INVESTIGATION OF TITLE AND PARTITION LAW

Kamal Udugampola*

Volumes have been penned down, on the latter above, the partition law (procedure) and the celebrated, much sought after decided authorities delivered at times; by the Supreme Court and the Court of appeal as well are overwhelming as at the date .Therefore the present day practitioner and the student is not any more materially handicapped, as far as practicing and learning the partition law is concerned. But must me borne in mind that it is solely a procedural law(special) and that law alone cannot help partitioning a co-owned land come before court by way of a partition action, without having resort to most the land law (substantial law) for investigation of title.

Investigation of title to a land, whether co-owned or otherwise about is purely and distinctly a labour work coupled by the land law (substantial law) the law of inheritance (interstate succession) given in every different perspective that is to say of normal citizens, Kandyans, Jaffna Tamils, Muslims (Sunni, Shiya) each of them is governed by, without which a co-owned land cannot be and shall not be partitioned.

Assuming whether the learned trial judge or the practitioner is aware of the said "Substantial Law" at least to the purpose required upon: the following materials must be equipped with, when to sailing in, in the waters of investigation of title; as the case maybe.

1. Title Deeds
2. Land Registry search notes
3. Land Registry "index" searches(extracts)
4. Land Registry book extracts (certified)
5. Existing Final decrees(Interlocutory Decrees as well) filed of record in the District Courts
6. Existing Final Partition Plans filed of record in the District courts.
7. Correct identification of corpus followed by the meets and bounds given in the title deeds or extracts.
8. Birth Certificate, marriage Certificate of parties and the other similar certificates connected there to.
9. Previous Testamentary proceedings if any.
10. Pedigrees proved in the previous actions in court.

Of the mentioned above, title deeds are top of importance for at present in our country, unlike in the good olden days, the Notary Publics authorized to execute the title deeds, and most of the practitioners of law as well do entertain in, it seems, a practice taken for granted, rather than wasting their, money and

* Attorney- at-Law

ISSN 1800-055X Vol. Iv

energy in searching for correct and valid title of someone's land; thus making haywire title to lands; just for a penny, and hope also it need not to mention here that all the title deeds written before a final decree or any interlocutory decree in an action in relation to a particular land or lands becomes invalid thereafter: and of no effect whatsoever.

Also it must be mentioned that the word title deed included the following as well in the land law;

a. Crown Grants (either British or local)
b. Fiscal's Conveyances (by court)
c. Title Plans (T.P).Here no documentary deed is availed but the survey plan (survey general's) itself makes title to the land described therein as well.
d. Sannas (old declarations given to people for services done)

Generally speaking the registration of deeds at Land Registries is satisfactorily being done, and also had been done, even without assistance of men whom have learnt the law for the purpose; the information required by for the purpose would be made available from, to a certain extent, but an irony of fate it was that the most number of old registration books the importance of which cannot be explained by any means, kept therein over the years have been become decomposed in the shelves itself as at the date; under the hand of the super authorities always ready to pass the bucks while living in cool rooms.

A trial judge or a general practitioner who is envisaged in, in investigation of title to a land given, having been fortified with the material required aforesaid, as for the case maybe, apart from knowledge of the substantial land law, briefly aforesaid, shall know his basic mathematics as well; for simple reason that the right or correct entitlement of a party or parties to a land has to be mathematically certain; if the investigation of title in satisfactorily alone.

It must also be mentioned at this point, that the drawing of a pedigree chart beginning with the original owner (if any) or the original owners to the far the same could be traceable, is helped to cut-short everything in this endeavor to ascertain degree,; followed by the document material aforementioned beginning from the beginning; as the case maybe.

Also it is not to mention that, in the case of a co-ownership of a land, the shares of all the co-owners, after the investigation of the title if the calculation is done perfectly and mathematically correct, when totaled, the answer should become "one" (1) and, it cannot become by any means more or less "one".

