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

Fathima Naseeda Saheed
No. 26, Krisp Road,
Galle.

PLAINTIFF

C.A 1076/1998 (F)
D.C. Panadura Case No. 436/L

Vs.

Abdul Latiff Mohamed Gaus
No. 43, Horethuduwa,
Moratuwa.

DEFENDANT

Fathima Naseeda Saheed
No. 26, Krisp Road,
Galle.

PLAINTIFF-APPELLANT

Vs.

Abdul Latiff Mohamed Gaus
No. 43, Horethuduwa,
Moratuwa.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Rohan Sahabandu for the Plaintiff-Appellant

Manohara de Silva P.C with Pubudini Wickremaratne
For Defendant-Respondent

ARGUED ON: 30.01.2012

DECIDED ON: 10.05.2012

GOONERATNE J.

This was an action filed in the District Court of Panadura, for a declaration of title to 1/28th portion of the land described in the schedule to the plaint, and eviction of the Defendant. The schedule to the plaint describes the land in question as lot 'E' – Ketelagawatte in extent of about 1 Rood and shown in plan 5934 of 17.2.1962. Plaintiff's case is that her husband one A. Jausaki was entitled to 32/112 share of the above lot 'E' as pleaded in paragraphs 1 to 11 of the plaint. Upon the death of her husband Plaintiff states she is entitled to 1/26th share of lot 'E' and her 4 children were entitled to the balance share of 7/28 of the land in dispute. Plaintiff also

claim prescriptive title. According to the Plaintiff, the Defendant entered the land on 26.03.1989 and erected a fence and disputed Plaintiff's title.

Parties proceeded to trial on 17 issues and 1 admission. It was admitted that from the land described in the schedule to the plaint, the Plaintiff would be only entitled to 1/28 portion of the land described therein. Notwithstanding the said admission, the Defendant denied the matters urged by Plaintiff. The Defendant in the answer has averred that schedule A & B of the land described in the answer and purchased from H.L.M Jausakin in 1978 and one Mais and possessed since 1978 respectively. Lots A & B are adjoining blocks possessed and Defendant claim prescriptive title.

The Defendant-Respondent's issues are focused and incorporated in issue Nos. 16 & 17 more particularly whether the above named A. Jausaki has transferred his rights to the Defendant or whether the Defendant-Respondent has prescribed to the land in dispute (issue 16 which incorrectly refer to the Plaint – where as it should be answer). Plaintiff a co-owner seems to have filed this suit against the Defendant-Respondent on the basis that the Defendant-Respondent is a trespasser. Co-owner might sue a trespasser to have his title to the undivided share declared and evict him from the entire land without joining other co-owners. (17 NLR 49 & 1996 (1) SLR 358, 52 NLR 430)

At the hearing of this appeal learned Counsel for Appellant and learned President's Counsel for Respondent made submissions and made reference to certain items of evidence. However there is something very significant in the judgment which, this court is bound to comment and also wish to emphasis that mere possession would not suffice to satisfy the requirements of Section 3 of the Prescriptive Ordinance. The Original Court should not have lost sight of the all important admission recorded at the trial. All the issues except issue Nos. 8, 10, 11, 12, 16 & 17 are answered as 'does not arise'. Therefore this court is reluctantly compelled to observe that the trial Court has failed to comply with the mandatory provisions contained in Section 187 of the Civil Procedure Code. Issue Nos. 1 & 2 referring to the original ownership had been answered as 'does not arise'. This appears to be no proper answer contemplated by the Civil Procedure Code. Issue Nos. 3 & 4 relating to possession of original owner and transfer of the respective lots should not be answered in this manner. Court should give an affirmative or negative answer since this necessarily connect evidence led at the trial and to answer same as does not arise would give rise to doubts as to whether the Original Court considered the evidence led at the trial at all? Documents P1 – P8 are all important documents to be considered along with oral evidence.

The trial judge refer to P1 – P5 and the evidence of Plaintiff, but this court is unable to ascertain the real meaning of the answer 'does not arise' as stated by the trial Judge..

The answers to issue Nos. 8 & 9 would demonstrate some form of inconsistency, if one peruse the admission recorded at the trial. Parties admitted that Plaintiff owns $1/28^{th}$ share of the land in dispute. I have no reason to doubt the submission of learned Counsel for Plaintiff-Appellant in this regard.

