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

W. Shanthi Sryalatha of
"Rose Castle", Matugama Road,
Nagoda, Dodamgoda.

PLAINTIFF

Vs.

C.A 742/1998 (F)
D.C. Kalutara 4155/L

1. L. J. P. R. S. Nihal Perera of
1130, Nagoda, Dodamgoda.

2. R. H. Raslin Nona of
Nagoda, Dodamgoda.

3. G. V. Gunapala Keerthiratne ,
Gallassahena, Nagoda,
Dodamgoda.

DEFENDANTS

AND

1. L. J. P. R. S. Nihal Perera of
1130, Nagoda, Dodamgoda.

1ST DEFENDANT-APPELLANT

Vs.

W. Shanthi Sryalatha of
"Rose Castle", Matugama Road,
Nagoda, Dodamgoda.

PLAINTIFF-RESPONDENT

2. R. H. Raslin Nona of
Nagoda, Dodamgoda.

3. G. V. Gunapala Keerthiratne ,
Gallassahena, Nagoda,
Dodamgoda.

DEFENDANT-APPELLANTS

BEFORE: Anil Gooneratne J.

COUNSEL: Dr. Sunil Cooray with M.D.J. Bandara
for the Defendant-Appellants

C. J. Ladduwahetti for the Plaintiff-Respondent

ARGUED ON; 29.06.2012

DECIDED ON: 25.09.2012

GOONERATNE J.

This was an action filed in the District Court of Kalutara for a declaration of title to the land described in the schedule to the plaint and eviction of the 1st Defendant-Appellant from a portion of the land described in the schedule to the plaint. Plaintiff has also prayed for damages against the 1st Defendant. The judgment was entered in favour of the Plaintiff-Respondent on 29.9.1998. Land in dispute is depicted in Surveyor

Wijenayake's plan 321 (P1) and more particularly the subject matter of this action is lot 2 of P1, which according to the said Surveyor, lot 2 is the same as lot 2 in final partition plan in case 30083. The dispute is only in respect of lot 2C which is within lot 2 of the above plan. The 1st Defendant-Appellant's position is that he has paper title to lot 2'C' and also has prescribed to the portion depicted as lot 2 'C'.

At the hearing of this appeal attention of this court was drawn to several plans which were in fact produced and marked in evidence in the Original Court. Appellant is critical of plan P1 and thereby attempting to get relief in this appeal. I will for clarity and convenience list the several points urged by the 1st Defendant-Appellant as follow. It must be noted that 2nd and 3rd Defendants filed a joint answer but having raised issues thereafter did not take part in the trial or made any appearance in the Court of Appeal.

(a) dispute relates to lot 2C of plan P1. Lot 2C is in the possession of the 1st Defendant on the basis of ownership of 1st Defendant's wife.
(b) A portion of 1st Defendant's house falls within lot 2C and the balance portion of the house outside lot 2C.
(c) Plaintiff-Respondent claim ownership to lot 2 of P1 in extent as 9 Acres 2 Roods & 32 perches.
(d) The schedule to plaint indicates that lot 2 in plan 5645 (P2) of 1955 by one Surveyor Binduhewa has been described in the schedule to the

plaint and the Court Commissioner Wijenayake has superimposed plan 5654 in his plan P1. (321).

(e) By the said superimposition which the Appellant calls a so called superimposition lot 2 in plan 5654 is said to be depicted as lots 2A, 2B, 2C & 2D in plan P1 (321).

(f) The portion of 1st Defendant's house within lot 2C damaged by plaintiff's agent's. Thereafter the Defendant and family abandoned the house.

(g) There cannot be any doubt that unless the Plaintiff has discharged her burden of proving that lots 2A to 2D in plan P1 are all portions of lot 2 in plan 5654, the Plaintiff's action must be dismissed, even if the Defendant is a rank trespasser who himself has not proved title to the said lots 2A to 2D.

