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

C.A 723/1998 (F)
D.C Colombo 15858/L

Michael Conelius de Sivla
Abeywickrema Wijeyanayake of
No. 32, Frazer Mawatha,
Moratuwa.

PLAINTIFF

Vs.

1. P. Don Robert Gladston Albert
2. S. A. Waas Gunawardena

both of No. 312, Thimbirigasyaya Road,
Colombo 5.

DEFENDANTS

AND

1. P. Don Robert Gladston Albert
(deceased)
2. S. A. Waas Gunawardena

both of No. 312, Thimbirigasyaya Road,
Colombo 5.

DEFENDANT-APPELLANTS

Vs.

Michael Conelius de Sivla
Abeywickrema Wijeyanayake of
No. 32, Frazer Mawatha,
Moratuwa.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

1A. S. A. Waas Gunawardena

No. 312, Thimbirigasyaya Road,
Colombo 5.

SUBSTITUTED-DEFENDANT-APPELLANT

S. A. Waas Gunawardena
No. 312, Thimbirigasyaya Road,
Colombo 5.

2ND DEFENDANT-APPELLANT

Vs.

K. E. Joseph Elmo Fernando
32, Frazer Avenue, Moratuwa.

SUBSTITUTED-PLAINTIFF-RESPONDNET

BEFORE: Anil Gooneratne J.

COUNSEL: Ikram Mohamed P.C., with A.M. Faiz and N. Udalagama
for the Substituted-Defendant-Appellant

Gamini Jayasinghe with D.M.A. Kannangara
for the Substituted-Plaintiff-Respondent

ARGUED ON: 05.06.2012

DECIDED ON: 11.10.2012

GOONERATNE J.

The Plaintiff instituted action seeking a declaration of title to the premises described in the 2nd schedule to the plaint which is a residential property bearing No. 312, Thimbirigasyaya Road, Colombo 5, and eviction of the 1st & 2nd Defendant-Appellants. Plaintiff also sought damages as prayed for in his plaint. Judgment dated 31.7.1998 was entered against the two Appellants by the learned Additional District Judge of Colombo as prayed for in the plaint. Parties proceeded to trial on 14 issues, and the Defendant-Appellants raised issue Nos. 13 & 14 on the basis that they acquired title to the property in dispute by prescription. The position of the two Defendant-Appellants were that since 1979 for a period of above 10 years they continued to be in undisturbed/uninterrupted continuous possession and thereby has prescribed to the property. Action was filed in the District Court on or about 26.5.1992.

At the hearing of this appeal learned counsel on either side drew the attention of this court to certain items of evidence to support each others case. However before I deal with them, it appears to this court that it would be necessary to refer to certain background facts as parties to the suit are closely connected family members and in the usual Sri Lankan society

approaching family disputes pertaining to land, ultimately end up in a court of law. The 1st Defendant is the son of the Plaintiff's sister and the 2nd Defendant is the wife of the 1st Defendant. The Plaintiff and 1st Defendant's mother are brother and sister. Plaintiff and 1st Defendant's mother and father had 9 children. Among them were Plaintiff (Michael) and 1st Defendant's mother (Grace Albert). Michael the Plaintiff-Respondent was executor of his father's last will namely Cornelis de Silva Abeywickrema Wijenmayake. Under the last will, the portion of property bequeathed to Plaintiff-Respondent is the subject matter of this case. This includes the parental house No. 312, Thimbirigasyaya Road, described in the 2nd schedule to the plaint. Up to 1953 the father and mother with their 9 children lived in the said house. The father died in 1953 and the mother continued to live with the children until her death in 1966. The property in dispute was bequeathed to the Plaintiff subject to mother's life interest and after 1966 Plaintiff became the sole owner. The above material remains undisputed in this case.

The learned President's Counsel for the two Appellants submitted to this court inter alia and placed much emphasis on document V29, and that the judgment of the District Court was not in compliance with Section 187 of the Civil Procedure Code. I will deal with the above at a

subsequent point in this judgment. The following matters are mentioned in the written submissions of the Appellants.

(a) the Plaintiffs witness Albert was 1st Defendant's brother and witness was not in goods terms with the 1st Defendant. The witness his mother and a sister left the premises in dispute in 1979. Thereafter only the 1st & 2nd Defendant and his family remained in the premises.

(b) Witness lost his eye sight in 1958 and as such unable to say all what he heard was true or false.

At folios 63-65 of the court record, witness states he is unable to state correctly as to who cut the jack trees. (this I observe that would nto mean that the trees were not cut). This witness also state that he is unable to state whether Defendant did any improvements to the premises. He also states when the uncle (plaintiff) asked them to leave the premises they left the premises and he is unable to state about a case. However at folios 65, witness admit that there was a case filed in 1989.

