IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

CA 1078/96 (F)
DC Kuliyapitiya Case No. 1035/P

Jayasooriya Arachchige
Jayalal,
"Laksiri Niwasa",
Wellawa, Bopitiya.

Plaintiff-Appellant.

Vs.
Jayasooriya Arachchige
Pushpakumara Jayasinghe,
Wellawa, Bopitiya.
Menik Purage Noiya,
Wellawa, Bopitiya.

Defendant-Respondents.

BEFORE : A W A SALAM, J

COUNSEL : Rohan Sahabandu for the plaintiff-appellant, Nimal Muthukumarana for the 2nd defendant-respondent and S N Vijith Singh for the 1st defendant-respondent.

ARGUED ON : 01.11.2011

Written Submissions tendered on : 31.05.2012

DECIDED ON : 17.09.2012

A W A SALAM, J.

This appeal arises on the judgment and interlocutory decree dated 16.12.1996. By the said judgment and interlocutory decree the learned District Judge decided to allow the partition action filed by the plaintiff and decreed that an undivided 1/3rd

share be allotted to the plaintiff and amotherv 1/3rd share to the 1st defendant keeping the balance undivided 1/3rd share unalloted in favour of Sopinona alias Marynona or her legal heirs.

The facts briefly are that the plaintiff filed action to partition the land called Meegahamullawatta described in the schedule to the plaint in extent A3 – R0- P0. He averred that on a chain of title traced from the three original owners an undivided 1/3rd share devolved on him and 2/3rd share on the 1st defendant. The plaintiff made the 2nd defendant a party to the action as her deceased husband had been on the land with the leave and licence of the plaintiff's predecessor in title. However, the 2nd defendant in her statement of claim took up the position that her husband K.P.Kiriya served under Karolis (a predecessor of the plaintiff) from the year 1940 and in consideration of the services rendered, Karolis had promised to give the lands to the said Kiriya, as set-out in the schedule to the statement of claim. At the trial on behalf of the 2nd defendant the main point of contest raised was whether Kiriya had possessed lots 2 and 3 shown in the preliminary plan 92/116 dated 5th August 1992 and acquired a valid prescriptive title. The learned District Judge answered the point of contest regarding the prescriptive rights of the 2nd defendant in the affirmative.

One of the main grounds urged against the impugned judgment is the failure of the learned District Judge to identify the corpus in relation to the land described in the schedule to the plaint. In terms of the plaint the land sought to be partitioned is described as in extent of about 3 acres. The deeds produced by the plaintiff also refer to the land as being of the same extent. The

Commissioner has been directed to survey a land of 3 acres as described in the schedule to the plaint. However the land surveyed was 2 acres 1 rood and 8 perches. As regards the extent of the corpus given in the plaint and disclosed in the preliminary plan there is a difference of 112 perches. The lis pendens registered in the case is in respect of the entire land which is in extent of 3 acres. In terms of section 16 (1) of the Partition Law the surveyor is required to report as to whether the land surveyed by him is substantially the same asa described in the plaint.

In the case of Brampy Appuhamy Vs Menis Appuhamy, the corpus sought to be partitioned was described in the plaint as a land about 6 acres, and a commission was issued to survey a land of that extent. The surveyor, however, surveyed a land of only 2 acres and 3 roods. Interlocutory decree was also entered in respect of a land 2 acres and 3 roods in extent without any question being raised by any of the parties as to the wide discrepancy between the extent given in the plaint and what was shown in the preliminary plan. None of the defendants had averred under section 23 (1) of the then Partition Act that only a portion of the land described in the plaint should be made the subject matter of the action. It was held that the Court acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the plaint.

In the case of Sopaya Silva and another vs. Magilin Silva (1989 Sri Lanka Law Report 105) following the judgment in Brampy Appuhamy this court held that on receipt of the surveyors return disclosing substantially a different land, the District Judge should decide whether to return the commission with

instructions to survey the land as described in the plaint or whether the surveyor should be examined as provided in section 18 (2) of the Partition Law. In this matter the surveyor has failed to report to court in detail the reason that led to the discrepancy. The surveyor has merely stated in his report as pointed out by the plaintiff he surveyed the land and that he thinks the land described in the plaint was surveyed by him. As has been pointed out in several judgments, the partition law requires the surveyors who undertake the preparation of the preliminary plan to survey the land described in the plaint and to take into consideration the location of the land, boundaries and the extent before coming to the conclusion as to whether the land surveyed by him is exactly the same as described in the plaint or at least something similar. The learned district judge appears to have failed to appreciate that the lis pendens registered in in this case is in respect of a land of 480 perches while the land surveyed is only 368 perches. Above all, the boundaries given in the preliminary plan and the land described in the schedule to the plaint are also different and the surveyor has not given any explanation on this matter as well. In the circumstances, it is quite clear that section 18 (3) of the Partition Law has not been complied with in this case and therefore the judgement and the interlocutory decree cannot be allowed to stand. It is the duty of the learned judge in every partition case to identify the corpus properly which duty is considered to be as important as investigation of title.

As regards the issue of prescription the learned district judge held that the 2nd defendant-respondent had prescribed to lots 2 and 3 in plan No. 92/116 dated 5th August 1992 by possession adverse to the plaintiff and the 1st defendant. According to the

evidence of the plaintiff Kiriya was a servant of the plaintiff's predecessor in title (Karolis) and it was he who had arranged the marriage of Kiriya. Admittedly, Kiriya had served under Karolis Appuhamy for more than 30 years. In 1960 the substituted 2nd defendant married and lived with Kiriya on the estate of Karolis Appuhamy. Hence, the change of character by an overt act has to be established. The learned district judge has not properly examined the question of ouster by an overt act.

On the contrary in 1965 Karolis Appuhamy transferred 1/3rd share of his rights to his son Karunaratne Jayasooriya by deed bearing No 12768 dated 1st June 1965. In the circumstances, an overt act is necessary to be established to claim prescription. In this respect it is appropriate to draw the attention to the cases of Sirajudeen vs. Abbas 1994 (2) Sri Lanka Law Report 365 and Alwis vs. Perera 21 New Law Report 321 also becomes important in this regard. The learned district judge has not considered properly whether the 2nd defendant -respondent has established the change of character by an overt act from being the position of a licensee. In short, the learned district judge does not appear to have appreciated the principle involved with regard to a claim of prescription made by a person who commenced possession with the permission of the owner.

Taking all these matters into consideration it appears that the question of prescription claimed by the 2nd defendant has not been properly analysed by the learned district judge and therefore needs to be reconsidered. In the circumstances, I am of the opinion that the judgement and interlocutory decree entered in this case should be set aside and that case sent back for retrial. Accordingly the learned district judge is directed to

rehear the case and evaluate the evidence on the question of prescription and adjudicate on that issue according to law. The learned district judge is also directed to identify the land properly before he enters judgement. Subject to the above variations, the judgment is set aside and case sent back for re-trial. There shall be no costs.

Judge of the Court of Appeal.

NR/-