Law Relating to Intestate Succession (Inheritance)

a. Matrimonial Rights and Inheritance Ordinance No.-15 of 1876.
b. Law of inheritance under the Kandyan Law Declaration and Amendment Ordinance No.39 of 1938.
c. Inheritance under the Matrimonial Rights and Inheritance (Jaffna) Ordinance, No-1 of 1911.
d. Muslim Intestate Succession – (Sections 1-63 of the code of

ISSN 1800-055X Vol. Iv

Mohomedans Law of 1806) and the Muslim Intestate Succession Ordinance in 1931 and the following text are the guidelines.

a. The Muslim Law of Succession Inheritance and Waqt in Sri Lanka- M.S. Jaldeen
b. Muslim Law of Succession- A guide – A.G.H. Ameen

Matrimonial Rights and Inheritance Ordinance's Sections – 21,22,24,25,26,28,29,30,31,32,33,34,35,36 primarily lay down the law as to how should devolve on a deceased person's immovable property, (to peoples other than Kandyans Muslims and Jaffna Tamils) intestate.

If somehow the aforesaid Ordinance is silent on a question, its section 36 says the Roman Dutch Law sit prevailed in North Holland shall be applicable.

The order of succession taken into account in the said law (sections) is that Descendants, Ascendants, Collaterals.

Ex;-If A dies leaving wife and children, wife and children are the closest descendants, and if A had no wife and children, then comes into being A's parents, who are the ascendants, if at that point A had neither descendants nor ascendants, the collaterals should be looked for.

A leaving property dies:-

A;s Descendants	A's Ascendents	A's Collaterals
I. Wife/Husband II. Children III. Children's children IV. If A is female, only A's children out of her wedlock if any.	I. Father II. Mother III. Surviving father IV. Surviving mother V. Grand Father VI. Grand mother	I. Brother II. Sister III. Full Brother IV. Full sister V. Half brother VI. Half sister VII. Half-brother's child VIII. Half-sister's child IX. Uncle X. Aunt

When summed up the law given in all the said sections in the Matrimonial Rights and Inheritance Ordinance it will be like the following;-

1. Deceased's wife inherits one half of his property
2. Deceased's Descendants, Ascendants and Collaterals get to inherit the other half of the property in the following order.
3. Deceased's children get equally *"per capita"* and his children's children if any at the time get *"per stripes"*
4. Deceased's children or children's children failing to get, then his father and mother both are entitled to.
5. If Deceased's one parent in surviving, that parent gets half only and the other half goes to Deceased's brothers and sisters.

ISSN 1800-055X Vol. Iv

6. When such brothers and sisters failing the said surviving parent gets the whole.
7. Deceased had no surviving parents estate goes to his brothers and sisters, and their children and also to their remoter children if any. (by representation)
8. Deceased's had no full brothers and sisters, and their children too, half of, succession passes to his half brothers and sisters and their children and also to remoter children on the father's side; and the half passes to half-brothers, half-sisters, and their children and remoter issue on the mother's side.
9. If Deceased had only half brothers and sisters on one side they take the whole provided that there in a grandfather or grandmother or higher ascendant yet not living.
10. If Deceased had such ascendants they get the other said half *"per capita"*
11. If all the aforesaid attempts are failed, then the inheritance passes to first to the nearest ascendants in line *"per capita"*. Thereafter decease's uncles and aunts, "per capita" and failing uncles and aunts then to their children and also great uncles and aunts with them *per capita*.
12. In the absence to find anyone aforesaid only the whole of the property passes to the surviving spouse.
13. Finally if there is no one to take inheritance such property will be of the state.

Law of Prescription

The term "prescription" has been acquired a major part in the partition law (substantive) and the land law as well. A usurper or a bona-fide possessor can acquire "prescriptive title" to a land provided he is well within the meaning of section 3 of the Prescription Ordinance; and also a bona-fide purchaser as well; as against the person or persons who is/are the rightful owner/ owners to the land.

Section 3 of prescription ordinance – No.22 of 1871

3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he

ISSN 1800-055X Vol. Iv

claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs: Provided that the said period of ten ears shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

In the case of ***Kirihami V. Dingiri Appu*** (6 NLR-200) it was stated in its judgment by Moncriff . J that,

It would appear that in order that a person may avail himself of section 3 of the prescription Ordinance No.22 of 1871,

1. Possession must be shown from which a right in another person cannot be fairly or naturally inferred;
2. Possession required by the section must be shown on the part of the party litigating or by those under whom he claims;
3. The possession of those under whom the party claims means possession by his predecessors in title.
4. Judgment must be for a person who in a party to the action, and not for one who sets up the possession of another person, who is neither his predecessor in title nor a part to the action.

Walter Perera's *The Laws of Ceylon*, Vol II at page 269,270

"The possession contemplated by the ordinance in that of a party to a suit and of his predecessors in title, but not that of a third party" and also

Possession must be possession *ut dominus.* It must be possession either in person or by agent with the intention of holding the land as owner, and it must be exclusive.

So it is trite law that if a person forcibly and intentionally keeps the rightful owner out of possession of a land given, and if that owner had not taken action against within 10 years of time from the date of the said ouster him from the land, the former acquires prescriptive title as against the rightful owner, to the land; in the law suit.

There is a proviso to section 3 of the prescriptive ordinance. According to the proviso, the 10 years shall only begin to run against parties claiming estates in the remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

In ***Lesin. V. Karunaratne*** 61 NLR 138 it was held that where a person donates land reserving to himself a life interest, prescription does not begin to run against the donee, until the death of the donor. In such a case, the donee as a remainder is entitled to the benefit of the proviso to section 3 of the Prescription Ordinance, and "adverse possession" cannot come into being.

In ***Corea V. Iseris Appuhamy*** 15 NLR 65, the privy council held that one co-owner can acquire prescriptive title to the entirely or to apart of the land as against the other co-owner or co-owners, as the case maybe; and this law still remains unchanged, even though later on local judges have spoken of different thoughts at occasions.

In ***Majeed V. Zaneer*** 61 NLR 361, one co-owner let out a premises and appropriated himself the total proceeds (rents) for over 37

ISSN 1800-055X Vol. Iv

years. H.N.G. Fernando J (then, later C.J) held that it was not sufficient by itself, to bring the case within section 3 of the prescription Ordinance.

In the same case he observed that "Firstly Section 3 of the prescription ordinance imposes two requirements;

i. Undisturbed and uninterrupted possession and
ii. Possession by a title adverse or independent of.

Secondly the question whether the second of these requirements is fulfilled does not arise unless the first of them has been proved.

From the Privy Council judgment of the case of ***Corea V. Iseris Appuhamy***, it is clear that a co-owner in possession can satisfy the 2nd requirement in any one of the following two different modes:

a) By proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title.
b) By proving that although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to his possession in that capacity **by ouster or something equivalent to ouster,** and that therefore and thereafter his possession had been by an adverse or independent title"

Yet it is sad to note that the writer has been observed over the past three decades that, most of our judges, when dealing in partition suits often tend to ignore the fact that is plain as a pikestaff that **"ouster"** or **"possession adverse to"** must only be considered **only amongst co-owners to a land in an action only,** thus making their judgment bad in the eye of the law.

Can say for an instance where A,B,C, being parties to a partition action who are co-owners while claiming their respective title to; D who is not a co-owner who claims either whole or a part of the corpus by prescriptive title, either of any one of two ways stated by H.N.G. Fernando .C.J above the judge hearing such case somehow takes into account or considers for "ouster" or a "possession adverse to" as far as D's claim is concerned, there he has been astrayed into an issue (false) which does not exist; by any means.

Finally yet another important point in law must also be added here, that a co-owned land which land has been de-facto divided and being possessed undisturbed over the years by them the co-owners, thereby acquiring prescriptive possession to each of the part so divided, such land cannot be subject to a partition suit thereafter, simply for the operation of this prescriptive law, which comes into being inevitably.

P.S.:- The inheritance law of Kandyans, Jaffna, Tamils and Muslims are not included in here for the passage had to be limited to words 3000 only.

ISSN 1800-055X Vol. Iv