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

Case No. CA 479/96 F

D.C. (Trincomalee) 93/L

Sameer Hajiar
Noona Umma,
Ward 6, Kinniya.
Defendant-Appellant

Vs

Sameed Hajiar
Abdul Hameed
Hajiar,
Ward 6, Kinniya.
Plaintiff-Respondent

Before : **S.Sriskandarajah, J. (P/CA) and**
A.W.A. Salam. J.

Counsel : Nizam Kariyapper for the defendant-appellant and
V Puvitharan for the plaintiff-respondent.

Written Submissions tendered on: 14.06.2011.

Decided on : 15.12.2011.

A W Abdus Salam J.

This is an appeal preferred against the judgment of the district judge of Trincomalee dated 31.5.96 granting relief to the plaintiff in a possessory action. The facts relating to the action briefly are that the plaintiff and the defendant are siblings. According to the plaintiff the land in dispute had been purchased by his father-in-law Asaman Magathum at a fiscal sale and was granted a fiscal conveyance bearing No 6 dated 20. May 1914. Even though the title of the father-in-law of the plaintiff is irrelevant to the action, the plaintiff has attempted to justify his possession by virtue of his father-in-law's title. The simple complaint of the plaintiff as averred in paragraph 4 of the plaint is that the defendant on or about 24 March 1991 wrongfully and unlawfully taken forcible possession of the subject matter.

The defendant having generally denied the averments in the plaint, by way of defence maintained that she was in undisturbed and uninterrupted possession of the land in question for a period of well over 20 years and that she had acquired a valid prescriptive title to the said property. The relief sought by the defendant is the dismissal of the plaintiff's action.

The matter of the dispute proceeded to trial on 8 issues of which the first five were suggested by the plaintiff and the

rest by the defendant. At the trial the plaintiff gave evidence and closed his case producing 4 documents. The defendant also gave evidence and thereafter led the evidence of A.S. Muththalif Hajiar and A.R.Segu Abdulla.

As far as the evidence adduced at the trial is concerned the learned district judge has arrived at the definite finding that the evidence of the defendant when compared with that of Segu Abdulla is full of contradictions. Taking the evidence of the defendant independently, the learned district judge has commended that she is not inclined to accept her evidence as being the true narration of the incidence relating to the matter in dispute and the general background of the state of affairs that existed in this area during the relevant period. Having analyzed the evidence of both parties the learned district judge has concluded that the version of the plaintiff is more credible than that of the defendant. I am not inclined to disturb the finding of the learned district judge on the credibility of the witnesses, for she has had the distinct privilege and opportunity of seeing the witnesses testifying and had in fact observed the manner in which they answered the questions put to them and the demeanour they maintained during such exercise. Having considered the totality of the evidence led at the trial, I am unable to hold that the trial judge's findings touching upon the credibility and testimonial trustworthiness, are unjustified or erroneous. The learned district judge paying attention to every careful detail to the testimony of the witnesses has adversely commented on the contradictions

arising between the testimony of the plaintiff and that of Segu Abdulla, as one of the grounds that influenced her to rely on the plaintiff's evidence in preference to that of the defendant and her witnesses.

The guiding principles relating to the approach towards the manner in which the appellate court should view at the findings relating to the credibility of witnesses and questions of fact have been succinctly laid down in the case of De Silva Vs Seneviratna 70 NLR 69. As the findings of a trial judge on those matters are based upon the trial judge's perception of evidence led at the trial, such findings are entitled to great weight. They ought to be reversed only if it appears to the Appellate Court that the trial judge has failed to make the full use of his advantage of seeing and listening to the witnesses.

In the present case when the judgment of the learned district judge relating to the evaluation of the evidence is even critically looked at, I am not satisfied that it deserves a reversal based on the principle that it had ended up in a miscarriage of justice.

When the impugned judgment is carefully scrutinized, it appears to me that the learned judge has fairly applied her knowledge of men and matters and their patterns of conduct together with the general customs, matters of affairs and human reactions specially during the period when there was absolute lawlessness in the area due to a state of an ongoing civil war and the presence of Indian

peacekeeping Force. Hence, I am not inclined to subscribe to the view that the learned district judge had erred in rejecting the evidence of the defendant and accepting the evidence of the plaintiff.

The next question that needs to be addressed is whether the plaintiff had a legal basis to institute a possessory action and emerge victorious over the defendant. To succeed in a possessory action the plaintiff must prove that he was in possession "ut dominus. In the words of Wood Renton, J. who later adorned as the head of the judiciary stated in Fernando et al vs. Fernando et al (13 N.L.R. 164 at 165) that one must have possessed not alieno nomine, but with the intention of holding and dealing with the property as his own and a lessee who has entered into possession bona fide under a lease is entitled to the possessory remedy even though the lease may be technically defective, as he "had possession "ut dominus.

A passage from the decision in Menike Vs Dharmadasa is worth reproducing so as to comprehend the true nature of the possessory action. In that judgment reported in 50 NLR 125 Kanagaratna J explaining the nature of the possessory action and its availability to various types of possession stated as follows...

> "Possessory remedies were granted to persons who had juristic possession. A person must have not merely the *corpus,* but also the *animus* of possession: the will coinciding with the physical

relationship. A person not only holds the thing in his hands, but intends to hold it for himself alone: it is his intention to exclude every one else from the thing. So far as the exclusion of others is concerned, he holds the thing in just the same way as if he were the actual owner, *i.e.,* as if he had legally sole control over it, whether he is really the owner or not, and whether again, in the latter case, he knows he is not the owner (as in the case of a pledgee or a lessee[*(1938) 40 N. L. R. 41.*]) *or* believes himself to be the owner (as in the case of a *bona fide* possessor). Any one who intends to exclude every body else has the *animus domini,* (the will of an owner), just as much as the owner himself. The possession of the juristic possessor entitles him to a legal remedy quite irrespectively of his right [*(1911) 14 N. L. R. 317.*]".

On perusal of the evidence led at the trial and accepted by the learned district judge, I do not think it is open to the defendant to urge that the plaintiff had no *animus* of possession. As is evident from the version of the plaintiff his determination to be in possession of the subject matter has coincided with this physical possession and that he had in fact intended the property to be held in his hands, to the exclusion of the defendant and all others. In other words his possession was in just the same way as if he had legally sole control over it, although he knew that his father-in-law was the owner. As has been authoritatively stated in the decided

cases any one who intends to exclude every body else has the *animus domini,* (the will of an owner), just as much as the owner himself. The possession of the juristic possessor entitles him to a legal remedy quite irrespectively of his right [*(1911) 14 N. L. R. 317.*].

For reasons stated above, my inclination certainly is to justify the findings on which the learned district judge has arrived at her judgment followed by the decree. As such, I am compelled to dismiss this appeal.

Taking into consideration, the relationship between the parties I make no order as to costs.

Judge of the Court of Appeal

I agree.

S.Sriskandarajah, J.

President of the Court of Appeal

NT/-