(h) Defendant-Appellant is critical of plan P1 and state the superimposition is not acceptable for the following reasons (in his own words in written submissions).

(i)A superimposition of an old plan can successfully be done only if there are acceptable points of fixation sill subsisting on the ground when the new plan (on which it is to be superimposed) is made. In this case the old plan of 1955 is plan No. 5654, and the new plan is the plan made by surveyor Wijenayake, bearing No. 321. Surveyor Wijenayake has categorically admitted that the boundaries shown in the old plan were non-existent on the ground when he visited the land on the commission issued in this case, and that the only point of fixation which he could use and which was still to be seen was the canal, the depa-ela (page 167)). However, the surveyor has not mentioned any of these matters in his report which accompanied plan P1.

(ii)What is of significance is that the depa-ela has been shown in his plan P1 as a line only, although he stated in evidence that it was about 3 feet wide. It is respectfully submitted that a depa-ela which is 3 feet wide cannot properly be shown by a single line on a surveyor plan. Its two banks, 3 feet wide, must necessarily be shown. (In the superimposition plan of the Defendant, 1D15 (p. 131-132), even the drain shown as the western boundary of lot 2 in that plan is depicted by showing the two parallel sides of the drain).

(iii) Moreover, a canal or depa-ela is likely to change its course over time, and plan No. 5654 had been prepared in 1955, whereas Surveyor Wijenayake went to the land only in 1993, namely 38 years later. A depa-ela, unlike a large river, is only a small water course and its course can well change in time.

(iv) For a successful superimposition it is essential that an unchanging point of fixation, such as a large rock, a building or an old tree, must be in existence. There was admittedly no such point of fixation in this case. Therefore, it is submitted that there has been no proper superimposition of plan No. 5654 on plan P1, and that therefore, lot 2C in plan No. 321(P1) has not been proved to be part of lot 2 in plan No. 5645.

(v) It is most important also to point out to Your Lordship that when Surveyor Wijenayake stated that he superimposed plan No. 5645, what he has actually done is to superimpose only a sketch of plan No. 5645, and not that plan or a certified copy thereof (pp. 165-166). That sketch has not been produced. There is no guarantee that the sketch is accurate. The term "sketch" itself shows that it was not a "certified copy". It is only the original plan itself or a certified copy of the original that is accurate and acceptable for purposes of a superimposition.

(vi) Surveyor Wijenayake never had the plan No. 5645 or a certified copy of it when he did his "superimposition". It is entirely on the basis of plan No. 5645 and its superimposition on plan No.321 (P1) that the Plaintiff's entire case rests. The Plaintiff cannot claim to eject the Defendant from lot 2C unless the superimposition wasvalidly carried out.

I would prefer to deal at the very outset before expressing my views on other matters, of an allegation made by the Appellant to plan P2, that it had not been certified. By this submissions 1st Defendant-Appellant inter alia attempted to get plan P2 rejected. It was the learned District Judge's view as stated in the judgment that at the time of producing the plan P2 it was not certified but subsequently Registrar of the court by his minute of 1.7.1997 had certified P2, and as such Trial Judge accepting P2 to be duly certified and P2 to be the final plan in partition case No. 30083 from which Plaintiff derived title. Therefore this court cannot accept any contrary view to that of the learned Trial Judge. This court also wish to observe that one M. Elaris Perera became entitled to lot (2) in plan 5645 in D.C. Kalutara partition case No. 30083 (P5 decree). Plaintiff-Respondent ultimately based on M. Elaris Perera's title to the land in dispute, by deed marked P7 to P13 became entitled or title devolved on Plaintiff on or about 1977 based on the chain of title pleaded in the plaint. The available evidence, on this aspect of the case seems to be not so seriously contested. Further there was no valid objection raised as and when documents P1 – P13 were produced and marked in evidence. Nor was any objection raised to Plaintiff's above documents when same was read in evidence at the closure of Plaintiff's case.

As such same becomes evidence for all purposes of the case and in law. 1981(1) SLR 18; 1915 – 1916 – 18 NLR 85; 31 NLR 385; 58 NLR 246; 1997 (2) SLR 101. No doubt the plans submitted on behalf of Plaintiff-Appellant are included in documents P1 – P13.

As such what remains is the question of identity, according to the Appellant which is indefinite? One of the main witnesses for the Plaintiff and in this case was Surveyor Wijenayake. The learned Trial Judge very specifically states he has no reason to disbelieve or doubt the Surveyor's evidence. The evidence reveal that the Surveyor made use of the tracing from the court record in case No. 30083/P and superimposed same on the corpus or plan P1. Evidence on the point by the Surveyor was that it is a correct/accurate superimposition. Trial Judge has considered the material elicited in cross-examination and conclude that there is no reason to disbelieve or reject the above Surveyor's evidence. Surveyor testifies that lots 2C & 2D are part of lot 2 in plan P1 , and being questioned on the data used by the Surveyor, he had impressed the Trial Judge that data tallies with the Superimposition. One has to bear in mind the gap between the original survey and the survey done by Surveyor Wijenayake. No doubt so many years have lapsed. As such there could be changes in the ground situation. Though Appellant argues that there were no fixations as rocks, building or

old trees, would not mean that Plaintiff's case is weak. It is an absurd argument to suggest such changes or non availability of fixation as above and reject Plaintiff's title. On a balance of probability Trial Judge prefers Plaintiff's version more particularly the evidence of Surveyor Wijenayake. Canal may change it's course over the years. due to environment disturbances or occurrences. On one hand it is inevitable. That should not be held against title of Plaintiff. I have also noted the following extract from the judgment of the Trial Judge which refer to certain primary facts and transpired in the evidence of Surveyor.

මිනින්දෝරුවරයා ඉඩම මැනීමට මෙම ඉඩමට ගිය අවස්ථාවේදී, 2සි දරණ බිම් කැබැල්ල විත්තිකරු ඔහුගේ ඉඩමට ඇඳා ගෙන ඇති බව පෙනී ගිය බවත්, ඒ 1 සහ ඒ 2 වශයෙන් අවුරුදු 3 ක් පමණ වයසැති නිවාස කොටස විත්තිකරු තනා ඇති බවත්, එය ගඩොල් බිත්ති වලින් හා වහල උළු වලින් සෙවිලි කර ඇති බවත්, ඒ 2 වශයෙන් පෙන්වා ඇති නිවසේ ඉදිරි කොටස අඩක් කැඩී ඇති බවත් වාර්තා කර ඇත...

මිනින්දෝරුවරයාගේ සාක්ෂි අනුව 2සි කැබැල්ලේ උතුරින් පෙන්වා ඇති කම්බි පැල ඉනි වැට අවුරුදු 5ක් පමණ පරණ බව පවසා ඇත. සලකුණු කර ඇති කම්බි වැටෙහි ගස් කොළන් නොමැති බවත්, ඒ ප්‍රදේශ වයස පවසා සිටීමට නොහැකි බවත් සාක්ෂි දී පවසන්නට විය. 2 ඩී කැබැල්ලේ උතුරු මායිමේ තිබෙන වැට අලුත් වැටක් බවත්, අවුරුදු 5 කට අඩු වැටක් බවත් මිනින්දෝරුවරයාගේ සාක්ෂි දී පවසා ඇත. එම සාක්ෂියට අනුව පෙනී යන්නේ පැමිණිලිකාරිය අයිතිවාසිකම් කියා සිටින ඉඩමෙන් 2 සි සහ 2 ඩී දරණ කැබලි වෙන් වීමට

ඇති, එනම් 2සි කැබැල්ලේ බස්නාහිරට ඇති වැටද, 2ඩී කැබැල්ලේ උතුරු මායිමේ ඇති වැටද පැරණි වැටවල් නොවන බවය.

