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

Wimaladasa Mathangaweera
141, Tissa Road,
Tangalle.

Plaintiff – Appellant

Vs

M.K.Pantis
122, Weeraketiya Road,
Tangalle.

Defendant-Respondent
(Deceased)

M.K.Dhammika Suranga
122. Weeraketiya Road.
Tangalle.

Substituted Defendant-Respondent

C.A.APPEAL NO.876/98 (F)

D.C.TANGALLE CASE NO.2431/L

BEFORE	:	**K.T.CHITRASIRI, J**
COUNSEL	:	W.Dayaratne, P.C. with R. Jayawardane and D.Divaratne Attorneys-at-Law for the Plaintiff – Appellant instructed by Ranjan Wijayasinghe Seevali Delgoda with Lahiru Dawakella Attorneys-at-Law for the Substituted Defendant – Respondent instructed by Lakshman Wewalwala.
ARGUED ON	:	**31. 10. 2012**
WRITTEN SUBMISSIONS FILED ON	:	**06. 12. 2012**
DECIDED ON	:	**16. 01. 2013**

CHITRASIRI, J

The plaintiff-appellant (hereinafter referred to as the plaintiff) sought *inter alia* to set aside the judgment dated 17.11.1998 of the learned District Judge of Tangalle. By that judgment learned District Judge dismissed the plaint dated 10.09.1991, in which the plaintiff sought to obtain a declaration, declaring that he is entitled to 23/24 share of the land referred to in paragraph 2 of the plaint. In that, the plaintiff also sought to evict the defendant-respondent (hereinafter referred to as the defendant) from the said land and to obtain the possession thereof. The defendant in his answer dated 04.05.1992 averred that he was not aware of such a land as referred to in paragraph 2 of the plaint. However, he claimed prescriptive rights over the land that he has described in paragraph 2 of his answer dated 04.05.1992 and prayed that the plaint be dismissed accordingly.

Learned District Judge having heard the witnesses including that of the plaintiff and the defendant decided that the plaintiff is entitled to 8/9 shares of the land but finally he dismissed the action having accepted the prescriptive rights claimed by the defendant.

The issues framed as well as the pleadings filed seem to show that there is a dispute as to the identity of the land in dispute. However, whilst giving evidence the defendant had accepted that the land he claimed is the land for which the action is filed by the plaintiff (page 55 of the brief). Therefore, there is no uncertainty as to the identity of the land subjected to this action. Accordingly, it is clear that this action is filed in respect of the land referred to in paragraph 2 of the plaint.

Learned Counsel for the plaintiff submitted that the learned District Judge misdirected himself when he decided that the defendant has acquired prescriptive title to the land in dispute. Both the plaintiff and the defendant had accepted the position that one Carolis Appu was living on this land until he died on 16.04.1978. The defendant in his evidence had stated that he commenced possessing the land in the year 1978. Learned District Judge having considered the evidence led before him, came to the conclusion that the defendant had acquired prescriptive title having possessed the land since the year 1980. At the same time, he also has decided that the plaintiff has proved that he (plaintiff) is entitled to 8/9 shares of the land. Finally, the learned trial judge dismissed the action of the plaintiff on the basis of prescription claimed by the defendant.

Accordingly, the issue is whether the learned District Judge is correct in accepting the prescriptive claim of the defendant over the land in dispute. As held in **Siyaneris V Jayasinghe Udenis De Silva [52 NLR 289]** the burden of proving independent rights as prescriptive rights, shifts to the defendant once the paper title is undisputed. It was upheld by Wigneswaran J in **Leisa and Another V Simon and Another [2002 (1) SLR 148]** quoting Gratian J in **Pathirana V Jayasundera [58 NLR 169]** and **Maasdorp's Institutes (7th Edition Vol 2 at 96)** Therefore, the burden, in this instance is on the defendant to establish that he had been in continuous and uninterrupted possession of the land during the period of 10 years, prior to the date of filing this action namely 10.09.1991 as required by Section 3 of the Prescription Ordinance.

Accordingly, I will briefly consider the evidence led in respect of the prescriptive claim of the defendant. The documentary evidence other than the document marked V2 relates to the **period after the year 1982.** The document marked **"V3"** relates to the year

1984. **"V4"** is the Voters List for the year 1988 whilst the Voters List for 1992 is marked as **"V5".** The other documents that were marked as **"V6** to **V14"** also show the matters that had taken place after the year 1982. The Grama Sevaka Niladhari through whom the defendant marked the document **"1V1"** had clearly stated that he is not aware of the defendant possessing the land prior to the year 1983. The particular Grama Niladhari had been working in the division where this land is situated since the year 1983. The aforesaid evidence shows that the defendant had been in possession of the land after the year 1982 but not before. In this instance, such a period is inadequate to claim prescriptive rights.

Document marked V2 is the only document available to establish the possession of the defendant for the period before the end of 1982. It is a document issued by the Registrar, District Court, Tangalle. By that document, it is evident that an action had been filed on 27.03.1980 charging the defendant in the Magistrate's Court for house breaking and theft. It is a document issued pursuant to the case record been destroyed. In that document, the address of the defendant is given as "22, Danketiya, Tangalle". Admittedly, the address of the land in question is "122, Danketiya, Tangalle". Hence, it is seen that the document marked V2 does not support the possession of the defendant in respect of the premises bearing No. 122.

Learned District Judge had come to the conclusion that the defendant had been living at the premises bearing "No.122" relying upon the document V2, even though the assessment number of the premises written on the said document is No.22 which is different to the number of the land in dispute. The reason assigned by the learned Judge for him to decide in that manner had been a mistake on the part of the officials who

issued the document. I do not think the learned Judge could have come to such a conclusion as no material is available to conclude so. Therefore, the decision as to the defendant's possession up to the end of 1982 relying upon the document V2 is not tenable. Accordingly, I am of the view that the conclusion of the learned District Judge as to the possession of the land relying upon the said document **"V2"** is erroneous.

Indeed, even the learned Counsel for the defendant is of the view that it is wrong on the part of the learned District Judge to act on **"V2"** in order to decide the possession claimed by the defendant. In the circumstances, I am in agreement with the contention of the learned Counsel for the plaintiff that the learned District Judge misdirected himself when he decided that the defendant had been in possession of the land before the year 1983.

As mentioned hereinbefore, unless the defendant establishes that he was in adverse and uninterrupted possession of the land for ten years since 10.09.1981, he cannot succeed in claiming prescriptive rights over the land. The defendant had failed to establish that he was in possession of the land for the full ten year period. Accordingly, the appeal of the plaintiff appellant should succeed.

Having acceded to the misdirection of the trial judge as to the defendant's possession over the land, learned Counsel for the defendant submitted that it is wrong to have decided that the plaintiff is entitled to 8/9 shares when his claim is for 23/24 shares of the land. At the outset, it must be noted that it is not a matter that had been appealed against. Accordingly, it is seen that the defendant had chosen to accept the decision of the

learned District Judge as to the entitlement of the plaintiff as decided. Hence, the defendant, at this stage has no right to canvass the judgment on those lines.

Moreover, it must be noted that the defendant being the respondent in this appeal cannot take up such an issue at this stage since he had not challenged the title of the plaintiff in the original court. This position in law was highlighted in the case of **Gunawardena V Deraniyagala. [2010 (1) SLR 309]** In that decision Her Ladyship Hon. Bandaranayake CJ held thus:

"On an examination of all these decisions, it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed."

However, I will briefly consider the decision of the learned District Judge as to the title of the plaintiff for completeness. It is correct that the plaintiff in his plaint has claimed 23/24 shares of the land relying on a particular pedigree. Even though the plaintiff has adduced evidence by producing the deeds to claim such a share, learned District Judge has declined to accept some of those. Relying upon the deed marked **"P4",** he had decided that the plaintiff is entitled to 8/9 shares of the land. **"P4"** had been executed in the year 1952, by which Carolis Appu has gifted his undivided 8/9 shares to the plaintiff. Carolis's title have been accepted by the defendant himself and it had been proved by the deeds marked **"V1"**, **"V2"** and **"V3"** as well. In the light of the above, it is clear that the decision as to the plaintiff's entitlement of 8/9 share in the land is not incorrect.

In **Attanayake vs.Ramyawathie [2003] 1 SLR 401,** Dr.Shirani Bandaranayake, J (as she then was) has stated thus:

> *"A co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to."*

The above authority shows that the plaintiff, though he has moved for a greater relief, is not prevented from having a lesser relief, if the evidence permits to do so. Therefore, it is correct when the learned District Judge decided to declare that the plaintiff is entitled to 8/9 of the land though his claim was for a share of 23/24.

When the title is proved, the title holder has the right to possess the land. This proposition in law had been upheld in the case of **Leisa and Another V Simon and Another. [2002 (1) SLR 148]** In that case Wigneswaran J held thus:

"Wille in his book "Principles of South African law" (3rd Edition) at page 190 states as follows:

"The absolute owner of a thing has the following rights in the thing:

(1) To possess it;

(2) To use and enjoy it; and

(3) To destroy it; and

(4) To alienate it."

In discussing the right to possession, he states; (also at page 190)

"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim recover the possession from any person in whose possession the

thing is found. In a vindicatory action ***the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant."***

In the light of the aforesaid authorities, I decide that the plaintiff having an unchallenged 8/9 share, is entitled to obtain possession of the land in dispute evicting the defendant, his heirs, agents and all others holding on his behalf. I further decide that the plaintiff is entitled to have a decree declaring that he is entitled to 8/9 shares of the land referred to in paragraph 2 of the plaint dated 10.09.1991. Learned District Judge is directed to enter decree accordingly.

For the aforesaid reasons, I allow the appeal with costs.

Appeal allowed with costs.

JUDGE OF THE COURT OF APPEAL