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

L. Supulawathie de Silva of
Sirisena Mawatha,
Balapitiya.

PLAINTIFF-APPELLANT

C.A 825/1998 (F)
D.C Balapitiya 1008/L

Vs.

1. P. Hector Silva of Ahungalla (dead)
2. P. Gnanasiri de Silva of Ahungalla
3. T. Ginasiri de Silva of Ahungalla

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: R.C. Gooneratne for the Plaintiff-Appellant

N. Wijesekera for the 2nd Defendant-Respondent

ARGUED ON: 25.08.2011

WRITTEN SUBMISSIONS FILED ON :

10.08.2011 (Both parties)

DECIDED ON; 08.11.2011

GOONERATNE J.

The Plaintiff-Appellant filed action in the District Court of Balapitiya on or about July 1985 to obtain a declaration of title to the land described in the schedule to the plaint and to eject/damages against the Defendants. At the trial two admissions were recorded, viz. the corpus admitted and as pleaded in the answer of the 1st &2nd Defendants by deed No. 1113 (P1) the 3rd Defendant transferred the land in dispute to the Garumani Dabalias Nona. The 3rd Defendant did not file answer and no relief sought against him. Parties proceeded to trial on 10 issues. This appeal arises from the judgment of the District Court dated 19.8.1998 where the learned District Judge dismissed the Plaintiff-Appellant's action. Plaintiff never gave evidence in the District Court. The Plaintiff relied on the evidence of the 3rd Defendant and officials of the Pradeshiya Sabha and a Surveyor.

In order to understand this case it should be noted that Plaintiff depends on deed P2 of 3.5.1985 (No. 1791) and by which the 3rd Defendant transferred the property in dispute to Plaintiff. Deed P1 was executed on 9.7.1969, which was a conditional transfer a transfer subject to re-transfer by 1 year (redeemable in 1 year). The 3rd Defendant failed to redeem the conditional deed. The position of the Plaintiff-Appellant in short is that 1

year after execution of P1, the 3rd Defendant continued to possess the land in dispute and acquired prescriptive title. As such Plaintiff-Appellant relies on deed P2 and more particularly on the prescriptive title of the 3rd Defendant.

The learned counsel for Plaintiff-Appellant urge the following matters in his written submissions.

(a) The 3rd Defendant was the original owner of the property in dispute. (It is pleaded in paragraph 2 of the plaint, but the learned District Judge reject this position as deed P1 refer to another deed as well)

(b) 3rd Defendant failed to redeem the conditional transfer.

(c) 3rd Defendant possessed the land in dispute from July 1970 and acquired prescriptive title.

(d) Contesting 1st & 2nd Defendants forcibly entered the land on or about May 1985.

(e) Refer to the case of Chelliah Vs. Wijenathan 54 NLR 337 ... Burden of Proof on party asserting to establish a starting point for his acquisition of prescriptive rights.

(f) Reference to items of evidence of 3rd Defendant.

(i) continuous possession after conditional transfer

(ii) possession against Dabalias Nona the transferee in deed P1.

(iii) Rely on cross examination (pg. 205) of 3rd Defendant about no issue with Dabalias Nona or that Dabalias Nona never disputed 3rd Defendant's possession.

(iv) That (pg. 169/170) possession was undisturbed and uninterrupted – relies on Calocterie Goeroenseiagey vs. Don Chritian Aratchi Morgan's Digest. Pgs. 169 & 170 …

> "There are two points regarding the law of Prescription that should always be well borne in mind… the first is that a possessor is always presumed to hold in his own right, and as proprietor, until the contrary be demonstrate; the second, that the contrary once established and it being shown that the possession commenced by virtue of some other title, such as that of a tenant or planter, then the possession is to be presumed to have continued to hold on the same terms, until he distinctly proves that his title has changed"

(v) Fact that 3rd Defendant possessed with the leave and licence of the above named Dabalias Nona never suggested in evidence by 1st & 2nd Defendant

(vi) 3rd defendant plucked coconuts 3 times a year prior to conveyance by deed P2 to Plaintiff.

(vii) 3rd Defendant owner of adjoining land used lavatory continuously in land in dispute.

(viii) House with the land bearing No. 16/70 paid rates from 1977. P3 – P12. Resided till 1974. Thereafter a cousin of Defendant resided (Desin de Silva).

(ix) Barbed wire fence cut down. Poultry shed of 1st defendant demolished.

(x) Children of Dabalias Nona never came to the village after her death.

(xi) 3rd defendant possession from 1970 not challenged.

