IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI

LANKA.

CA 416/92 (F)
D.C. Panadura: 114/P

Pushpa de Silva Withanachchi

Rukmani de Silva Withanachchi

Mille Agnes Weththasinghe

Suvineetha de Silva Withanachchi.

13th - 15th Defendant-Appellants.

Vs.

Abayawansa Leelanatha Weththasinghe

Plaintiff-Respondent. (deceased)

Ajith Lukshman Weththasinghe

Substituted Plaintiff-Respondent.

And others

C.A. 416/92 F D.C. 114/P Judgment 04.09.2012

BEFORE : W.L.R. Silva, J. & A.W.A. Salam, J.

COUNSEL : N.R.M. Daluwatte PC with Rohan Sahabandu for the Defendant-Appellant. Asoka Fernando with A.R.R. Siriwardane for the Substituted Plaintiff-Respondent.

ARGUED ON : 07.12.2010, 03.03.2011, 31.03.2011 and 06.06.2011.

W/S TENDERED ON: 08.11.2011.

DECIDED ON: 04.09.2012.

A.W.A. Salam, J.

The plaintiff filed action on 11.8.1987 to partition the land called Obawatta said to be in extent of 3 Rood as per schedule to the plaint. A preliminary plan was made by K.G Fernando, Licensed Surveyor and Commissioner of Court to identify the corpus in reference to a survey plan. Accordingly, preliminary plan No 579 dated 10.1.1988 depicting the corpus as lots 1 and 2 in extent of (1) 25.8 Perches and (2) 2 Roods 8.56 Perches respectively was submitted by the Commissioner. The total extent of the land consisting of Lots 1 and 2 as aforesaid aggregates to 2 Roods 34.36 Perches which extent fell 4 Perches short of the extent shown in the plaint.

The plaintiff averred that one Silvestri was the original owner of the corpus and his rights devolved on him and

1 to 18 defendants. The contesting defendants on the other hand maintained that the said Silvestri who was also known as Silvestri Appuhamy did not own the land described in the plaint but was the owner of the land called Obawattekattiya in extent of 1 Acre. However, the contesting defendants admitted to a great extent, the line of devolution of title shown by the plaintiff. The matter of the dispute proceeded to trial on several points of contest involving

1. The identity of the corpus,
2. Exclusion of lots 2 in the preliminary plan,
3. The prescriptive claim affecting lot 2 and
4. Effect of the *fidei commissum* alleged to have been created in respect of a portion of the corpus.

According to the plaintiff the land sought to be partitioned is depicted as lot 1 and 2 in the preliminary plan bearing No. 579 aforesaid. The appellants took up the position that lot 2 depicted in plan No. 407 dated 29th October 1988 made by N.A.G Silva Licensed Surveyor should be excluded from the corpus as they had acquired a valid prescriptive title to it. Lot 2 depicted in plan No. 407 aforesaid is in extent of 1 Rood and 31.29 Perches. A plan said to have been prepared in the year 1889 bearing No. 1514 was produced by 13th, 14th and 19th defendants marked as 14D1. This plan was superimposed at the instance of the said defendants on the preliminary plan and the evidence of the Surveyor summoned by the contesting defendants, was that the

land depicted in plan 1514 is not identical to lot 2 in the preliminary plan. The boundaries shown in plan No. 1514 did not tally with the boundaries of lot 2 in the preliminary plan and the extent of lot 2 shown in plan No 1415 substantially differed from the extent shown in the preliminary plan. To be precise the extent of lot 2 as shown in the preliminary plan is 88 .56 Perches while the extent of the land shown in plan 1514 is 71.39 Perches.

It is noteworthy to look at the difference in the extent of the two lands shown in plan No's 1415 and 579 (preliminary plan). A mere cursory glance at the two plans would reveal that the reduction shown in the purported original plan 1415 is 43.07 Perches.

As a matter of fact the land depicted in plan 1415 was not found to be on the ground. Taking all these matters into consideration including the boundaries referred to in the deeds produced by the plaintiff, the learned district judge in a painstaking exercise, by judgement dated 11 May 1992 came to the conclusion that the land sought to be partitioned has been correctly depicted as lot 1 and 2 in plan No. 579 aforesaid. Having addressed my mind to the issue relating to the identity of the corpus and the approach of the learned district judge towards the resolution of the dispute, I am unable to endorse the submission that the learned district judge has erred in identifying the corpus.

With the learned district judge identifying the land sought to be partitioned as lots 1 and 2 in plan No. 579, the contesting defendants invariably has to be identified as co-owners of the subject matter. In such an event, as the law demands, the contesting defendants are obliged to establish adverse possession followed by ouster by an overt act, in order to prove their alleged prescriptive title. In a well-considered judgement, the learned district judge concluded that the contesting defendants have failed to establish their prescriptive claim in terms of the law and proceeded to dismiss the assertion relating to prescription set out by the contesting defendants. In the circumstances, I am not inclined to subscribe to the view that the learned district judge has erred himself in holding against the contesting defendants on the question prescription.

Quite appreciably, the learned district judge has taken immense pain in the investigation of title and to produce a meticulously arranged schedule of shares pointing to the undivided interest of each co-owner. One of the important findings of the learned district judge relates to the standing of the appellants in relation to the subject matter of the action. Having assiduously gone through the title the learned district judge has arrived at the conclusion that the appellants are co-owners of the subject matter and therefore not able to prescribe to it unless the stringent requirements relating to acquisition of title by prescription by a co-owner is proved by cogent evidence.

According to the plaintiff the original owner of the subject matter was one Silvestri Wettasingha who died leaving as his legal heirs the widow and six children. The appellants took up the position that Silvestri Wettasingha referred to by the plaintiff did not own the subject matter of the action but owned the land called Obawattakattiya in extent of 1 Acre. They maintained that the said Silvestri died leaving the widow named Molligoda Liyanage Michohamy and Sagiris Wettasingha and Lewis Wettasingha and others whose names they were unable to disclose.

on a perusal of the pleadings, documents and evidence led at the trial, it is quite clear that the original owner of the land in question was one Silvestri Weetasingha and his rights have ultimately devolved on the plaintiff, 13, 14, 15 and 19 defendants and others. The evidence led at the trial clearly shows that 13, 14, 15 and 19 defendants have derived title from Benjamin de silva Withanachchi who inherited rights from his mother Dilona Wettasinghe who is a daughter of Sadiris Wettasingha. According to the plaintiff Sadiris Wettasingha is a child of the original owner Silvestri Wettasinghe.

An important question that came up for determination in the lower court was whether deed of gift No 13754 dated 31.12.1878 marked as 14D8 created a *fidei commissum.* As far as 14D8 is concerned the rights in the subject

matter has been given to one Suppiah to possess and not to sell, mortgage or gift and therefore the said Suppiah has taken charge of the property subject to the *fidei commissum* created by that deed. The terms and conditions of this deed are quite clear in that it has imposed a prohibition against alienation and other normal restrictions as are imposed in the case of a *fidei commissum.* In the circumstances, the deed of gift bearing No 13754 had only transferred possession of the undivided interest in the land to Suppiah and the learned district judge has come to the conclusion that the deeds produced marked as 14D7, 14D5 and 14D4 do not convey any rights to the transferees. As a result, the learned district judge decided that Philippu Pulle and Nagamma should be treated as co-owners of an undivided ½ share of corpus.

As regards the creation of the *fidei commissum* by deed No. 13754 (14D8) by Sadiris and the consequences of the said deeds have been dealt in detail by the learned district judge. According to the learned district judge an undivided ½ share of the corpus is owned jointly by Nagamma and Philipu Pulle in the proportion of 1/4 share each and therefore an undivided ½ share jointly owned by both them should be kept unallotted.

In the circumstances, the learned district judge has allotted an undivided ½ share from and out of the corpus to the legal heirs of Silvestri and left the balance ½ share unallotted in favour of the estate of Philip Pulle and

Nagamma.

Having given my anxious consideration to the judgement of the learned district judge and the legal approach made by him to resolve the dispute, I see no reason to interfere with the findings, judgement and interlocutory decree entered by the learned district judge. As such, this appeal stands dismissed subject to costs.

A.W.A.Salam, J

Judge of the Court of Appeal

I agree.

WLR Silva, J

Judge of the Court of Appeal

Vkg/-