(c) Plaintiff's evidence from the Appellant's point of view had also been discussed. Plaintiff permitted 1st Defendant's mother to occupy the premises under whom the 1st Defendant and his family occupied the house. Plaintiff filed action against the sister (1st Defendant's mother) in R.E case 7142. Consent decree was entered in the above R. E case (P34). Appellant allege consent decree signed by Appellant's mother when she was not resident at No. 312, Thimbirigasyaya Road, Colombo 5. Plaintiff brought her to court. Defendants not made parties.

(d) Execution of decree was objected to by the Defendants. That application dismissed after inquiry.

(e) V 29 dated 20.1.1978 letter, sent requesting Defendant to quit the premises.

This court observes that the question posed at folio 126 of the record would not strictly contemplate the position indicated above by the Appellant in this regard. The question is that a letter was sent in 1978 requesting Defendant to quit. The answer is 'no' and does not accept it.

This court observes that another question was put to the Plaintiff suggesting that in 1978 Defendant was asked to quit. The answer was, they did not vacate. At that point letter V 29 was marked. The position was put to the Plaintiff based on V29 and the question in it's original form reads:

ප්‍ර: මා යෝජනා කරනවා මේ ලේඛණයේ අස් වෙලා යන්න කියා ඉදිරිපත් කර ඇති කරුණු අසත්‍යයයි කියා?
උ: පිලිගන්නේ නැත.

In view of Plaintiff's answer to above I do not think that the Appellant's position is strictly correct. As such I need to consider Plaintiff-Respondents' view also as the Appellant rely on V29 (may be to prove the starting point of prescriptive rights?).

What is really important in this suit is to decide whether the Defendant-Appellants have prescribed to the property in dispute. In other words, have the Defendants proved and satisfied the requirements/ingredients contained in Section 3 of the Prescription Ordinance? When opposing parties have close family ties the facts placed

before court need to be very closely examined. In the case in hand the evidence reveal that the 1st Defendant was only a child of, Grace Albert who was his mother. No doubt 1st Defendant/2nd Defendant's position was always subordinate to his mother, and the Plaintiff-Respondent merely permitted the 1st Defendant's mother to use and occupy the premises for which the Plaintiff-Appellant extended certain financial assistance from time to time since Grace Albert had difficulty in running the house hold, which background facts quietly crept in to the case record by way of evidence which may have looked not so significant at the point of leading evidence. I have noted the following items of evidence which remains un-contradicted on examination of the record and the proceedings.

(i) Plaintiff's father and mother had 9 children, along with him. Grace Albert is Plaintiff's sister.

(ii) Until the demise of Plaintiff's mother and father, they occupied the premises in dispute, up to about 1966 along with the family and other children, though at certain intervals some left after marriage or died.

(iii) 1st Defendant himself admits in evidence that his mother was the head of the household, after the death of grand-mother.

(iv) Plaintiff was engaged in war service in the period 1947 and later was a planter and Estate Superintendent in an estate in the Nuwara Eliya District for some years at least up to 1984.

(v) Plaintiff was the executor to his father's last will, and administered the estate of the father and distributed portions of large land at Thimbirigasyaya in terms of the last will. Under the last will Plaintiff was bequeathed the property in dispute subject to the life interest of mother who died in 1966.

(vi) Plaintiff extended help and financial help to Grace Albert, and permitted her to occupy the premises in dispute, even after he became the sole owner on the demise of his mother. Plaintiff helped 1st Defendant-Appellant in his marriage and also an attesting witness for their marriage.

The sequence discussed from (i) to (vi) above as far as possible would no doubt fortify the position of the Plaintiff that he had paper title, and the title documents as and when produced and marked in evidence were not challenged, according to the proceedings in the District Court. Documents mentioned in paragraphs 2 – 13 of plaint, and marked in evidence P1 – P9 (at pgs. 221 – 262 of the case record). As such there was no serious contest to Plaintiff paper title. I would at this point of my judgment refer to some important legal positions applicable from time immemorial. Almost all documents produced in evidence were marked without any objection more particularly documents P1 – P9. As such it becomes evidence for all purposes of the law and in this case. Vide 1981(1) SLR 18 at 24; 1915 – 1916, 18 NLR 85; 31 NLR 385; 58 NLR 246; 1997 (2) SLR 101. In all the above circumstances Plaintiff has good title to the property in dispute.

Once the paper title became undisputed the burden shifted to the Defendants to show that they had independent rights in the form of prescription as claimed by them. The dictum of Gratian J. in Pathirana Vs. Jayasundera 58 NLR at 177, becomes applicable and may be noted.

In a rei vindiatio 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

I had the benefit of reading the following authorities cited by learned counsel for Plaintiff-Respondent incorporated in the written submissions of Plaintiff-Respondent. Theivandram Vs. Ramanathen Chettiar 1986 (2) SLR 219 at 222; Beedi Johava Vs. Warusawithana 1988(3) SLR 227. I would advert to the legal position that moment title is proved, the right to possess it, is presumed. As such Plaintiff has dominium by proving paper title.

There is evidence of Plaintiff as well as Plaintiff witness Hugh Mettasena Albert (1st Defendant's brother) that Plaintiff-Respondent after the death of Plaintiff's mother and father, it was the Plaintiff who maintained the property in dispute and Plaintiff permitted Grace Albert the 1st Defendant's mother to occupy the premises in dispute. Even after Plaintiff's father's death Plaintiff provided his mother's expenses for the household, and after mother's death he provided household expenses to Grace Albert the 1st Defendant-Appellant's mother. There is also evidence of payment of

Municipal rates (P10 – P29). In all important matters pertaining to the property in dispute, decisions taken by Plaintiff.

Attention of this court had been drawn to documents P30 & P31. These documents were produced to demonstrate Plaintiff-Respondent control and possession over the property. These documents would be important to show the cutting down of jack trees in the property and to infer Plaintiff's possession and control. P30 is an exercise book containing figures and details of timber sown from the jack trees that were cut. The exercise book P30 contains the figures of 1st Defendant, 2nd Defendant and Plaintiff. P31 is the permit issued to Plaintiff-Respondent by the Government Agent giving permission to cut jack trees. P30 and P31 would establish Plaintiff-Respondent's possession/control over the property in dispute. In P30 there is evidence of the 1st Defendant admitting Plaintiff-Respondent monitory accounts. Further dates appearing in P31 and P30D to P30H would to some extent reduce or lessen the importance of letter V29. I will deal with V29 at a subsequent stage. No doubt the evidence on P30 & P31 indicate Plaintiff was in control of the property and the Defendant-Appellant acted as Plaintiff's agent in the instance.

In cross-examination of the 1st Defendant on the exercise book P30 (folio 175) shows that the 1st Defendant was reticent when questioned

about the writing by uncle (Plaintiff-Respondent). It is interesting to note the following which also reflect on Appellant's demeanor in court

ප්‍ර: 'පැ.3' 'ඩී' 'fපිටි' කියා අකුරු තියෙනවා?

උ: ඒවා මාමාගේ අකුරු කියි පිලිගන්නවා.

ප්‍ර: 'පැ.30' 'අයි' හි අකුරු කාගේද? කලින් මමාගේ කිවේ නැහැ. මේවා කාගේද? දැන් පිලිගන්නවාද?

උ: ඔව්

ප්‍ර: ඒ වාගේම සෑම පිටුවකම 'fපලැග්', 'fපිටි' කියා තියෙනවා?

උ: ඔව්

ප්‍ර: මමා ලියපුවා?

උ: ඔව්

ප්‍ර: 'පැ.30' 'ඩී' හි අකුරු මාමාගේ කියන්නත් බැහැ මාමාගේ නොවේ කියන්නත් බැහැ?

උ: මට කියන්න බැහැ මාමාගේ අත් අකුරු ගැන

(සක්ෂිකරු සාක්ෂි කුඩුවේ සිට සිනාසෙයි)

ප්‍ර: හිනා ගියේ ඇයි

උ: ලියන අකුරු නම් මම දන්නවා. මමාගේ ලොකු අකුරු

ප්‍ර: තමන් කලින් කිවා මාමාගේ අකුරු හඳුනන්න බැහැ කියා? මිට මොහොතකට කලින් කිවා. මාගේ ලඟ කොල තියෙනවා?

උ: පිළිතුරු නැත.

Letter V29

This letter is dated 26.1.1978. This is an item of evidence relied by the Appellant to demonstrate, despite of V29, the Appellants continued possession (without quitting as in V29). This I observe would not be the starting point of prescription. I agree with learned counsel for the Plaintiff-Respondent that the document must be read in it's entirety, in the context of

the case in hand. This court observes that V29 is a letter from an uncle to nephew referring to a family problem and uncle seems to be giving good advice to maintain peace among the family members and a humble request to the 1st Defendant-Appellant to move out as early as possible. It is not certainly a notice to quit but as the Respondent calls it, a mere admonition by uncle to nephew, after hearing of an assault to his sister, which advice is natural in the circumstances of the case. I am unable to agree with the point of view of the Appellant regarding letter V.29. I hold that V29 is not the starting point of prescriptive possession. It is not a positive act but mere communication between parties.

In Podihamy Vs. Elaris 1988(2) SLR at 137...

In viewing the claim of the 1st defendant based upon prescriptive possession one must not lose sight of the very important fact that the parties are close relatives who had been living in amity during earlier times which therefore rendered it necessary for the 1st defendant to show some positive act suggesting ouster as a starting point for prescriptive possession to commence.

Further V29 is dated 20.1.1978. P31 the permit given to Plaintiff is dated 23.1.1979 and P30D of P30 I find the date 28.3.1981. The last page of P30 gives the date 28/3 & 10/4. As such if one were to consider the contents of V29 and P30, P31 there are no grounds of 'ouster' contemplated in any of them.

No where in the evidence of the 1st Defendant-Appellant, he refer to any obstruction by any act committed against the use and enjoyment of Plaintiff's rights.

The electoral list P11 – P20, to be noted, 1978 headed by Grace Albert (1st Defendant's mother) followed by brother and sisters and the Defendants.

1979 -1986 omission of 1st & 2nd Defendants names only Grace Albert. 1983 - Plaintiff-Respondent as head of the house hold and includes 1st & 2nd Defendant (1983 Plaintiff retires as a planter).

The list produced by Defendant from 1980 – 1986 refer to premises No. 312 A? 1986 list headed by Plaintiff-Respondent.

All the above taken together does not favour Defendant's continued possession. Nor adverse possession.

Having considered the evidence led at the trial along with the judgment of the learned trial judge, it is clear that the point of obstruction/protest or challenge to Plaintiff-Respondent's rights commenced only with execution proceeding in Case No. 7142/RE, i.e on 9.2.1989, when Fiscal went to execute the writ. I am in agreement with the views of Respondent in this regard. At pg. 180/181 of the original record the Defendant no doubt admitted the correct position.

ප්‍ර: මේ ලගදි 1989 පමණ තමා මේ අදහස ඇති කරගෙන අයිතිය ඉල්ලන්න පිස්කල් (Fiscal) ගියාට පසුව?

උ: 1989 අම්මා ගියාට පසුව

I have also considered the dicta in the following case, and I hold that in the case in hand the Appellants have not proved and established the requirements under Section 3 of the Prescription Ordinance. Document V29 does not suggest any starting point of prescription.

Sirajudeen & Two Others Vs. Abbas 1994 (2) SLR 365 at 370..

There is another relevant aspect of the plea of prescriptive title which was overlooked by the trial judge. That principle is best stated in the words of Gratiaen, J. in Chelliah v. Wijenathan, where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights." Mr. Daluwatta relied on 1D1 as the starting point of prescription. As already stated, 1D1 is of little or no avail to the 1st defendant's case. In my view, the 1st defendant has failed to establish a starting point for his acquisition of prescriptive title. This too is another important lacuna in the 1st defendant's case.

On a consideration of the totality of the evidence led in support of the 1st defendant's case. all that we are left with is the facile story of walking into abandoned premises after the Japanese air raid. The material is far too slender to found a claim based on prescriptive title. Mr. Kanag-Isvaran for the plaintiff respondent relevantly cited the following passage from Walter Pereira's Laws of Ceylon. 2nd Edition, page 396. "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak

to specific facts, and the question of possession has to be decided thereupon by court. Peynis v. Pedro. In the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the 1st defendant to a decree in his favour in terms of section 3 of the Prescription Ordinance.

I would consider the judgment of the trial judge to be in order having considered the main question of prescriptive rights on one hand and on the other hand the possession of the 1st & 2nd Defendant-Appellants and the Plaintiff-Respondent. It cannot be said as alleged by the Appellants that there is a total disregard to Section 187 of the Civil Procedure Code. Trial Judge has analysed all important items of evidence and given his views on same. Even if one argues that certain aspects of the judgment could be faulted I am not inclined to disturb the judgment and the ultimate conclusion arrived at by the learned District Judge, in my view is correct which are supported by the evidence led at the trial. The alleged errors have not prejudiced the substantial rights of parties. In Gunasena Vs. Kandage & Others 1997 (3) SLR 393..

Per Weerasuriya J.

"The learned District Judge was in error for failing to adduce reasons for her findings. Nevertheless the question that has to be examined is whether or not such failure on her part had prejudiced the substantial rights of the defendant-appellant or has occasioned a failure of justice. Having considered the totality of the evidence, it seems to me that no

prejudice has been caused to the substantial rights of the defendant-appellant or has occasioned a failure of justice by this error, defect or irregularity of the judgment.

In all the above circumstances I affirm the judgment of the learned District Judge. Appeal dismissed, without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL