IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

CA 16/99 (F)

DC Colombo Case No. 16723/L

1. Kelaniyage Neil
   Ratnayake Perera,
   No.47, Kelani Siri Mawatha,
   Sinharamulla, Kelaniya.
   And 02 others.

Plaintiff-Appellants.

Vs.

1. Dawundage Ariyasena
   Fernando,
   No.6, Gemunu Mawatha,
   Galborella, Kelaniya.
   And 04 others.

Defendant-Respondents.

BEFORE : A.W.A. Salam, J.

COUNSEL : Dr. S.F.A. Cooray with Hippola for the Plaintiff-Appellants and Athula Perera for the Defendant-Respondents.

ARGUED ON: 04.10.2012

DECIDED ON:02.05.2013

A W A Salam, J

The plaintiff-appellants sued the defendant-respondents inter alia for a declaration of title to the portion of land described in schedule III to the plaint. It is a portion of the larger land described in schedule I. There was no contest that the land in schedule II to the plaint is subject to the life interest of the 3rd defendant-respondent. The incidental relief sought by the plaintiff-appellants is the ejectment of the contesting defendant-respondents from the said land.

The plaint set out that the defendant-respondents are in possession of the land described in schedule II to the plaint which they described as an allotment of land known as lot G. The defence raised by the defendant-respondents was that they possessed the strip of land set out in schedule III of the plaint and shown as lot 2 in plan No 1684/A of M.W.D.S. de Silva, Licensed Surveyor and Commissioner of court and thereby acquired a valid prescriptive title. At the conclusion of

the trial, the learned district judge held that the contesting defendant-respondents had acquired a valid prescriptive title to the portion of land in dispute and proceeded to dismiss the action. This appeal has been preferred against the said judgment.

The only contest in the case before the learned trial judge was the ownership to the land depicted as lot 2 in plan No 1684/A. The allotment of land marked as lot G to the West of lot 2 in plan No 1684/A admittedly belongs to the defendant-respondent and does not form part of the corpus, namely lot 2 aforesaid. In the circumstances, it is to be observed that the burden was on the defendant-respondents to establish that they have prescribed to the said lot 2 by right of long and prescriptive possession for a period of more than 10 years immediately prior to the institution of the action as contemplated in section 3 of the Prescription Ordinance.

The evidence adduced at the trial shows that there has been no proper physical boundary between the land claimed to be

in the possession of the defendant-respondents namely Lot G and the land belonging to the plaintiff-appellants.

As far as the defendant-respondents' case is concerned, their unmistakable position was that by virtue of certain deeds they have acquired title to lot G and that they never had encroached upon the land of the plaintiffs'.

The land owned by the defendants is depicted in P3 as lot G. The document marked as P3 is the final scheme of partition in case No 6000/P in the year 1954. This position was not only is averred in the plaint but also admitted by the 2nd defendant in his evidence. The extent of lot G in plan marked as P3 is 22.63 perches.

As far as the evidence is concerned, the plaintiff- appellants have clearly established their title to lot 2 depicted in the Commissioner's plan and the learned district judge had apparently misdirected himself in not declaring the plaintiff-appellants as the lawful owners of the subject matter of the action.

As a matter of fact the recent survey done by the defendant-respondents in 1986 appears to have been surreptitious done and a period of 10 years has not elapsed since the date of that survey. Quite noticeably, up to the year 1986 there had been disputes from time to time between the parties over the ownership of lot 2.

Further the 2nd defendant in his evidence has clearly admitted the encroachment of the land belonging to the plaintiff-appellants. This evidence of the 2nd defendant is found at page 159 of the brief.

Quite prominently the complaint made to the police P4 dated 16.11.1993 indicates that 2nd defendant had purchased Lot 4 shown in document D5 and broke the fence of the plaintiff-appellants. One of the salient errors committed by the learned district judge appears to be that he had not adverted himself to the fact that the defendants did not raise any issue with regard to their right of prescription. Factually, the defendant-respondents relied on the ownership of lot G which is in extent

of 22.63 perches as per document marked P3. As has been submitted on behalf of the plaintiff-appellants when in fact the defendant-respondents have asserted right to block of land in extent of 22.63 perches, it is impracticable to have the defendants declared entitled to an extent of land more than 22.63 perches.

It is appropriate at this stage to advert to section 3 of the Prescription Ordinance which reads that "proof of undisturbed an uninterrupted possession by a defendant in any action, or by those under whom he claims, of immovable property, by a title adverse to or independent of that of the claimants or plaintiff in such action that is to say a possession unaccompanied by payment of rent of produce or performance of service or duty or by any other act by the possessor from which an acknowledgement of the right existing in another person would fairly and naturally be inferred for 10 years previous to the bringing of the action.

The learned district judge in his judgment has failed to consider whether the contesting defendant-respondents had

possession of the subject matter for a period of 10 years immediately preceding the date of the action. The learned district judge in his judgment has never considered as to whether the defendant-respondents had possession of the subject matter for a period of 10 years preceding the date of action. The phrase used by the learned district judge to answer the question relating to prescription is that the defendant-respondent's had been in possession of the subject matter for a long period of time. (බොහෝ කාලයක්)

this finding of the learned district judge is not sufficient enough to confer prescriptive title on the contesting defendant-respondents. In any event the defendant-respondents have failed to lead cogent evidence relating to their prescriptive possession to the subject matter. Hence, I am compelled to allow the appeal and declare that the plaintiff-appellants as the owners of the corpus described in schedule II of the plaint. In the circumstances the judgment of the learned district judge appealed against is set aside and the district court is

directed to enter judgment for the plaintiff-appellant as prayed for in the plaint without damages.

There shall be no costs.

Judge of the Court of Appeal

NR/-