IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

Case No. 803/96 (F)

DC Kalutara 4125/L

Dadimuni Novarishamy
Silva,
No.10, St. Sebastian Road,
Katukurunda,
Kalutara.
Plaintiff
Vs.
Dadimuni Gilot
Silva,
No.982/2, Galle Road,
Katukurunda, Kalutara.
Defendant
AND
Dadimuni Novarishamy
Silva, (Deceased)
No.10, St. Sebastian Road,
Katukurunda,
Kalutara.
Plaintiff-Appellant
Vs.
Dadimuni Gilot Silva,
No.982/2, Galle Road,
Katukurunda, Kalutara.
Defendant-Respondent

BEFORE : A.W.A. Salam, J

COUNSEL : S.N. Vijithsing for the Plaintiff-Appellant and M.U.M. Ali Sabry with Ms. Shazina Razeen for the Defendant-Respondent.

ARGUED ON : 06.06.2011 and 26.06.2012

DECIDED ON : 29.11.2012.

A.W.A. Salam, J

The facts relevant to the appeal are that the plaintiff filed action in the district court of Kalutara against the defendant-respondent (hereinafter referred to as the "plaintiff") seeking *inter alia* a declaration of title to the property described in schedule 1,2, 3 and 4 of the plaint. The plaintiff thus sought the declaration of title to lots 7, 12, 13 and 15 depicted in plan 885 filed of record in DC Kalutara, case No 673/P.

The details of the said lots 7, 12, 13 and 15 are set out in the plaint in schedule 1, 2, 3 and 4 respectively. These lots were depicted for the purpose of the action in plan No 297 made by K D L Wijenayaka, LS as lots 7A, 7B, 7C, 15 A, 15B, 13A, 13B, 12A, 12B and 12C. However, in suggesting the issues the plaintiff confined himself to lots 7A, 15 A, 13A, and 12B. The learned district judge in his judgment came to the conclusion that the defendant has prescribed to lots 7A and 15 A. He further held that the plaintiff is entitled to a declaration of title in his favour in respect of lots 12 and 13 in plan No 885 or 12A, 12B, 13A and 13D depicted in plan No 297. Being aggrieved by the said judgment of the learned district judge, the plaintiff has

preferred the present appeal.

When the appeal was taken up for argument the learned counsel for the plaintiff expressed his willingness to confine the appeal only to the decision made in respect of lots 7A and 15A depicted in plan No 0297 dated 18 and 28 September 1993 made by KDL Wijenayaka, LS. Accordingly, this judgment is confined to the propriety of the decision made by the learned district judge in relation to the said lots 7A and 15A only.

The position of the plaintiff was that lot 7 described in the first schedule to the plaint was unallotted in partition case No 673. Even though the said lot was unallotted the plaintiff claimed that one Jyaman Silva would have become entitled to it, had he submitted the title deeds. Based on this assertion, the plaintiff maintained that by virtue of deed of transfer No 1393 dated 16 June 1988 the said Jyaman Silva transferred the said lot No 7 to him.

Lot No 15 which is described in schedule 4 to the plaint also had been kept unallotted in the previous partition action. The said lot No 15 has been carved out, adjacent to the lot that was given to the plaintiff.

As such, the plaintiff claimed that he has prescribed to the said lot.

As regards the claim made in respect of lot 15A, the defendant took up the position that it was on the rear side of his lot No 14. The defendant has been in possession of lot 14 and Lot 15A immediately adjacent to lot 14A on which he has constructed a house. It was the testimony of the defendant which has been accepted by the learned district judge that there had been no fence or any other physical boundary separating lots 15A and lot 14A. At the trial, overwhelming evidence has been led on behalf of the defendant to show that lot No 15A and 14A had been in the possession of the defendant for a long period of time, which fact has been considered by the learned district judge as being sufficient to acquire a valid prescriptive title in terms of Section 3 of the Prescription Ordinance.

In the partition action lot 15 has been allotted alongside the allotment of land given to the plaintiff. This in fact constitutes no proof that the allotment in question (lot 15) had been allotted to the plaintiff. The plaintiff has not proved that he had been in possession of the said lot. The evidence led at the trial

clearly demonstrates that lot 15A was in the possession of the defendant.

According to the evidence of the daughter of the defendant "Renuka", Lot 14 has been purchased in the year 1976 from the 55th defendant in the partition case namely Paulus Silva. Her testimony was that there was no fence separating Lot7 and Lot14. The kitchen of the house in Lot14 had been in Lot15 and built by her grandfather in the year 1950. According to Renuka, as the defendant refused to the remove fence a false complaint had been made to the police by the plaintiff and when the police arrived at the scene it was observed that their kitchen was on that lot.

Taking into consideration the entirety of the evidence led on behalf of the defendant, it is quite clear that the defendant has enjoyed Lot15A as part and parcel of his land and acquired a valid prescriptive title as observed by the learned district.

It was observed in the case of Fradd Vs Brown & Co Ltd 18 NLR 302 that when the question turns on the credibility of the witnesses the appellate court should be generally guided by the impression of the Judge who saw the witnesses as to how they performed in the witness box.

In this case it can hardly be said that the judge has misapprehended the facts relating to the main issue regarding the question of prescription.

Therefore, I see no necessity to exercise the appellate jurisdiction against the findings, judgment and decree entered by the learned district judge. Consequently, the appeal preferred by the plaintiff is dismissed subject to costs.

Judge of the Court of Appeal

NR/-