All persons and Attorneys involved in Civil practice in a Court of Law would be mindful of the position that once issues are framed pleadings are crystallized in the issues. Requirement under Section 187 of the Code cannot be ignored and the only argument that could be advanced is to consider same in the light of article 138(1) proviso to the Constitution. However having considered the evidence and the issues framed in this case, Court cannot conclude that no prejudice had been caused to the plaintiff. Trial Judges failure to comment on vital aspect of the evidence would necessarily prejudice the substantial rights of Plaintiff, and result in an failure of justice being caused to Plaintiff having produced oral and documentary evidence to prove the case of the Plaintiff. Bare answers to

issues without reasons would amount to non compliance with Section 187 of the Code. Warnakula Vs. Ramani Jayawardena 1990 (1) SLR 286; NLR 337, 59 NLR 214 CLW 167.

Sopi Nona Vs. Cornelis. 210 BARL Supreme Court held it is essential for the trial Judge in order to meet out justice in a fair and rational manner to consider the evidence led on points of contest. The case in hand does not give cogent reasons to reject Plaintiff's case, but merely refer to deed V2 and oral evidence of mere position.

I wish to state that I am unable to endorse the views of the learned District Judge since majority of the issues answered in the judgment state 'does not arise'. Evidence germane to each issue must be reviewed and examined. Let me also consider the evidence led on behalf of the Defendant-Respondent. More particularly the evidence relied and adverted by Defendant and the aspects of that evidence considered by the trial judge, as follows:

(a) District Judge refer to the evidence of Somapala Fernando and one Nalin called by the Respondent. Witness Nalin testified that his hardware had been stocked in the land in dispute to prove Defendant-Respondent possession on the basis land was sold to him. Stocking of hardware was between 1984 – 1999 according to the evidence. Action

was filed on or about 1989. This does not cover the required period of prescription as at date of plaint. Trial Judge has not been able to gather this point.

(b) The Grama Sevaka (Fernando), was also cultivation officer from 1978 – 1989. Evidence point to the fact that there was plantation and thereafter hardware on the land in question. In cross examination, witness admitted that he became aware that Defendant-Respondent possessed the land which was bear land after finding out from the neighbours, which is hearsay evidence. This witness does not provide direct evidence. (Pg 84). Trial Judge cannot possibly rely on the evidence of the above witnesses (as in 'a' & 'b') to corroborate the Defendant-Respondent's possession.

(c) Plaintiff's lawyers preparation of deed D1, was not a proper deed in law. D1 was a document supposed to be a deed but not signed or registered as required by the provisions of the Registration of Documents Ordinance. However the trial Judge accept such position but admit the document as a document to favour the Defendant's possession of the land. In the judgment the following extract may be noted:

විත්තිකරු ලියවිල්ලක් ඉදිරිපත් කරමින් පවුසකි නැමැති අය එම ඉඩම ඔහුට විකුණු අවස්ථාවේ ලියන ලද ඔප්පුවක් ද ඉදිරිපත් කරන නමුත් එම ඔප්පුවේ අංකය හෝ විකුණුම්කරුගේ හා ගැණුම්කරුගේ නම ඇතුලත් කොට නැති අතර දිමනාකරු තුන් දෙනෙක් හා සාක්ෂිකරුවකු අත්සන් කර ඇති බවට කියා ඇති අතර එම ලියවිල්ල ඉදිරිපත් කරන්නේ එම

ලියවිල්ලෙන් අයිතිය පැවරුනා යයි කිමට නොව එම ඔප්පුවේ දිනයේ සිට ඉඩම බුක්ති විඳින බව ඔපුපු කිරීමට බවත් විත්තිකරු කියා ඇත.

This court observes that issue No. 10 has been simply answered in the negative. In this regard as regards the disturbance that took place on 27.3.1999 Plaintiff placed oral evidence and produce the police statement (P7). Defendant did not offer any evidence on this point. Trial Judge simply rejects issue 10 without any reasons since in a rei vindication suit, the Plaintiff claiming a declaration need to have title. Plaintiff seems to have produced and led sufficient evidence of title supported by an admission recorded at the trial. Therefore in a case of this nature if the trial court chooses to reject such position such court need to properly and correctly record a suitable answer with reasons. Moreover title has been established and as such the burden would shift to the Defendant-Respondent to prove that he possess the property in dispute legally. As such issue 10 need to be answered with cogent reason. Trial judge makes no reference regarding the disturbance as raised in issue No. 10.

