to possess. He is a co-heir. If Muttu Natchia sold the property to an outsider and he entered into possession of the whole property believing himself 30 40

to be the owner, the position would be different.
A partition of this property is not practicable.

16. The judgment of the Supreme Court was delivered in open Court on 20th February 1956.

17. From this judgment the 13th Defendant - appellant appealed.

10 18. The hearing in the Supreme Court was on September 24th and 25th 1959 and came up before Their Lordships Bassanayake C.J., De Silva J. and H.N.G. Fernando J. and decided on December 11th 1959. The majority judgments dismissed the appeal.

19. Bassanayake C.J. in a dissenting judgment took the view that the appeal should be allowed.

20. The Petitioners humbly and respectfully submit that both the District Court of Colombo and the Supreme Court of Ceylon and the majority of the Supreme Court erred in their determination and that the conclusion reached by His Lordship and Chief Justice Bassanayake J. was right.

20 21. They pray that the appeal of the Petitioners be allowed for the following among

R E A S O N S

- (i) BECAUSE the Appellant's predecessor in title was entitled to a decree in his favour under Section 3 of the prescription Ordinance as he had possessed the entire land since the year 1916;
- 30 (ii) BECAUSE the burden of proving interruption of prescriptive possession with the death of fiduciaries was not on the Appellant as against the interests of the Plaintiff or any other Defendants-Respondents;
- (iii) BECAUSE the Plaintiff and the other Defendants-Respondents cannot claim the benefit of the proviso to Section 3 and Section 13.
- 40 (iv) BECAUSE on the facts of this case, no co-owner can claim the benefit of the Appellant's position as he has possessed not on their behalf but for himself without giving them their share of the rent;

- (v) BECAUSE in the present case there is evidence of "ouster" or "something equivalent to ouster";
- (vi) BECAUSE the Appellant came into possession of the land in 1916 on the death of his father; who himself had been in possession of it and has continued to take the entire rent from that day;
- (vii) BECAUSE the Plaintiff and the Defendants and several generations thereafter have been content to allow the Appellants and their father to collect the entire rent; 10
- (viii) BECAUSE there is no evidence that till the date of their action in September 1953 anyone has even questioned the Appellant's right to take the rents during these 37 years.
- (ix) BECAUSE apart from actual Ouster, our law, as the English Law recognises a presumption of Ouster and is one that the Court may draw under Section 114 of the Ceylon Evidence Ordinance which provides that the Court may presume the existence of a fact which it thinks likely to have happened regard being had to the common course of material events, human conduct and public and private business in their relation to the fact of the particular case. 20
- Here the Appellant has been in possession and received the rent to his own use without accounting to the others and those others have acquiesced in it for such a length of time as will enable the Court to presume under all the circumstances an actual ouster of the others more than 10 years before the institution of this action. 30
- (x) BECAUSE the majority of Their Lordship of the Supreme Court of the Island of Ceylon made some inference from the fact of the Island of Ceylon made some inference from the fact of the 13th Defendant-Appellant in the Supreme Court, neither giving evidence himself nor calling any witnesses. But the record evidences the fact that the 13th Defendant-Appellant died pending the appeal 40

and it should therefore be presumed that the 13th Defendant-Appellant was gravely ill at the trial in the lower Court.

(xi) BECAUSE the majority of the Judges of the Supreme Court did not infer from the evidence of "collected the rents" that he had appropriated the rent exclusively for himself, which it is respectfully submitted, and in so expressly stated by His Lordship the Chief Justice is the natural and only inference from that evidence.

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HANAN ISMAIL.

No. 53 of 1961

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME
COURT OF CEYLON

B E T W E E N :

HUSSAIMA and OTHERS
(All substituted in place of
13th Defendant-Appellants)

Defendants-Appellants
PETITIONERS

vs.

A.L. UMMU ZANEERA alias
SHAMSUNNAHAR

Plaintiff-Respondent

A.L. SITHY AZEEMA alias Sithy
Nafeesa wife of M.I.M. Abdul
Hannan of Maligawatte and Others

Defendants-Respondents
RESPONDENTS

CASE FOR THE APPELLANTS

LEMAN HARRISON & FLEGG,
44, Bloomsbury Square,
London, W.C.1.

Solicitors for the Appellants.