It must be noted that the Surveyor had narrated, in tracing P4 several points of fixation on all sides of the plan and stated he could get an accurate fixation. There were two other Surveyors called to give evidence for the 1st Defendant-Appellant at the trial who seems to have let down the Defendant-Appellant and not supported the Defendant's case at all (Surveyor Weerakkody and Seneviratne). I will deal with that evidence at the stage of commenting on the Defendant-Appellant's case.

There is no doubt of Plaintiff's title, which devolved from P7 to P13 from Elaris Perera who got title to lot 2 in the above partition case. Defendant's issues 6/7 refer to the 1st & 2nd schedule in the answer which was one Sunitha K. Goonatilleke's land. The said Sunitha blocked out the land and the land described in the 2nd schedule purchased by Defendnat's wife Jacintha Fernando. The land called Andiyakanda is identified as the lands comprised in schedule 1 & 2 of answer. As such issue 6 & 7 need to be answered in favour of Defendant-Appellant by the Trial Judge though the two Surveyors called by the Defendant did not provide acceptable answers to prove identity. Surveyor Seneviratne in his evidence (called by the Defendant) though a commission was issued to him he stated he never

surveyed the land in the 1st schedule. The other Surveyor Weerakkody in evidence said that the plan was prepared by him on imagination. I have no hesitation in endorsing the following submissions of the Respondent which the learned District judge has considered in the judgment.

(a) The land in the first schedule of the answer and issue No. 6 is said to be shown in plan 172 of U M De Silva Licensed Surveyor dated 07/09/1958. This plan was never marked and produced in evidence at the trial. Although it is clear that the defendant had a copy of it.

(b) A copy of this plan is at page 361 of the brief produced as a R document at the initial injunction inquiry. Obviously the defendant did not wish to be cross-examined by the plaintiff on this document.

(c) In this respect it is also important to note the cross-examination of Mr. Wimal Seneviratne licensed surveyor who was called by the defendant in order to prove the identification of Andiyakande.

(d) At 304 and 305 of the brief Mr. Seneviratne admits that although he was ordered by way of the commission to survey and describe the land in the first schedule he had not surveyed the land in the first schedule of the answer.

(e) The block out land referred to in issue 7 and the second schedule to the answer is depicted according to the defendant in plan 447 of Mr Weerakkody licensed surveyor marked 1V13 at the trial.

(f) This plan does not mention that this land is blocked out from the land shown and described in schedule 1.

(g) Lot 3 of plan 447 (1V 13) aforesaid is what the defendant claims to have bought from Sunitha Goonethilleke. The surveyor who made this plan Mr. Weerakkody was called to give evidence by the defendant.

(h) Mr. Weerakkody in his cross-examination clearly states at page 319 of the brief that plan 447 was made from imagination. This is also established by the fact that he does not state that he had surveyed or seen the larger land depicted in the 1958 plan.

The material placed before the Original Court and as the judgment of the court indicates, Surveyor Seneviratne has not superimposed the entire land in plan 447 but shows the Western boundary of Andiyakanda. The final partition plan does not show Andiyakanda as a boundary. The boundary is state land. As such Andiyakanda cannot be a land abutting the corpus and identity of the Andiyakanda land is in doubt. Further by deed P14 the above Sisiliya Gunatilleke transferred her title from the land called Andiyakanda and not the land claimed by Plaintiff. Sisiliya Gunatilleke was the 4th Defendant in partition case No. 30083 but she had no rights or title to lot 2 in the above partition case. All this could be gathered from Plaintiff's documents marked in evidence without any objection. By 1956 decree was entered in the partition case. Further P14 is dated 1958. The Trial Judge very correctly states having verified the evidence and documents, that P14 does not refer to the land claimed by Plaintiff called 'Mahaudumulla'.