Reference made to Fernando vs. Wijesooriya 48 NLR 320 …

Canekaratne J. There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner"

Wijesundera v Dasa 1987 2 SLR 66…

G.P.S. de Silva J. It seems clear that possession by the predecessors in title of the defendants themselves is adverse in the sense that their possession is incompatible with the title of the plaintiffs and their predecessors – in title

(xii) Contesting Defendant did not lead evidence to show that Dabalias Nona and her heirs possessed the land in dispute

(xiii) The payment of rates from 1977, the 3rd Defendant possession became adverse – refer to Section 110 of the Evidence Ordinance. As such contesting Defendant should establish that possession

prior to 1977 by 3rd Defendant was not as owner. Respondent have failed to establish same.

(g) Action to be decided on issues, the contesting Defendant did not formulate any issue that the 3rd Defendant possessed the land with the leave and licence of Dabalias Nona.

(h) Following material provided by appellant as regards the lapses in the District Judge's judgment.

(i) District Judge's finding that 3rd Defendant possessed with Dabalias Nona's permission or consent not maintainable and it is incorrect. Continued possession by the 3rd Defendant from the date on which the property had to be redeemed would turn to be adverse possession or 3rd Defendant's possession would becomes adverse. As such an overt act to change the character of possession not necessary. 3rd Defendant-Appellant relies on Alwis vs. Perera 21 NLR 321...

De Sampayo J. "Where a person transferred his lands to certain family connections, but continued in possession till date of action (sixty years), the Supreme Court held (in the circumstances) that the possession was not permissive, but that it should be presumed to have become adverse."

Tillekeratne v. Bastian followed

Semble, even apart from this presumption, a vendor, who after sale remains in possession, should be considered as possession adversely to the purchaser.

Wijesundera v dasa 1987(1) SLR 65 at pgs 69-70…

G.P.S de Silva held "the fact that the defendants knew that the new owner after the sale was the 1st defendant's husband is not a bar to the defendant's claim to a prescriptive title, but rather tends to strengthen their claim, having regard to all the facts and circumstances of the case.

(ii) The learned District Judge accepts the 3rd defendant's evidence that he continued to possess this land. But he hold that such possession was with the knowledge of Dabilis Nona. Therefore to establish prescription an overt act is necessary to establish prescription .. It is respectfully submitted that the learned District Judge's finding is a complete misunderstanding of the concept of "adverse possession" In Tilekeratne v Bastian 21 N.L.R 12 Bertram C.J said "The effect of the principal is that, where any person's possession was not originally not adverse, and he claims that it has become adverse, the onus is on him to prove it, and what must he prove? He must prove not only an intention to possess adversely, but a manifestation of the intention to the true owner against whom he sets up his possession… Thus it is sometimes said that he must prove an "overt unequivocal act." In this case, with the execution of the conditional transfer, marked P1, Dabilias Nona became the owner of the premises. In the conditional transfer, it is expressly stated "to have and hold the premises hereby sold and conveyed"

Thus on execution of P1 Dabalias Nona is deemed to have obtained possession. In July 1970, with the failure of the 3rd defendant to redeem the property, Dabilias Nona became the absolute owner. Therefore the mere possession thereafter by the 3rd Defendant becomes adverse.

(iii) The learned District Judge holds that with the payment of rates in 1977, the 3rd defendant's possession became adverse.. It is respectfully submitted that in terms of section 110 of the Evidence Ordinance "when

the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner who affirms he is not the owner. Therefore, since it is held that possession from 1977 was adverse to the successors-in-title of the 1st and 2nd defendant, the burden was on the contesting defendants to establish that the 3rd defendant's possession prior to 1997 was not as owner. This too, the contesting defendants failed to do.

(i) Appellant emphasis the fact that there is no evidence that the 3rd Defendant entered the land with the permission and or approval of G. Dabalias Nona

(j) Essence of an issue to the effect that the 3rd Defendant possessed the land with the leave and licene of the 3rd Defendant.

(k) Case to be tried on the issues formulated refer to Haniffa Vs.Nallama 1998 (1) SLR 72 at pg. 76 "That is relevant for present purposes and what needs to be stressed is that once issues are framed, the case which the court as to hear and determine become crystallized in the issues. It is the duty of the court to record the issues on which the right decision of the case appears to the court to depend.

(l) Deed P1 is fraudulent according to the learned District Judge. Appellant states that the points suggested by the trial Judge does not invalidate the deed.

The Defendant-Respondent urge the following:

(1) Plaintiff-Appellant never gave evidence in the trial court.

(2) Deed P2 does not refer to a previous deed. It only refer to prescriptive title.

(3) Refer to contradictory position in deed P2 and the period of prescription as claimed in his testimony in court by Appellant. According to deed P1 it was attested on 9.7.1969. The oral evidence confirms that possession commenced 1 year after 9.7.1969 i.e in the 1970. In deed P2 it is stated by the date of attestation (May 1985) the 3rd Respondent has already possessed the land for over 20 years. As such according to P2 he would have possessed as from 1965. Evidence in court does not take the starting point of prescriptive possession to 1965. Oral evidence of 3rd Respondent is that he commenced possession on 1970.

(4) Assessment notices produced in the case by the 3rd Defendant commences from 1978 and not during the above prescriptive period from 1965-1985.

(5) The 3rd Defendant's evidence reveal that he ceased to occupy the small house within the corpus in 1974. One of his brother occupied from 1975. emphasis that possession was broken by 1974. No continuous possession.

(6) The requirement in Section 3 of the Prescriptive Ordinance not satisfied.

The entire case of the Appellant rest on the question whether the alleged possession was permissive or adverse, possession. The facts of this case has not been made simple enough to conveniently conclude either way. If possession was properly explained and exemplified it would have been easier for the Original Court and the Appellate Court to arrive at the required conclusions of adverse possession. Further, material suggesting some form of possession has been placed before court only by the 3rd Defendant.

At this point I refer to Alwis vs. Perera 21 NLR at 326…

> There is also another point. I wish very much that District Judges – I speak not particularly, but generally – when a witness says "I possessed" or "we possessed" or "we took the produce," would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts, as the witnesses have in their minds, are stated in full, and appear in the record. In making this observation I feel sure that I am expressing the mind of all my colleagues on this Bench. I do not think that Judges of first instance realize the strong feeling which is entertained in this Court as to the recording of bare expressions of this nature. I wish that every Judge of first instance would come to regard it as a personal reproach to himself if he allows such an expression as "I possessed" or "I took the produce" to appear unexplained on his record.

The District Judge however does not reject the position that the 3rd Defendant did not possess the land in question during the relevant period. The 3rd Defendant has represented the fact that he was the owner of the land in dispute, at least until deed P1 (1113) was executed. But deed P1 was a conditional deed which was not redeemed by the 3rd Defendant. Therefore Garumani Dabalias Silva on execution of deed P1 (subject to conditions) gets good paper title to the property. There is absolutely a lack of material to suggest the type of possession the vendee of deed P1 G. Dabalias Silva had to this land. Other than the 3rd Defendant, the contesting 1st & 2nd Defendant had not been able to testify about possession during the period 1969 to 1985.

This is no doubt a question of fact that depends on facts of the case. Each case on possession need to be examined properly to decide whether any adverse possession to support a plea of prescription is established. I am mindful of the learned District Judge's views on suspicious circumstances mentioned by the trial Judge i.e plaint makes no reference to dead P1. Deed P1 also refer to another deed 33521 of 15.2.1966 which means 3rd Defendant is not the original owner of the land. No mention of deed P1 in deed P2, No consideration passed when P2 was executed (as in evidence) though it is stated so in the deed.

On the other hand as urged by the Defendant-Respondent the alleged prescriptive period relied upon by the 3rd Defendant differ in period with the oral testimony and the averments in deed P2. I also find that the evidence by the 3rd Defendant of continuous user of a lavatory and plucking of coconuts at least up to 1984 had not been contradicted. To get on to the more serious question is whether facts of this case is either similar or goes parallel to cases on adverse possession as discussed above i.e Alwis vs. Perera 21 NLR 321 and Tillekeratne vs. Bastian. In other words the vendor who continued to occupy or possess the land in dispute after affecting a transfer of property is presumed to have possessed adversely. However bad, cunning or a schemer the 3rd Defendant was with regard to land transactions, (could be dealt in law on a different cause of action), notwithstanding learned District Judge's views, there is some aspect of the case which suggest 3rd Defendant's possession. The dicta of the cases cited viz.Alwis vs Perera and Tillekeratne vs Bastian and as stressed by the learned counsel for Appellant at a glance seems to apply. Appellant's counsel urge, in that case the learned District Judge accepts Don William's evidence. "It is perfectly true that the Plaintiff has always lived upon our land by our permission". In such a case as the Appellant describes, it is not disputed that an overt act is necessary to change the character of possession. I agree with

the contention that there is no evidence at all that the 3rd Defednant entered the land with Dabalias Nona's permission. It is unsafe to act on inferences or presume a fact in issue on answers provided to leading questions. But in evidence there is a strong indication as noted by the learned District Judge about 3rd Defendant having no dispute with the G. Dabalias Nona. Why is that? Or what is that? It would have been the best point in evidence to explain adverse possession by the 3rd defendant. Let me examine the material that transpired to decide whether it was adverse possession or not. In the judgment of the Original Court Judge are in the proceedings of 27.9.1993 at pg. 14 the following had been recorded.

ප්‍ර ඩබ්ලියස් නෝනා සමග තමන් ආරවුලක් තිබුනෙ නැහැ?

උ නැහැ

ප්‍ර කවදාවත් ඩබ්ලියස් නෝනා භුක්තියට එන්න එපා නියා නෙරපා හැරියේ නැහැ?

උ ඔව්

ප්‍ර දරුවෙකුටවත් ඇයගේ සහෝදරයෙකුටවත් ඉටමට එන්න එපා කිවේ නැහැ?

උ නැහැ ආවෙත් නැහැ

The above questions and answers are closely connected to possession. The answers provided by the 3rd Defendant suggest that he was never disturbed at all by G. Dabalias Nona regarding possession. As such 3rd

Defendant's possession was not adverse towards G. Dabalias Nona or her successors. The learned district Judge cannot be faulted for his views on this aspect of the case. Factual positions could be interpreted differently by different persons. Entering the land with permission or without permission and non resistance to possession are three different aspects. Can it interchange? It depends on all facts and circumstances. The most reasonable, direct and plausible reasons could be fathomed by the 3rd Defendant's answer to above and the trial Judge's reasoning on same. Trial court Judge is in the best position to cage the witness. Watch the witnesses actions and reactions, demeanour etc. and arrive at a conclusion.

I am convinced that the above mentioned Alwis vs. Perera and Tillekeratne Vs. Bastian are well recognized and persuasive judgments to be adopted and followed even in todays context. Let me take another look at the case of Tillekeratne vs. Bastian at pg. 324... (in the case of Tillekeratne vs. Bastin.

> In the case of Tillekeratne v. Bastian, and that is this, that where it is shown that people have been in possession of land for a very considerable length of time, that fact, taken in conjunction with the other circumstances of the case, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession. It does seem to me that this is a case in which that presumption ought

justly to be drawn. Here is a family which for sixty years have been in possession, quite possibly, as the District Judge suggests, originating by permission. It does not seem to me just that they should be disturbed through a stranger, for purposes of his own, buying in an outstanding paper title. In the circumstances of the case, I think it is just that it should be presumed that the possession at some appropriate date had become adverse.

If one take a very close look at the above passage incorporated in the case of Alwis vs. Perera what is important in that is that:

(a) people have been in possession of the land for a very considerable length of time.
(b) that fact, taken in conjunction with other circumstances
(c) family which for 60 years have been in possession.

In the case in hand (a), (b) & (c) above cannot be established. It is my view that considerable length of time need to go over and above the prescriptive period in Section 3 of the Prescription Ordinance. On the own admission of the 3rd Defendant, in his evidence, there also seems to be a break in possession by 1974, as he ceased to occupy the small house. His brother occupied from 1975.

In the case of Walpita vs. Dharmasena 1980 (2) SLR 183 & 184 held presumption of ouster could be drawn from long and continued

possession of well over 40 years. The case in hand is no comparison for long years of continuous possession. It is in fact doubtful whether the 3rd Defendant who gave evidence on behalf of the Plaintiff on Plaintiff's absence and who also gave instruction to lawyers to file action, ever had a long continuous uninterrupted period of possession. What is the other fact that one could take in conjunction with other circumstances? It is absolutely nil in the present case. Leave aside the 60 years mentioned in the case of Tillekeratne Vs. Bastin, even the bare 10 years is doubtful, with the above break in period. At this point I would look at the evidence on assessment notices produced. The first notice of assessment was in 1978. The 3rd Defendant had given his name to the local body as the land-lord in 1977. It is stated by the 3rd Defendant that he gave the local body his name for the first time in 1977 after he transferred the property to G. Dabalias Nona. This evidence would never support the prescriptive period. In fact it would not come closer to the required prescriptive period. Further by looking at the assessment notice identity of the property in dispute is very doubtful.

In all the above circumstances of this case I take the view that mere possession is not sufficient and the facts of the case in hand is no comparison, or cannot be applied/adopted with the cases mentioned above,

Alwis vs. Perera and Tillekeratne vs. Bastian. I am convinced with the judgment of the learned District Judge. As such I affirm the judgment of the District Court and dismiss this Appeal without cost.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL