IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms of Sec.754(1) of the Civil Procedure Code and Article 138(1) of the Constitution.

C.A.923/97

D.C.Galle: 10463/P

Punyawathie Gunaweera,

Piyadigama, Ginthota.

Plaintiff-Appellant

Vs

1) Gertrude Silva

2) Daniel Wijeratne

3)W.K.Samson (deceased)

4th Respondent Substituted

4) Walgama Kankanamge Dayasena

Defendants Respondents

Before : W.L.Ranjith Silva, J. & A.W.A.Salam, J.

Counsel: N.R.M. Daluwatte PC for the Plaintiff Appellant

S.N.Vijithsingh for the 3rd Defendant Respondent

Argued : 24-09-09, 22-10-09, 19-05-10.

W/ Sub : 12-01-2011

Decided on: 31.03.2011

W.L.Ranjith Silva, J.

The Plaintiff Appellant (Appellant) instituted action for the partition of the Land called Dikkumburagewatta alias Thalgahawatte, which upon a commission issued by Court in the course of the action came to be depicted as lot 1 in Plan No.214 dated 18 November 1988 prepared by surveyor Anton Samararatne which is filed of record, marked X. The report of the surveyor is marked as X1. The Learned District Judge after trial dismissed the action of the Appellant holding that the 3rd and the 4th defendants respondents (3rd and 4th contesting defendants respectively) have prescribed to the said land, the subject matter of this action, depicted as lot 1 in the said Plan (hereinafter referred to as the Land).

Counsel, for the 3rd Defendant Respondent who shall hereinafter be referred to as the 3rd contesting defendant argued that by deed bearing number 2827 Palliyaguruge Don Nicolas Wijesiri Goonawaradane who was entitled only to a ¾ share of the Land gifted only his 3/4 share of the Land. to his children and that the balance ¼ share was not given to them. He

contended that the balance ¼ shares was never disposed of by way of deeds and that there is no evidence to show that the said Palliyaguruge Don Nicolas Wijesiri Goonawaradane was the original owner of the Land. He contended further that there is no evidence to show that Palliyaguruge Don Nicolas Wijesiri Goonawaradane was the father of the transferees. Therefore he contended that the fact that the balance ¼ share devolved on the Appellant and the 1st and the2nd defendants was not substantiated and thus the Appellant and the 1st and the 2nd contesting defendants did not acquire any rights to the remaining ¼ share of the Land. The Counsel contended that the balance 1/4th share should be kept unallotted and the 3rd and 4th contesting defendants should be allowed to stay on that ¼ share of the Land and enjoy their share of the Land. This submission of the Counsel for the Respondent is misleading. I have perused the document P1 and I find that it is a deed of gift and in that it is specifically mentioned that the donor Palliyaguruge Don Nicolas Wijesiri Goonawaradane is gifting his ¾ share of the property to his grandchildren and that he was doing so for the love and affection he had towards them. Thus it appears that the balance ¼ shares had devolved on the plaintiff and the 1st and the 2nd defendants as claimed by the plaintiff'. The Learned Judge in his judgment has come to a specific finding that the paper title to the Land was with the plaintiff and the 1st and the 2nd defendant's. Therefore in all the circumstances, especially as there is no cross appeal filed by the 3rd and 4th contesting defendants, we find that there is no reason to interfere with the findings of the Learned Trial Judge that the plaintiff had proved the devolution of title on the deeds.

Prescription.

The Learned Judge has held against the Appellant on the issue of prescription. (Issue No.8) The learned Trial Judge has held that the 3rd and the 4th contesting defendants have prescribed to the Land. Therefore I now proceed to decide on the issue of prescription.

Title by prescription is an illegality made legal due to the other party not taking action at the proper time. I would like to quote one of the relevant maxims namely the maxim ***Vigilantibus non domientibus, Jura subvenient*** meaning –the laws assist those who are vigilant, not those who sleep over their rights. Dealing with this maxim, it is stated, in the book entitled **'Broom's Legal Maxims' Tenth Edition at page 599,** I quote; "...for if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to recover the possession; both to punish his neglect ***nam leges vigilantibus, non dormientibus jura subvenient*** and also because it was presumed that the supposed wrong-doer had in such a length of time procured a legal title ,otherwise he would sooner have been sued".

<u>The version of the contesting defendants</u>

The version of the 3rd and 4th contesting defendants was that in 1925 one Ginthota Kapuge Arnolis (Arnolis) commenced to possess the Land having erected a house thereon, that in or about 1945 the 3rd contesting defendant married Julie Nona the daughter of the said Arnolis and came to reside on the Land and effected repairs to the house that was already there. The

3rd contesting defendant pleaded that he was in adverse, independent and uninterrupted possession of the Land since 1945 and acquired prescriptive rights to the same, that he never came on the Land as a licensee or as a lessee under the mother of the Appellant, that he paid all rates/taxes in respect of the Land and cultivated the same. The 3rd contesting defendant further claimed that the tombs shown in the preliminary Plan marked as X are those of his father in law Arnolis and mother-in-law Arnolihamy.

The Appellant's version

The Appellant's case was that the 3rd contesting defendant came to reside on this Land with the leave and license of the Appellants mother and after her death remained in possession of the Land looking after it on behalf of her children, namely the plaintiff and the 1st and the 2nd defendants. It was contended on behalf of the 3rd contesting defendant that, the brother of the Appellant, the second defendant had on one occasion stated that the 3rd contesting defendant came to reside on the Land with the leave and license of his mother and on another occasion has stated that the 3rd contesting defendant came as a tenant of his mother. In the eyes of the law it may be that there is a vast difference between a licensee and a lessee but for a layman such as the 2nd defendant this cannot be of any significance and thus should not be given an undue weightage, because in colloquial language as understood by common man what was meant was obviously that the 3rd defendant came to reside on the Land with the permission of their mother.

First and foremost I must deal with the findings of the Learned Trial Judge wherein he concluded that there was no basis for

the plaintiff to file this partition action as there was no assertion that common possession was not possible, as such the action was filed on a wrong basis.

It is no longer necessary especially after the amendment whether it was in force at the time this action was filed or not, for a co owner to establish that the co-ownership was not possible. The law before the amendment was not in accordance with the Roman Dutch Law and that was the reason why the amendment was brought about and at present a co - owner can file action to determine the co-ownership irrespective of the fact that common possession was possible or otherwise. In this regard I would like to refer to 10.3.1 Voet, - Wille on Principles pages 310 and 311. It is no longer necessary to aver or plead the existence of a course of action to file a partition action. This is a right any co owner has. Filing a partition action in such circumstances cannot and will not prejudice the rights of parties in possession actual or constructive as the Partition Act contains extensive provisions sufficient to guarantee their rights, be it a co owner or a stranger, i.e. Se.49, the provisions protecting the rights of the tenants, provisions providing for notices on the parties who have acquired rights etc.

It was the position of the Appellant that her father resided on the Land adjoining the Land in dispute till his death which occurred in 1947. Counsel for the Appellant argued that it is highly unusual and improbable that a titleholder of a land living in the adjoining land would allow a trespasser to come and erect buildings on his land next door to where he is living, lying down, without taking any action or without complaining to the police. The position taken up by the 2nd defendant in his evidence is that the 3rd contesting defendant sought permission

from his mother to stay on the Land and thus commenced to occupy the Land in dispute with the consent of his mother though he could not remember the exact date. Before the arrival of the 3rd contesting defendant, another person by the name of Alwis was in possession of this Land and that it was only after he left that the 3rd contesting defendant came into occupation of the subject matter.

The Learned District Judge's conclusion with regard to the issue of prescription is mainly based *inter alia* on the birth certificate of his child born unto the 3rd contesting defendant by Julie Nona in 1956, marked as 3V3. In that the place of birth is given as Dikkumburagewatta, Wadugeygoda. It appears that the Learned District Judge has considered only the name of the land Dikkumburagewatta and not the place where the land is situated. According to most of the deeds, the Plan marked X and also so many other documents the subject matter of this partition action is situated at Hathuwa Piyadigama and not at Wadugeygoda. 3V3 does not support the 3rd contesting defendant's version; on the contrary it shows that the birth of the child had taken place on a different land in a different place. Thus it appears that the Learned District Judge's conclusions are based on wrong findings.

Plaintiff's mother complained to the headman of Piyadigama (west) as born out by P8 on 19th of December 1959 with regard to a boundary dispute that arose in respect of this land with a person called Piyasena and in that the place is given as Piyadigama. P8 speaks volumes as to the fact that she was in control and in possession of this Land. If the 3rd contesting defendant was in adverse possession he should have taken the initiative to complain against the trespasser. His inaction over

this dispute shows that he was merely a licensee under the plaintiff's mother.

It is common ground that there were two tombs on this land. In the death certificate of Porolis De Silva Wijeratne, marked as P6, the place or the area is described as Dikkumburagewatta Piyadigama. The death certificate of William Silva Wijeratne, the father of the Appellant, also bears the place of burial as Dikkumburagewatta Piyadigama. Although the 3rd contesting defendant stated that the tombs belonged to his father-in-law and mother-in-law he had not claimed the tombs before the surveyor. The contesting defendants have failed to produce the death certificates of the father-in-law and the mother-in-law in support of their claims that the tombs were those of his father-in-law and the mother-in-law. It is also noteworthy that according to X1, the report of the surveyor, the 3rd contesting defendant has not claimed the Land or the tombs before the surveyor. The 3rd contesting defendant had claimed only the buildings which were counter claimed by the Appellant. Even though there may have been many other portions of lands by the name Dikkumburagewatta it is highly unlikely that the owners of those lands would have permitted the Appellant or for that matter any other person to build tombs on their lands. The reason why the Learned District Judge came to the conclusion that those tombs found on the subject matter were not those of the father and mother of the Appellant and that their tombs were on a different land by the same name Dikkumburagewatta was on a wrong apprehension of facts. (Viz. That the adjoining land Dikkumburagewatta belonged to the father of the plaintiff.)

The Learned District Judge formed his opinion that the Land mentioned in P6, the death certificate referred to an adjoining land where the plaintiff's mother lived and that it could not be the Land, the subject matte of the partition action, for the simple reason that the contesting defendants had stated that there were other lands by the name Dikkumburagewatta adjacent to the subject matter. But the Learned District Judge has completely failed to refer to the name of the Land given on the documents that were before him. There is no evidence whatsoever to show that the father of the Appellant owned the adjoining land and the evidence only showed that he was residing on the adjacent land up to his death. The Learned District Judge had gone on the footing that the Appellants father was the owner of the adjoining land which formed a part of a larger land called Dikkumburagewatta but there was no basis for such a finding.

The evidence was led on behalf of the Appellant that after the death of the father of the Appellant they left the village Piyadigama and came to live in Galle, that the mother of the plaintiff came to this land at intervals to pluck nuts and to attend to the Plantations. The Learned District Judge in his judgment has looked askance at this evidence and had considered this evidence to be preposterous. His reasoning was that it was unlikely that the mother of the Appellant had traveled 12 miles in order to attend to these needs. This reasoning of the Learned Trial Judge resulting in the rejection the evidence of the Appellant that she exercised her rights on this land at intervals appears to me rather unfounded and irrational. Owners of lands travel far distances to reap the harvest and in order to attend to their Plantation. These are common occurrences and I am unable to justify the

findings of the Learned District Judge on this matter. It is also quite natural and normal for owners to maintain their lands in far distant corners of the island either by themselves or through their agents and there is nothing strange in such conduct. The Learned Judge rejected this evidence simply because his vision was clouded by coming to the erroneous conclusion that the Appellant's mother owned the adjoining land whereas in actual fact she was only residing there and that she was not the owner of the adjacent land.

Assessment rates

Document marked P9 shows W.Wijertatne as the owner of the Land and premises in suit which is No.8 Sri Dhamawansa Mavatha, Piyadigama. The Appellant produced the tax receipts for the payment of rates P10-P27 in respect of years of assessment 1961 to 1987. The number of the house standing on this property is number 81/1 and in respect of this house the register bears the name of Samson as the owner that is the name of the 3rd contesting defendant.

The 3rd contesting defendant has stated in his evidence that he paid rates in respect of the Land but did not produce any receipts for such payments. But the 3rd contesting defendant had paid rates only in respect of the house that was on this land that too appears to be on the basis that he owned that house. His name appeared after 1964 probably the 3rd contesting defendant had got his name inserted in the register subsequently on a revision of the assessment register. Payment of rates alone does not prove possession for the purposes of

section 3 of the Prescription Ordinance. **(Vide. Hassan Vs Romanishamy 66 CLW at page 112)**

The 3rd contesting defendant claimed prescriptive rights to the Land and not in respect of the house that was on that land. Payment of rates for the house will not enable the 3rd contesting defendant to claim prescriptive rights to the Land in question. Even with regard to the house, he had commenced paying rates in1964 and the Appellant or her mother had not been aware of the fact that the 3rd contesting defendant had started paying rates. In **Cadijar Umma Va Don Manis 40 NLR 392** it was held that for an agent or licensee to prescribe he must change the character of his possession by some act which is known to the principal, the owner of the Land, that he is in adverse possession. (Vide.

There has been no overt manifest act proved by the 3rd defendant showing the change of character of possession till 1988 when he ordered the plaintiff not to enter the land and this action was instituted shortly thereafter on 15.03.1988. (Vide. pages 79 onwards of the brief). The 3rd defendant had no time to prescribe.

In Bandara Vs Piyasena 77 NLR at page 102 it was held, I quote,

"A lessee is not entitled to dispute his landlord's title. Consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he acquired certain rights to the property subsequent to his becoming the lessee and during the period of the lease. His duty in such a case is to first restore the property to the lessor and then litigate with him as to the ownership" **(Vide also**

Najeemdeen and others Vs Nageshwary and others 1999-3 SLR 123, Lebbe Marikkar V sainu et al 10 NLR 339, Silva et al V Kumarihamy 25 NLR 449, Reginold Fernando V Pabilinahamy and Others 2005 1 SLR page 31, Siyaneris V Jayasinghe Udenis De Silva 52 NLR 289)

Credibility of the Respondent

In this regard I would like to refer to 3V3 Birth Certificate produced by the 3rd contesting defendant. Production of this document was a clear attempt to mislead the Court on the issue of prescription. When a person was born at Piyadigama the birth certificate should bear that name as the place of birth. In 3V3 the place of birth is given as Wadugegoda. While a Court of appeal will always attach the greatest possible weight to any findings of facts of a judge of a court of first instance based upon oral testimony given before that judge , it is not absolved by the existence of these findings from the duty of forming its own view of the facts, more particularly in a case where the facts are of such complication that there right interpretation depends not only on any personal impression which a judge may have formed by listening to the witnesses but also upon documentary evidence, and upon inferences to be drawn from the behaviour of these witnesses (demeanour and deportment) both before and after the matters on which they give evidence. A Court of Appeal in such situations is free to overrule such findings of facts if it appears that the trial judge has misdirected him self on the facts or that wrong inferences have been drawn from the facts. **(Vide. PereraVs Sigera Srikantha Law Reports (volume 7) page 17 and Karunaratne Vs Anulawathie Srikantha Law Reports (volume7) page 74)**

Therefore it is to be seen that an appellate court can and should interfere even on questions of facts although those findings cannot be branded as "perverse".

No buildings on the Land

The second defendant has mentioned in his evidence that the house on the Land was built by his father but it appears that none of the deeds referred to a building. In any case the initial house that was on the Land was built of wattle and daub with a thatched roof. Counsel for the Appellant argued that it is not the practice to mention in deeds, such temporary structures built of wattle and daub. In the survey report as at the time X1 survey Plan was prepared, the particular house had been described with the only difference, that the roof was thatched with aluminum sheets (takaran). Therefore it is my considered view that the absence of a reference to a house in those deeds submitted by the Appellant cannot be taken seriously and should not be held against him.

Plantations

The Learned Judges findings on the Plantations are mainly based on the fact that the 3rd contesting defendant came on the Land in 1945. But if that finding is an erroneous one, finding with regard to the Plantations also becomes erroneous because the basis upon which those findings were reached was the fact that the 3rd contesting defendant came to reside on the Land in 1945. The Land has been claimed by the plaintiff and the second defendant before the surveyor. The Plantations too were

claimed by both parties. The 2nd Defendant claimed that the Plantations belonged to him and his mother. The Appellant had submitted certain documents in proof of his claim to this Plantation whereas the 3rd contesting defendant had not submitted a single document in proof of his claim to the Plantation.

Dispossession

A person who is in occupation of a property as a tenant licensee or even a lessee continues to possess the Land in that capacity unless by some overt act he manifests his intention to occupy the said land in a different capacity. A secret act on the part of the licensee, tenant, or lessee to possess the Land in a different capacity shall not constitute adverse possession or change the nature of his occupation.

If the Respondent came into possesiion with the leave the licensee of the Appellant's mother, then he remains to be in that position as an agent and he cannot prescribe to the Land unless he could establish that he changed his character asserting that he thereafter possessed the Land adversely for the required number of years independently, undisturbed and uninterrupted.(**Cadija Umma Vs D.M.Harris 40 NLR 392. Manawadu Vs Eknaligoda 3 NLR 213)**

In **Nawaratne Vs Jayatunge 44 NLR 517** it was held that I quote, "the defendant entered into position of the Land in dispute with the consent and the permission of the owner, she cannot get rid of this character unless she the some over to act showing an intention to process adversely.

In **Silva Vs Kumarihami 25 NLR 449** it was held that possession of a lessee, licensee, servant or agent is in law the possession of the lessee or the owner.

It was the position of the Respondent that he married the daughter of Arnolis and came into possession of this land under him but he failed to produce the marriage certificate in proof of this, which would have been strong prima facie evidence in his favour if what he said was correct. According to the answer filed by the 3rd and 4th contesting defendants the Respondent had come to reside on this land in 1945 and not in 1943. In his evidence the Respondent stated that he did not know Arnolis and that the said Arnolis did not stay on the Land. The Respondent has highlighted a particular anomaly in the evidence of the second defendant with regard to the capacity under which the Respondent happened to come on this land. The second defendant being a layman would not have understood the implications or the differences between a lessee / tenant or a licensee. Whatever the term used by the defendant the fact remains that the Respondent came to reside on this land with the leave and license of his mother.

For the reasons I have adumbrated on the facts and the law I hold that the Learned District Judge has not evaluated the evidence on the issue of prescription rationally, causing enormous prejudice to the Appellant and the 1st and 2nd defendants resulting in a substantial miscarriage of justice as the entire case rested basically on the findings on the issue of prescription. For the reasons I have enumerated in the foregoing chapter is if the issue a new regard to prescription was answered against the 3rd and 4th contesting defendant's the

Learned District Judge would have certainly held in favour of the Appellant and the 2nd defendant allowing and granting the prayers to the plaint, partitioning the Land among the Appellant and the 1st and the 2nd defendants as prayed for. For these reason I hold that the Learned District Judge's findings with regard to the issue of prescription and his judgment cannot be allowed to stand. Therefore I set aside the Judgment of the Learned District Judge dated 07-02-1997.

I am mindful of the fact that this action has been instituted as far back as in 1988. The Judgment in the original court had been delivered in the year 1997 and it had taken all most 13 long years for the appeal to be heard and disposed of. In this background it would be meaningless to send this case back for a re-trial when the misdirections on law with regard to the application of the law relating to prescription can be conveniently corrected by this court. Further, in the event of a re-trial being ordered it would undoubtedly contribute towards further delay and invariably result in the contesting defendants being given a second bite of the same cherry by
affording them an opportunity to have recourse to an unnecessary trial and an appeal. In the circumstances, I am of the view that this is a fit and proper case where the point of contents can be answered afresh in the exercise of the appellate jurisdiction of this Court. Hence, I answer the points of contest as follows

No.1, 2, 3, and 4 yes

No.5 no

No.6 and 7 yes

No. 8 and 9 no

No.10 yes

The learned District Judge is hereby ordered to enter interlocutory decree accordingly and proceed with the case.

Judgment of the District Court is set aside.

Appeal allowed

JUDGE OF THE COURT OF APPEAL

A.W.A.Salam, J.
I agree

JUDGE OF THE COURT OF APPEAL