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

C. A 769 A and 769 B / 1996 F

DC Panadura 246/P

H Winnie Fernando,
No 16, Walana,
Panadura

10th Defenadant-Appellant

K G Sunil,
No 216/5,
Egodauyana, Moratuwa.

11th Defendant-Appellant

Vs

V P Malalasekara,
102/3, Rosmead Place,
Colombo 7

Plaintiff-Respondent

A M Wijeratna,
8, Elliot Place,
Colombo 8

1st Defendant-Respondent and others

Before : A.W.A.Salam J
Counsel: Mahinda Ralapanawa for the 10th defendant-appellant, Daya Guruge for the 11th defendant-appellant and R C Gunaratna for the respondents.

Argued On: 22.03.2011

Written Submissions Tendered On: 05.04.2011
Decided On: 13.12.2011

defendant conveyed to him on deed 235 in the year 1988 an undivided l6 perches and that the corpus be partitioned between him and the 10 defendant. The main ground of appeal of the 10th and 11th defendants is based on an alleged improper examination of title by the learned trial judge.

There was no controversy that in 1971 the plaintiff's mother Clarice instituted a rei-vindication action (No 12417) against Winnie Fernando, the 10th defendant and two others seeking the ejectment of them from the land and premises in suit. Clarice, the plaintiff in the rei-vindicatio action has based her title on the same line of title as has been pleaded by the plaintiff in the instant partition action.

The appellant had sought to impugn the judgment of the learned district judge also on the grounds that the 10th defendant-appellant's had possessed the corpus for more than 16 years even after the judgment had been entered against him in the rei-vindicatio action. The appellants state that the plaintif and 1st to 9th defendants are estopped from claiming the land since they have not executed the judgment in the rei-vindicatio action for a long period of time exceeding well over 10 years. Further the 10th defendant appellant put forward in the forefront of his case that his possession of the subject matter over a period of 16 years after entering judgment and decree in case No 12417/L has given him sufficient prescriptive title. In any event, the 10th defendant appellant has

The plaintiff in his evidence stated that subsequent to the impugned judgment having been entered in case No 12417, he informed the 10th defendant of his intention to dispose of the property and permitted him to stay on the land till he built him a house. As regards the permissive user of the 10th defendant, the plaintiff was able to establish that they prepared plan bearing No 2604 by W.R.B de Silva licensed Surveyor which was submitted for approval to the Urban Council of Panadura in September 1980. The receipt issued by the Panadura Urban Council is marked P16. As a matter of fact the 10th defendant in his evidence admitted that a surveyor came to the land and subdivided into five lots and it was the plaintiff intention to sell the same. However 10th defendant maintained the position that he objected to the said survey.

As regards the payment of rates to the Urban Council, it has to be observed that until the year 1985 the rates have been paid by plaintiff. The receipts regarding the payment of rates were produced marked P10, P11, P12, 1D6, 1D7. The 10th defendant in his evidence stated initially that he paid the rates for both allotments of land. Thereafter he stated that there was a remission of rates but no evidence was produced in support of this assertion. In the circumstances, the learned counsel of the plaintiff has submitted that his client has clearly rebutted the presumption arising under section 110 of the Evidence Ordinance and established that the 10th defendant's occupation

his behalf and rejecting the evidence of the 10th defendant-appellant. It was also submitted that in deciding this case in favour of the plaintiff-respondent he has failed to give any reasons for his findings other than a mere narration of the evidence given by the witnesses.

As regards Points of contest No's 29 and 30 it was urged that the learned district judge had erred in deciding the same in favour of the plaintiff-respondent when it was quite clear that the boundaries and extent given in the land described in the schedule to the plaint are different from the boundaries and extent given in the Preliminary Plan marked 'X'. It is to be observed at this stage that there was no contest regarding the identity of the corpus and whatever the slight discrepancies that they may have occurred in the description of the land and its boundaries cannot be taken as being favourable to the contesting defendants. It is to be noted that the contesting defendants have in fact made a claim for prescriptive title to the subject matter of the action that was identified by the plaintiff in his plaint and also depicted in the preliminary plan.

It transpired in the evidence of the plaintiff that to facilitate the plaintiff and/or his successor in title to possess the property in the manner they wanted the 10th the defendants has agreed to accept alternative accommodation provided by the plaintiff. Accordingly the plaintiff has constructed a house at

that the contesting defendants are mere licensees.

For reasons stated above, I am of the opinion that the both appeals preferred by the 10th and 11th defendant-appellants do not merit any favourable considerations and therefore liable to be dismissed. Accordingly, the judgment of the learned district judge therefore is affirmed and appeals dismissed without cost.

Judge of the Court of Appeal

A W Abdus Salam,J

This is an action to partition the land called Appukutiyawatta and Parangiyawatta, in terms of the Partition Law No 17 of 1997. The plaintiff in his plaint has shown undivided rights in the land to his siblings 1st to 9th defendants. The 10th and 11th defendants are claimants before the surveyor and added as parties to the case. They filed their statement of claim setting up a title to the entire land by right of long and prescriptive possession. The corpus has been depicted in plan No 725 dated 12. 5. 1990 made by K G Fernando Licenced Surveyor and Commissioner of Court.

According to the plaintiff by right of long possession Don Siyadoris Apphuhamy and Kuruppage Dona Banchohamy were the owners of the corpus which was originally depicted in plan 8916 dated 03.05.1922 made surveyor Flamer Caldera. The said original owners had gifted the property to their daughter Dona Claris who died leaving a last will bearing no 5044, dated 11.10.1970 which was duly proved and admitted to probate in the District Court of Colombo in Testamentary proceedings No 897. Subsequently, by executors conveyance bearing No 6755, the land in question has been conveyed to the plaintiff and the Is to 9th defendants.

The 10th and 11th defendants maintained that they had prescribed to the land and 12th defendant pleaded that the 10th

raised the question as to whether the plaintiff had proved that he was the licensee in case No 12417/L and whether the learned district judge in his the impugned judgment has given sufficient reasons for his conclusion that the land should be partitioned according to the rights shown by the plaintiff.

There had been admittedly two previous cases in which the 10th defendant and the 11th defendant's predecessor-in-title were defendants. It has been contented on behalf of the plaintiff-respondent that in fact the burden of examining title of the parties in a partition action was considerably lightened due to the decree entered in the earlier actions against the contesting defendants. In the circumstances, the plaintiff has submitted that the position maintained by the contesting defendants that there had been no proper examination of title by the trial judge, cannot be accepted.

Another question that loomed large in the presentation of the case of the contesting defendants was that they had prescribed to corpus. The mother of the plaintiff instituted action bearing No 12417 against the 10th defendant and sought the ejectment of the 10th defendant from the land. The plaint in that case is marked P6, the answer P7 and the decree dated 19th January 1973 as P8. The plaintiff's mother died in 1973 and probate was issued on 23.09.1982. It is contended at the argument that the 10th defendant was in possession of this land since 1973 and therefore the burden is on the plaintiff to establish that he did not possess the land *ut dominus*.

of the land was referable to an acknowledgment of the plaintiff's title.

According to the 11th defendant the mother of the plaintiff instituted action No 10875 against the 11th defendant's predecessor-in-title Siripala in respect of this land. The plaint is marked 1D2, the answer 1D3 and judgment was entered in favour of the plaintiffs mother in l968. The decree entered in the said case was marked as 1 D 4. Thus it is common knowledge that Siripala has had no paper title to this land and the 11th defendant in his statement of claim pleads that he purchased this land in 1985. In his evidence he stated that at the time he made the purchase from Siripala, the latter was not on this land. The 11th defendant was able to testify in regard to his alleged title only from the year 1985. Admittedly, when Jayasiri Malasekera cut down trees on this land Siripala had not objected to the trees being so cut down.

The evidence also indicates that Siripala Fernando had put up a foundation for a building and the 11th defendat-appellant put up a small house on the very same foundation. He testified that the plaintiff and/or his agent did not cut down any trees that stood on the said five (05) perches of land.

It was submitted that the trial judge had erred in accepting the evidence of the plaintiff-respondent and other evidence led on

Sarikamulla in Panadura for the 10th defendant. The 10th defendant has in fact agreed to vacate the premises in question and has also made a statement to the police stating that he is willing to move into the house constructed by the plaintiff to provide him alternative accommodation. A photograph of the house constructed by the plaintiff has been produced marked as P14.

Even though the contesting defendant alleged that the statement made to the police has been recorded under duress it has not been proved according to law. The contesting defendant has not even made a single complaint to any one in authority regarding the alleged duress exerted on him. Further, the contesting defendant has also made the statement to the mediation board admitting the position taken up by the plaintiff.

Taking all these matters into consideration it is highly improbable on a balance of probability to infer that the contesting defendants have acquired a prescriptive title to the subject matter of the action or acquired any other rights by right of purchase.

In the circumstances, the irresistible conclusion the learned district judge could have arrived at was that the land in question is owned by the plaintiff and 1st to 9th defendants and