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

A. R. Sumanawathie
No. 30/97, Mayadunna,
Kohombana, Ampara.

PLAINTIFF

C.A 209/1998 (F)
D.C.Ampara 232/L

Vs.

A. R. Dharmadasa
Dematamalpelessa,
Uhana, Ampara.

DEFENDANT

AND

A.R. Sumanawathie
No. 30/97, Mayadunna,
Kohombana, Ampara.

PLAINTIFF-APPELLANT

Vs.

A. R. Dharmadasa
Dematamalpelessa,
Uhana, Ampara.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Athula Perera for the Plaintiff-Appellant

Defendant-Respondent absent and unrepresented

ARGUED ON: 21.02.2012

DECIDED ON: 16.05.2012

GOONERATNE J.

This was an action filed in the District Court of Ampara by the Plaintiff seeking a declaration that she is the lawful permit holder of the paddy land described in the schedule to the plaint and eviction/damages against the Defendant-Respondent. The learned District Judge dismissed Plaintiff-Appellant's action on the basis that Defendant has prescribed to the land in dispute. Appeal arises from the judgment of the learned District Judge dated 23.2.1998. Parties proceeded to trial on 11 issues. The permit marked P1 and letter D1 produced by Plaintiff and Respondent respectively would be evidence in this case for all purposes of the law. Documents being produced at the closure of each parties case without any objection.

The case of the Plaintiff-Appellant based on evidence led at the trial was that:

(1) permit (P1) bearing No. 22/157 issued in favour of Plaintiff-Appellant in terms of the Land Development Ordinance. (Extent – 2 ¾ Acres)

(2) Plaintiff's father was given a permit by the Government for 7 Acres. He died on or about 1969.

(3) Permit for 2 ¾ acres given by her father to Plaintiff-Respondent which was regularised by the Government Agent (P1)

(4) Plaintiff worked in the paddy field till 1987.

(5) Plaintiff's son fell ill and had to be hospitalized in Kandy. As such she permitted and requested the Defendant-Respondent to work the field during her absence. Defendant was Plaintiff's brother.

(6) Defendant-Respondent refused to hand over possession

(7) Plaintiff complained to Government Agent and police about forceful occupation of Defendant Respondent. No share of the corpus was given by Defendant to Plaintiff although he agreed to give a share.

(8) Evidence in cross-examination indicates that the Plaintiff worked the paddy filed along with her husband. During the father's life time her husband had worked in the paddy filed with her late father. Suggestion in cross-examination the Plaintiff never worked in the paddy filed had been denied by Plaintiff.

(9) Permit not cancelled, and is in operation.

(10) Plaintiff's version supported by witness Indrasena Fernando from Divisional Secretariat Office. Permit not cancelled.

(11)There was a recommendation to issue a permit to the Defendant-Respondent. No positive step taken to issue a permit. There is only a recommendation (D1) to issue a permit to Defendant, but not issued in terms of the law.

Defendant-Respondent had given evidence and led evidence of at least 4 other witnesses to prove possession. It was Defendant's position that he has prescribed to the land in dispute.

The learned District Judge has relied on evidence of Defendant and other witnesses regarding possession. District Judge accept the version of the Defendant of possession at least 15 years. There is also reference to the case of Wijesinghe Vs. Kulatunga 61 NLR 223.

A Crown grant given under the provisions of the Crown Grants (Authentication) Ordinance is not valid if it does not bear the signature of the "counter signing officer" referred to in section 2(2). The fact, however, that the certificate bears the signature of the Assistant Private Secretary to the Governor instead of that of the Private Secretary, is not a ground for saying that the grant is bad on the face of it.

Where a Crown grant in respect of a field was given to certain persons in the year 1928 but the contesting defendants and their predecessors in title had sole possession of the field from 1909 to 1947 without any acknowledgment of title in any one else –

Held, that, in spite of the Crown grant, the contesting defendants had a good prescriptive title.

Mere possession alone would not suffice. It is essential that a party who relies on prescription prove and satisfy court that he has established the essential ingredients in Section 3 of the Prescription Ordinance, i.e adverse and independence possession. This aspect of the law does not seem to have been considered by the learned District Judge. Further court should be cautious where a permit has been issued under the Land Development Ordinance, where such permit is not cancelled and is operative under the Ordinance.

In all cases of prescription there must be a denial of title, an exclusion of the contesting owner and an adverse possession. 6 CWR at 225. In a case of this nature the starting point of possession must be clearly established. Trial Judge seems to have ignored this aspect. There is also evidence of consent and permission to cultivate given by the Plaintiff-Appellant to Defendant-Respondent. Has any evidence transpired in court to change such position and make it adverse? To this mere possession would not alone establish a prescriptive right.

In Juliana Hamine Vs. Don Thomas 59 NLR 546 per L.W. de Silva J. ...when a witness giving evidence of prescriptive possession and states "I possessed" or "we possessed". The court should insist on those

words being explained and exemplified. 21 NLR 321 followed the above dicta. (Full Bench). Thomas Vs. Thomas (1855-7 K & J. 79, 69 E.R 701) English Court held. "Possession is never considered adverse if it can be referred to a lawful title".

A person who wish to succeed in prescription must meet the requirement of high order of proof to establish adverse possession, and it is his burden to prove. Navaratne Vs. Jayatunge 44 N.L.R 517 when one gives permission to possess, unless the possessor get rid of his character of licensee by doing some overt act showing an intention to possess adversely, no prescriptive rights could be established.

An allotee had sufficient title to bring a rei vindication action 56 NLR 407. On death of an allottee succession can only be in terms of the Land Development Ordinance 62 NLR 213.

In the above circumstances I hold that the Defendant's evidence led at the trial is not at all sufficient to prove prescriptive title. As such the learned District Judge has erred on the question of prescription. Plaintiff holds a lawful permit under the Land Development Ordinance which had not been cancelled. Defendant cannot succeed since he does not have any

document to at least compare it with a permit issued under the Ordinance. I set aside the judgment of the learned District Judge. Appeal allowed with costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL