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

C.A 249/1997 (F)
D.C. Kurunegala 2827/L

M. M. N. Punchibanda of
Werapola, Wariyapola
(Deceased)

PLAINTIFF-APPELLANT

M. M. N. Pemadasa of
Werapola, Wariyapola

SUBSTITUTED-PLAINTIFF-APPELLANT

Vs.

1. M. M. N. Punchibanda of
Werapola, Wariyapola
(Deceased)

1A. M. M. N. Ranbanda of
Werapola, Wariyapola

1B. M. M. N. Punchibanda of
Werapola, Wariyapola

2. M. M. N. Bandimenika of
Pothuhera
(Deceased)

2A. A. M. Bandaranayake of
Ratmale, Pothuhera

2B. R. M. Senanayake of
Ratmalegedera, Pothuhera.

3. W. M. Kuma of
Werapola, Wariyapola.

4. W. M. Muthumenika of
Walgampattu Korale, Ratmale.

5. M. M. P. Kiribanda of
Werapola, Wariyapola

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: P. Peramunagama for Substituted Plaintiff-Appellant
Upali de Almeda with R.J. V. de Almeda for
1a, 1b, 3, 4 & 5 Defendant-Respondents

ARGUED ON: 24.11.2011

DECIDED ON: 16.02.2012

GOONERATNE J.

This was an action instituted in the District Court of Kurunegala, against the Defendant-Respondent seeking a judgment setting aside the usufructuary Mortgage Bond No. 3072 dated 10.10.1905 (P1)

attested by F. F. Kulatilaka, Notary Public on payment of Rs. 50/- to the Defendants and a deed to be executed by the Registrar of the District Court in favour of the Plaintiff-Appellant and possession be handed over and Plaintiff-Appellant be placed in possession in the land described in the schedule to the plaint. It appears from the record that plaint was filed on or about 31.7.1986 and amended plaint was filed on 23.5.1990. Perusal of the record does not indicate whether amended plaint was objected to by the Defendant and whether court accepted the amended plaint. Issues have been raised by the appellant on the plaint. However the learned District Judge seems to have based his judgment on the amended plaint. Amended answer is dated 14.5.1993.

What is significant in this suit is that as pointed out by the counsel for Defendant-Respondent, the institution of the case is after a lapse of 81 years from the date of the Mortgage Bond and an attempt to redeem it. Judgment delivered in the Original Court on or about 10.3.1997. Over a century passed between the material dates. The original mortgagor and mortgagee namely Ranhamy and Ukkubanda respectively died long year ago and Plaintiff-Appellant claim that he is a grand son and the original mortgagor was his 'කිරි අත්තා', in the way he describes.

It was the position of the Appellant at the hearing of this appeal that Plaintiff is entitled to redeem the mortgage and on that basis strictly Plaintiff's title need not be gone into or considered. Counsel also drew the attention of this court that issues Nos. 1 – 3 had been answered in his favour in the affirmative. However the learned District Judge answers to same should be examined carefully since it is not merely a brief answer as 'yes' and 'no', but to reproduce same is that (answered by the trial Judge).

Issue (1) According to P1 mortgaged to Ukku Banda

As such court has been careful not to admit that P1 was executed by Plaintiff's predecessors or that the Defendants are successors of the mortgagee Ukkubanda as suggested in the said issue.

Issue (2) Defendants possess the land as admitted by Defendants.

This answer slightly varies from the issue suggested.

Issue (3) Rs. 50 deposited in courts.

The issue No. (3) in it's context reads differently.

As regards Issue No. 4 trial Judge states not proved. In other words Plaintiff is not entitled to redeem and get possession of the land according to law and issue No. 5 Plaintiff is not entitled to relief prayed for in the plaint.

In the above answers by the learned District Judge it is apparent that issues are <u>not strictly</u> answered in favour of the Plaintiff-Appellant. In the submissions of the Appellant it is also stated that according to the

Mortgage Bond P1, mortgagors his heirs, executors, administrators, trustees or agents of the mortgagor is entitled to redeem the mortgage from the mortgagees, heirs, executors, administrators, trustees or agents of the mortgagee. Appellant very strongly stressed that there is no necessity to join co-owners for the purpose of redeeming the mortgage. He also argued that once redeemed by one co-owner other co-owners are entitled to possess. This is the point that concerns this court since the Appellant in his evidence has disclosed the fact that Plaintiff has brothers and he (Plaintiff) is not the sole owner of the property. Plaintiff's father was one of the children of the original mortgagor Ranhamy, who had 5 children. What about them or their successors, heirs etc?

Learned Counsel for Appellant also referred to folio 134 of the judgment and argued that the trial Judge's reasoning at that point is contrary to the prayer to the plaint. As stated above Plaintiff had other brothers who are not parties to this action. The trial Judge has emphasized in that part of the judgment that (ඔහුගේ පියාට තවත් දරුවන් සිටියා නම් මෙම දේපල ඔහුට පමණක් නොව ඔහුගේ අනිකුත් සහෝදර සහෝදරියන්ට හිමිවිය යුතුය. ඒ අනුව ඔවුන් ද මෙම නඩුවේ පැමිණිලිකරුවන් විය යුතුය. එසේ නොකර පැමිණිලිකරුගේම පිළිගැනීම මත තම පියාට තවත් දරුවන් සිටියා නම් මෙම

දේපලෙන් ඔවුන්ට ද කොටස් හිමිවිය යුතු බැවින් පැමිණිලිකරු සිය පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති පරිදි ඔහුට පමණක් නම් බවට තීන්දුවක් කරන ලෙසට ඉල්ලා සිටීමට ඔහුට නීතියෙන් අයිතියක් නැත. එනම් රන්හාමිට, ඩිංගිරිබණ්ඩා, මුදියන්සේ, කිරිමැණිකා, රන්මැණිකා සහ මුතුමැණිකා යන දරුවන් සිටි බවත් මුදියන්සේට දරුවන් දෙදෙනෙක් හෝ තිදෙනෙක් සිටි බව දන්නා නමුත් ඔවුන්ගේ නම් නොදන්නා බවත්, කිරිමැණිකා, රන්මැණිකා සහ මුතුමැණිකාට දරුවන් සිටි බවත් පැමිණිලිකරුට සහෝදරියන් 5 දෙනෙක් සහ සහෝදරයන් සිටි බවත් පැමිණිලිකරුට සාක්ෂියෙන් පිලිගෙන ඇති හෙයින් පැමිණිලිකරුගේ පැමිණිල්ල අනුව උක්කුබනණ්ඩා මිය ගිය පසු එම දේපල 1, 2, 3, 4, 5 හුක්ති විඳින ලද බවත් පැමිණිල්ලේ සඳහන් කර ඇතත් මෙම විත්තිකරුවන් එම දේපල හුක්ති විඳින්නේ කුමන පදනමක් යටතේ ද යන්න හෙලිදරව් කර නැත.

I have also considered the following authorities cited by learned counsel for the Appellant.

30 NLR 97 ....

The owner of certain property gave an usufructuary mortgage to the defendants, covenanting that "he will not, during the continuance of this mortgage, lease or mortgage the said premises or do any act or deed whatever, which may impeach the rents and income thereof, without the consent in writing first had and obtained."

Thereafter he gave another usufructuary mortgage to the plaintiffs, who were authorized to retain a portion of the consideration for the discharge of the previous mortgage.

Held, that the plaintiffs were entitled to redeem the mortgage granted to the defendants.

1993 (1) SLR 259....

Partition Action – Right to bring a partition action – Pactum antichresis – Usufructuary mortgage bond.

Subject to a few exceptions, only a person who has the ownership and possession or has the right to possession can bring a partition action.

Held: that a plaintiff whose share is subject to a usufructuary mortgage bond in favour of a defendant has full ownership though possession is lost until the redemption of the bond. Such a person can be said to be in possession through the mortgagee and is entitled to file a partition action

A mortgage is a right over the property of another which serves to secure an obligation. It is accessory to a principal obligation and cannot subsist without it.

There is sometimes a stipulation in a mortgage bond (called pactum antichresis) that the mortgage shall have the use of the property and its fruits in lieu of interest , the mortgagor retaining the power at all times redeeming the property.

This type of mortgage bond is called an usufructuary mortgage bond and is not uncommon in our rural areas.

71 NLR 52....

Where a hiwel andekaraya mortgages the hiwel ande of a field to be held and possessed by the mortgagee in lieu of interest, the mortgage is of the usufructuary kind and prescriptive possession of the field by the mortgagee against the mortgagor cannot commence until the mortgage bond is discharged.

A Court can give judgment only in favour of a person who is a party to the action and not in favour of some other person who is neither his predecessor in title nor a party to the action.

Appellant also contends that Defendants are not entitled to prescribe to the property in suit.

24 NLR at 224 ....

Plaintiff executed an usufructuary mortgage of the land in favour of T. T. assigned this mortgage to J. J executed in favour of P what was apparently intended to be a mortgage of his mortgage rights. The deed, however, purported to mortgage the lands originally mortgaged by the plaintiff as though J was the owner, P put the bond in suit, and under the decree the land was sold by an auctioneer, who conveyed the land itself to the purchaser.
Held, that the purchaser under this deed acquired the unsufructuary rights of J to take the produce of the land in lieu of the interest on the mortgage debt.

The appellant argues that the Defendant's witness (3D) in his evidence admitted that the mortgagee was his grand father. (Pg. 122/123 of the brief). In that way Plaintiff may be trying to establish that he is entitled to get the mortgage redeemed. It is the view of this court that under normal and regular circumstances mortgagor or his heirs/successors would be entitled to redeem the mortgage and be placed in possession. The case in hand is not so simple and the very long delay (not properly explained) would

cause difficulty and a court has to be very cautious not to deprive a legally recognized right of either party merely because relationship of mortgagee is mentioned would not suffice.

The Defendant –Respondents on the other hand stress the long delay of 81 years. When it is said so and apparent to court, it is prudent for court to be extremely cautious. Certainly a delay of this nature cannot be merely ignored or taken lightly. This court observes that the Plaintiff-Appellant has not placed acceptable facts concerning Plaintiff pedigree in the plaint/issues and further Plaintiff do not attempt to provide material of the devolution of title. More care need to be taken when there is a total denial of an usufructuary mortgage and that Defendant's predecessors were mortgagees. Just bare details would not suffice. Possession which may be legal and permissive with the lapse of time which is very long and unexplained could become adverse.

The cases cited by the Respondent counsel need to be carefully considered.

Murugappa Chettiar vs. Muththal Achy
58 NLR 29 at 27....

It held that the learned trial Judge had failed to apply established principles pertaining to an action against the estate of a deceased person and, itself applying those

principles, came to the conclusion that the plaintiff had not proved his case. Their Lordships are of the opinion that this decision should be affirmed.

Adopting a view expressed by Fry, L.J., the Supreme Court (Gratiaen, J) said it was the duty of the court to approach the case "with great jealousy, because the claim is brought forward against the estate of a deceased person when that person, who was a chief actor in the transaction impugned was dead," re Garnett, Gandy v. Macaulary. In the same case Brett, M. R., said:-

"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted and the mind of any judge who hears it ought to be, first of all, in a state of suspicion."

I would also incorporate the following in this judgment, relied upon by the Respondents.

Furthermore, the appellant has sought relief in respect of an undivided one half share of a divided extent of 2 Lahas Kurakkan sowing as per the schedule to the plaint. Having thus sought by way of prayer rights in respect of an undivided one half share of 2 Lahas Kurakkan sowing extent, he is precluded from raising issue No. 18 relating to rights in respect of a divided portion of land depicted as Lots 1 and 2 in Plan No. 3266 marked 'X' unless the appellant satisfies Court that subsequent to 1905, a partition took place of the larger land of 2 lahas Kurakkan sowing extent making Lots 1 and 2 in 'X' the allotment of land a divided extent in lieu of an undivided one half share. This was however not the stand of the appellant. No court can grant relief other than those prayed for, as held in the case of Surangi vs. Rodrigo 2003 (3) SLLR 35

Respondent also submit that the mortgagor had 5 children and one of them was his father. His father had 5 children including the Appellant. As such Respondent argues that the entire rights of the mortgagor Ranhamy do not devolve on the Appellant. If at all only an undivided 1/25th share. Learned counsel also submitted that appellant cannot act in a representation character unless a recognized agent within the provisions of the Civil Procedure Code. It was suggested also that intervening circumstances would be a bar to redeeming a mortgage.

In Ran Naide v. Punchi Banda - 31 NLR 478

> A court may presume from lapse of time, in conjunction with other circumstances, that the possession of an usufructuary mortgagee has become adverse.

At pg. 479/480 ....

> The defendants have succeeded in showing that the character of the possession changed and was adverse for well-nigh fifty years. This case is almost on all fours with the case Fernando v. Perera cited by Counsel for the appellant, where Shaw J. observed that undisturbed possession for a long term of years by a usufructuary mortgage may, by itself, raise a presumption of an ouster. There too the defendants produced some old cases in which they and others claiming as heirs of the mortgagees had asserted title to the land.

Tillekeratne Vs. Bastian 21 NLR 12 ....

> It is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.
>
> It is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten yeas before action brought."

A method in which a mortgage may be extinguished is by prescription. Under Roman Dutch Law there is a conflict regarding the period to prescribe. However in our country the required period is 10 years (The Conveyancer & Property Lawyer Vol. 1 Part II E.R.S.R. Coomaraswamy pg. 229). Though the Plaintiff-Appellant states there is no need to join all the co-owners, I am not inclined to accept that submission since the way in which the prayer to the plaint is drafted it is not possible to grant that relief since the Plaintiff-Appellant seems to be the sole beneficiary. The deceased mortgagor had several heirs and defendants. Some of them or good part of the heirs are not properly described and the devolution of title of Plaintiff, and has not been established and proved in this suit may be due to a very long lapse of time. In such a situation court has to act with caution and take all possible precautions to prevent an abuse of process. Plaintiff must plead and prove his title, even if there is a heavy

burden. Plaintiff's pedigree has not been established and proved. Instead evidence revealed that several persons were the original mortgagors heirs or successors, and special details were not led in evidence. It would be necessary to establish that the Defendants are the heirs of the original mortgagee. No death certificates, marriage certificates or birth certificate were produced. At least the death certificate of Plaintiff's father should have been made available. Instead Plaintiff only testified to the fact that his father died 30 years ago. Why was the Plaintiff-Appellant silent for a period of 30 years since his late father's demise? Plaintiff seems to have invited the Defendants to plead prescription.

I have also noted the evidence of Plaintiff that he is in possession of ½ share of the land. Report and plan x and x1 refer to the fact that Plaintiff does not possess the land in dispute. Lot 1 & 2 of plan 'x' claimed by 3rd – 5th Defendants and that these Defendants are in possession of same. Plaintiff's oral evidence and plan and report contradicts the position of Plaintiff's possession. This would fortify Defendants-Respondents prescriptive rights.

Further the vague answers given by the Plaintiff in evidence apart from the fact that plaint does not disclose the capacity and possession of Defendants, I have noted the following answers:

It is not mentioned anywhere in the plaint how and in what capacity that they are in possession. Following are the answers given in evidence by the plaintiff.

ප්‍ර පුංචිබණ්ඩා උක්කු බණ්ඩාගේ දරුවෙක්ද

උ බණ්ඩාගේ දරුවෙක්

ප්‍ර බණ්ඩා කියන්නේ කවුද

පි බමුණාකොටුවෙන් ඇවිත් සිටින්නේ

ප්‍ර ඔහු උක්කු බණ්ඩාගේ උරුම කරුවෙක් නොවේ

පි නැහැ

ප්‍ර බණ්ඩි මැණිකා කාගේ කවුද

පි පුංචිබණ්ඩා නංගි

ප්‍ර ඒ කියන්නේ බංඩාගේ දුව

පි ඔව්

ප්‍ර බන්ඩි මැණිකාගේ අම්මා කවුද

පි මම හරියට දන්නේ නැ. උක්කු මැණිකා කියලා කියනවා

He further admitted that the 3rd defendant Herathhamy is a person from Mahakeliya who has married in Binna.

He further said that the 3rd defendant's mother Dingi;

උක්කු බණ්ඩාගේ දරුවෙක් වෙන්ද ඕනැ

ප්‍ර කිරිඉණ්ඩා කාගේ කවිද?

උ ඔහු ගමේ කොනක්. ඔහුට ඉඩම ලියලා දිලා තියෙනවා. අයිති කරවන් කවුද දන්නේ නැ. ඔහුගේ ඔප්පුවල මිගහමුල වත්ත වැටිලා නැ.

He further said that Punchi Banda's father is from Bamunakotuwa and that he is not sure about the pedigree of the defendants, but they have deeds. He also admitted that he has not given how the defendants got their title and further admitted that he or his predecessors in title had no possession since 1905.

I am also in agreement with the Respondent's submissions that having sought in the prayer (connected to the schedule of plaint) rights in respect of undivided ½ share of 2 lahas sowing in extent, issue No. 18 refer to divided portions of land. Lots 1 & 2 in plan 'x' are divided extents. The question is whether any divided portions were proved in a partition action.

On the other hand the Respondents have placed evidence of devolution of title and produced deeds and documents V1 – V7 and proved title to the land from 1925. There is also evidence of possession by the defendants, as their own land from 1925.

In Walpita Vs. Dharmasena 1980 (2) SLR 183 Wimalaratne J. held presumption of ouster could be drawn from long and continued possession for a period of well over 40 years.

Ran Naide Vs. Ounchi Banda 31 NLR 473 followed.

In all the above circumstances and the several factual positions that emerge from evidence, would support the position of the Defendant-

Respondents especially with the long lapse of time. There are several unexplained areas and gaps in the version of the Plaintiff-appellant's case. Ordinarily a party would be entitled to redeem the mortgage and regain possession. The case in hand differ in very many material aspects. As such this court does not wish to disturb the findings of the learned trial Judge. Judgment of the District Court is affirmed. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL