

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

C.A. 70/97 (F).
D.C. Mount-Lavinia L/ 26/92

Lakshman Waidyasiri,
12/1A, De Alwis Road,
Kalubowila Road,
Dehiwala.

Susila Ranasinghe,
211/33/ B,
Old Kottawa Road,
Mirihana.
Nugegoda.

Defendant-Appellants

Vs.
M.Malani Costa,
M.A Siripala,
145/6, High Level Road,
Kirulapana.

Plaintiff-Respondents.

BEFORE: A W A SALAM, J

COUNSEL: Ranjan Suwandandarathna for the Defendant-
Appellant and L.Wickramaratne for the Plaintiff
-Respondents.

ARGUED ON: 26.03.2012.

DECIDED ON: 28.08.2012.

A.W.A. Salam, J.

The plaintiff-respondents (hereinafter referred to as the plaintiffs) filed action against the defendant-appellant^s (hereinafter referred to as the "Appellants") and another person for a declaration that the respondents and another person who is not a party to the case are the lawful owners of the land described in the schedule to the plaint, an order of ejectment of the defendants therefrom and damages. The defendants in their answer moved for a dismissal of the plaintiffs' action on the basis that the plaintiffs have no title to the land in question and that the defendants are the owners of a portion of the property which is the subject matter of the action. After trial the learned district judge held *inter alia* that one Asilin Fernando was the owner of the subject matter of the action by right of long and prescriptive possession and that she had transferred her rights to the 1st and 2nd plaintiffs. He further alleged that the occupation of the land by the defendants is unlawful. Being aggrieved by the said judgement the Appellants have preferred the present appeal.

At the trial, the plaintiffs led the evidence of (1) Asilin Fernando, the alleged original owner of the subject matter (2) Weeratungage Sandun Wijesri (3) Suppiah Thomas (4)

Kuruppu Arachchige Sriyani (5) Gunadasa Perera (6) Attanayaka Attorney-at-law (7) Welikada Liyanage Gnanathilaka and (8) Siriwardena Kuruppu. The plaintiffs closed their case producing documents marked P1 to P11. In presenting the defendants case the 2nd defendant testified before the trial judge and closed the case of the defendants producing documents marked D1 to D8.

The purported original owner of the land Asilin Fernando claimed that she had possessed the property for a long period of time and executed a deed of declaration, five years prior to the institution of the action. It is after the execution of this deed; Asilin Fernando transferred her rights to the plaintiffs in the year 1989. The plaintiffs filed the action barely 3 years after the execution of the deeds of transfer in February 1992. In this background, to obtain a declaration of title to the property the plaintiffs relied heavily on their possession of the subject matter which extended to nearly 3 years and the possession of their predecessors Asilin Fernando and her husband. Admittedly, Asilin Fernando has had possession of the subject matter only for the short period of three years after the execution of the deed of declaration declaring her as the owner. As far as the evidence of Asilin Fernando is concerned, she has not testified clearly as to her mode of possession so as to acquire a valid prescriptive title to the land in dispute. The learned district judge has been

influenced to a great extent by the deed of declaration executed by Asilin Fernando, when he came to the conclusion that the plaintiffs are the owners of the subject matter. This evidence, in my opinion is not adequate to confer title on the plaintiffs against the defendants who are also on the land having purchased rights. As a matter of fact, the defendants have constructed a substantial house on the subject matter and it was led in evidence that they have purchased rights from one of the owners of the property who instituted a partition action in respect of the larger land of which the subject matter is a portion.

Even though, several witnesses have testified on behalf of the plaintiffs, none of them had given any material evidence to substantiate the claim of the plaintiffs that they have prescribed to the property on their own possession and that of the possession of their predecessors in title.

The documents produced by the plaintiffs at the trial are of recent origin and quite noticeably none of the documents fall outside the period of 10 years or at least count 10 years preceding the date of the action. In so far as the plaintiffs' documents are concerned, the electoral register P1 cannot be considered as sufficient evidence of original ownership. P2 is a survey plan by which the

purported original owner has subdivided the larger land in the year 1988 and therefore is of recent origin. P3 and P4 being deeds on which the plaintiffs have purchased rights are dated 2nd August 1989 and therefore cannot be considered as evidence establishing the alleged prescriptive possession for more than 10 years. P5 is also a plan made in 1980 and does not constitute evidence in proof of prescriptive title. P6 is a complaint made to the police in the year 1990 and P7 is a copy of the caption of the relevant partition case. Both documents are not adequate enough to come to the finding that the plaintiffs have prescribed to the subject matter. P8 is dated 22 November 1995 and the deed of declaration P9 is dated 1 May 1987. Thus, it would be seen that none of the documents are relevant to the period beyond 10 years from the date on which the action was filed. It must be observed that upon the production of the declaration of title deed P9 alone, one cannot infer that the original owner of the land has had long and prescriptive possession, in the absence of positive proof to that effect. In a *rei-vindicatio* action, the burden is always on the plaintiff to prove that he is the owner of the subject matter of the action. As has been correctly observed by the trial judge a weak defence cannot in any event lend support to the plaintiffs. As has been repeatedly held by our courts, in a *rei-vindicatio* action the burden is fairly and squarely on the plaintiffs to establish the title to the property in

respect of which a declaration is sought by adducing cogent evidence, which burden they have failed to discharge.

In any event, on a perusal of the judgement, it appears that the learned district judge has not carefully analysed the evidence of the 2nd plaintiff and the other witnesses for the plaintiffs as to the issue relating to prescription. It is trite law that clear and cogent evidence must be adduced, before someone can claim a declaration of title to an immovable property. The learned district judge has not analysed the evidence adduced with regard to the possession of the plaintiffs and their predecessors in title as required by law. For this reason, I am of the opinion that the impugned judgement cannot be allowed to stand and therefore should be reversed. Accordingly, the case is remitted to the district court for re-trial in due course.

In the result the appeal is partly allowed subject to costs.

Judge of the Court of Appeal

Vkg/-