The other important matter is the prescriptive rights to lot 2 (issue No. 9/10). It refer to prescriptive title of 1st Defendant wife Jacintha Fernando, who was not a party to the suit. In this connection I have read the case cited by counsel, Dharmasene Vs. Alles and Others 1985 (2) SLR 35..

Held:

The plaintiff sued the 1st defendant for declaration of title to certain lots of a land partitioned by a final decree of court. While conceding 'paper' title in the plaintiff the 1st defendant's position was that his father had prescribed to the disputed lots. The 1st defendant did not claim title to these lots from his father.

A party to a suit cannot under s. 3 of the Prescription Ordinance set up the title of a third party who is not his predecessor in title and who has not been joined in the action. The judgment in a case must be declaratory of the right of a party to the suit not of a stranger.

In Timothy David Vs. Ibrahim 13 NLR 318...

In order that a person may avail himself of section 3 of Ordinance No. 22 of 1871, possession for the prescriptive period must be shown on the part of the person litigating or of those under whom he claims.

Where plaintiff who had paper title to a land sued defendant, a Muhammadan, for declaration of title, ejectment, and damages, and defendant. set up a prescriptive title on the part of his wife, and alleged that he was in possession of the land on behalf of his wife, but did not get his wife added as a party to the action-

Held,

(1) That it was not open to defendant under the circumstances to establish his wife's prescriptive title.

(2) That it was for the defendant to have got his wife made a party to the case if he wanted to set up her title by prescription.

(3) That under Muhammadan Law the husband is in no sense the legal representative of the wife for the purpose of such proceedings as these.

As the Trial Judge observes the Defendant-Appellant cannot set up his wife's title without making her a party. This position is well supported by case law, and the judgment of the Original Court refer to same.

The Defendant's wife as argued by Appellant purchased Andiyakanda only in 1986. Plaintiff acquired title some years before the alleged purchase of land by Defendant's wife. Further the chain of title of Plaintiff commences from the partition decree which creates new title, and not like other decrees affecting land which merely declaratory of existing rights. 53 NLR 63. Trial Judge goes into the question of possession of lot '2C' as alleged by the Appellant that the former owner's agent Punchinona possessed lot 2C. Trial Judge has extensively dealt with the position more particularly that Punchinona never gave evidence at the trial. If the Appellant thought it fit to prove superior title, strong evidence of possession of long years of adverse possession against the Plaintiff-Respondent should have been led at the trial. The requirement is to satisfy the ingredients of Section 3 of the Prescription Ordinance. There is absolutely no trace of any

such position placed before the trial court to support the case of the 1st Defendant-Appellant.

In a rei vindicatio proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. 'The Plaintiff's ownership of the thing is of the very essence of the action'. Maasdorp's Institutes (7th Ed. Vol. 2, 96 Pathirana Vs. Jayasundera 58 NLR 169 at 177. In the case in hand Plaintiff has set out her title and has proved title against the Defendant-Appellant. No doubt Plaintiff has proved she has dominium . The dicta in Wanigaratne Vs. Juwanis 65 NLR 167; De Silva Vs. Goonetileke 32 NLR 217; Peeris Vs. Savunhamy 54 NLR 207, have been followed and fulfilled by Plaintiff.

If the Defendant-Appellant insist for relief in his favour, in the circumstances of this case paper titled coupled with prescriptive rights should be proved. There is a total lack of such evidence. Nor has the Appellant provided adequate details of identity to lot 'C' to get a decree in the Appellant's favour. On a balance of probability. Plaintiff no doubt is entitled to judgment. Plaintiff-Respondent has proved title along with the required possession. Attempt made by the Appellant to create doubts of the Plaintiff's ver5sion of identity of the corpus should fail. I endorse and affirm

the well considered judgment of the learned District Judge. Having considered the main issue of title and declaratory relief, I do not wish to interfere with the Trial Judge's findings on other matters such as damages etc.

Appeal dismissed with costs.

Dismissed.

JUDGE OF THE CO URT OF APPEAL