I have also considered the following submissions of Plaintiff-Appellant, which submissions are incorporated in this judgment as follows, since I am not in a position to reject same, and this court is convinced of such position.

1. The evidence is that, the main land was about 1 ½ Acres and there were 3 lots – A + B + E – and the action was filed in respect of Lot E – the evidence was that this was owned by 4 parties – who later sold their shares. Onc of the 4 owners – Pathuma according to the evidence sold his rights to one Premadsa in 1972. The other co-owner – Fawzie who Jaleel the other co-owner had sold his share to Premadasa – and the last co-owner Muvis was dead.

2. The defendant's position was that, the plaintiff's husband and his brothers by a deed transferred the land to the defendant. This was denied by the plaintiff. The other witness who gave evidence for the plaintiff was one Razik – he was the owner of Lot B in Plan 380/28.9.1962. The defendant tried to show that he sold the land to the defendant – this is wrong (page 51). When this witness was giving evidence, the defendant tried to produce a document D1 which he tried to call a "Deed".

3. The initial position of the witness was that he did not sing the said document D1. D1 which is not a deed – was allegedly witnessed by this witness. According to the defendant, the plaintiff's husband and his brothers transferred Lot E to the defendant. Razich's position was that – he only signed a deed when he transferred Lot B – and not Lot E- as he was not an owner, and that, he did not witness the document D1.

The learned President's counsel who appeared for the Respondent supported the judgment of the learned District Judge and submitted inter alia that document D1, though not a deed, same was produced in court for another purpose, i. e to demonstrate to court that the Respondent possessed the land and that consideration was in fact (Rs.3000/-) was paid to Plaintiff's deceased husband and that with such possession the Respondent prescribed to the land in dispute. D1 had been signed by witnesses. Learned President' s Counsel also submitted that it was the deceased Plaintiff's husband who placed the Respondent in possession. He also drew the attention of this court to certain items of evidence to prove possession of Respondent. On payment of Rs. 3000/- to deceased Jausaki, Respondent immediately possessed the land in dispute. There is also reference to plan No. 381 and in evidence the deceased Jausaki showed the plan in 1975 and stated that he would sell the land to Respondent. In that way President's Counsel emphasized that Respondent was in possession from 1975 – 1989. The other argument adduced on behalf of Respondent was the Plaintiff's answer to court failing to categorically deny or answer that there was no sale to Respondent by her husband.

Plaintiff merely states she is unaware. Counsel also suggests that evidence led by Defendant remains uncontradicted. Cited the case of Edrik Sivla. 70 NLR 179.

Having considered both sides of this case in appeal I am inclined to take the point of view of the Appellant more particularly to the several lapses discussed above pertaining to the judgment of the Original Court. When paper title is proved the burden would shift to the other party which need to be discharged properly. Mere assertions of possession would not suffice in the circumstances of this case. A person who wish to succeed in prescription must meet the requirement of high order of proof to establish adverse possession. In all cases of prescription there must be a denial of title, an exclusion of the contesting owner and an adverse possession. 6 CWR 225. 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 J K & J. 79, 69 ER 701) English Courts held, "possession is never considered adverse if it can be referred to a lawful title".

In the instant case I do not wish to be unreasonably harsh to insists on possession described by the Defendant-Respondent to be explained or exemplified in a very strict manner. However when an admission has been recorded re-title of Plaintiff's, statement of mere possession cannot be relied upon to stretch it to be adverse possession specially where the supporting witnesses of the Respondent was unable to offer precise proof of possession and gave only hearsay evidence.

I am also compelled to comment on document V1. Certainly it is not a deed. Though the Respondent's position seem to be that it was produced for a limited purpose – re – to prove possession, I am firmly of the view that nothing flows from same, and is only a peace of paper with some signatures. V1 is more or less a blank paper There is no prior registration, no number of the deed, 2nd page is again blank. There is no date or date of signatory. No reference to consideration (amount). I reject whatever evidence connecting document V1. No rights transferred by document V1.

It must be noted that plan V2 was not made with the intention of transferring the land to the Defendant. In fact Defendant admitted such position. (Pg 57 of proceedings dated 12.12.1997). Only plan in Defendant-Respondents favour is plan V4. made in 1985. 4 years after V4 Plaintiff filed this case. As such Defendant could not possibly rely on prescription

In all the above circumstances I am inclined to set aside the judgment of the District Court. I allow this appeal with costs. Judgment to be entered in favour of Plaintiff-Appellant as prayed for in the plaint.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL