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

C.A. No. 43 / 2000 F
D.C. Colombo No. 17440 / L

Mrs. Eileen Eunice De Silva,
No. 28/4, 6th Lane, Nawala,
Rajagiriya.

Plaintiff

Vs.

G. Liyanage Jayanoris,
No.28/1, Cooray Mawatha,
6th Lane, Nawala,
Rajagiriya.

Defendant

AND NOW BETWEEN

Mrs. Eileen Eunice De Silva,
No. 28/4, 6th Lane, Nawala,
Rajagiriya.

Plaintiff Appellant

Vs

G. Liyanage Jayanoris,
No.28/1, Cooray Mawatha,
6th Lane, Nawala,
Rajagiriya.

Defendant Respondent

BEFORE	:	UPALY ABEYRATHNE, J.
COUNSEL	:	Manohara De Silva PC with Wimal Hippola for the Plaintiff Appellant Rohan Sahabandu PC with E.D. Palihapitiya for the Defendant Respondent
ARGUED ON	:	18.03.2013
DECIDED ON	:	02.07.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Colombo seeking for a declaration of title and ejectment of the Respondent from the premises described in the schedule to the plaint. The Respondent filed an answer praying for a dismissal of the Appellant's action and claimed a prescriptive title to the said land. After trial the learned Additional District Judge delivered judgement in favour of the Respondent. Being aggrieved by the said judgment dated 17.02.2000 the Appellant has preferred the present appeal to this court.

According to the Appellant the original owner of the land in suit was one Benjamin Edward Cooray. After the demise of the said original owner the title of the said land had been devolved on his wife Christina Cooray and four children.

They had amicably partitioned the said land by a deed of partition bearing No. 80 dated 10.08.1978. Thereafter said Christina Cooray by a deed of gift bearing No 4582 dated 19.03.1980 had gifted her rights to Nawalage Marlene Marcelle Cooray and he by a deed of gift bearing No 4882 dated 16.10.1981 had gifted his rights to the Appellant. The Appellant's position was that the said original owner Edward Cooray had let the said premises to the Respondent at a rent of Rs. 50/- per month and thereafter the Respondent has become the tenant of said Christina Cooray, Marlene Marcelle Cooray and the Appellant respectively.

The Respondent's position was that in 1964 the Appellant's father undertook to find a house on rent for the Respondent and accordingly the Appellant's father has introduced one Jacob who was in occupation of a house of which the owners had left to India and the Respondent has got the said house on a rent of Rs. 1250/-. After receiving the said rent of Rs. 1250/- said Jacob has left the said premises and the Respondent has gone in to occupation of the said premises. The Respondent has further said that he paid rent to the father of the Appellant. (At page 123 and 124 of the brief)

According to the said evidence of the Respondent the owners of the premises were not in the country and had left to India. If it was the prevailed position of the premises in suit why did the Respondent pay a rent to the Appellant's father who had no connection to the said property? The Respondent has not called any witnesses to prove the said position.

It seems from the said evidence that the story of the Respondent that he got the house from Jacob and the owners had left to India is highly

unbelievable. Since the Respondent has paid rent to the Appellant's father, an inference can be drawn that the Respondent has admitted the ownership of the Appellant's father. The Appellant has proved his title by leading documentary evidence P 1 to P 7. Said title deeds have been admitted by the Respondent. (At page 181 of the brief)

The Appellant's position was that the Respondent has failed to pay rent to the Appellant after he became the owner of the premises in suit. Thereafter the Appellant, by P 38, has informed the Respondent that he has paid the rent up to March, 1983 and has failed to pay the rent thereafter and has requested the Respondent to quit the premises and to hand over vacant possession thereof on or before 28th of February 1994 and to pay all arrears of rent from April 1983. The Respondent has not replied to the said notice to quit. It is well settled law that in certain circumstances the failure to reply to a letter amounts to an admission of a claim made therein.

In the case of Wijewardene vs. Don John 25 NLR 196 Woodrento J observed that "It was pointed out, moreover, by Lord Esher, Master of the Rolls, in the case of Wiedeman v. Walpole (supra) that there were circumstances, for example, in business and mercantile litigations, in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer if he means to dispute the fact that he did so agree. It Appears to me that the present case falls within the .category indicated by Lord Esher in the passage, the effect of which I have just summarized We have here the formal letter of demand written by the plaintiff-respondent's proctor to the first defendant-appellant, clearly stating that he was in possession of the land belonging

to his client, and that lega proceedings would be instituted if he did not withdraw. It was a land with which the evidence shows that the first defendant-appellant had been in various ways connected, and I think that the learned District Judge was right in drawing, from his omission to reply, the adverse inference that the facts alleged in it were true."

In the case of The Colombo Electric Tramways and Lighting Co. Ltd. Vs. Perera 25 NLR 193 Jayawardene, A.J. observed that "The failure of the defendant to reply Braid's letter of July 29 (P 14), in which it was clearly stated that defendant had agreed and was liable to pay two-thirds of the cost of the installation until September 22 after he had been threatened with an action, amounts, in my opinion, almost to an admission in law of his liability to pay a two-thirds share of the cost."

In the present case the Appellant by P 38 has informed the Respondent that he has paid the rent up to March, 1983 and has failed to pay the rent thereafter and has further requested the Respondent to quit and to hand over the vacant possession of the premises on or before 28th of February 1994 and to pay all arrears of rent from April 1983. The Respondent has failed to reply to the said letter. If the Respondent has prescribed the premises in suit as claimed by him, a reply to P 38 would have been sent to the Appellant. But he has not done so. Hence an inference can be drawn that the contents in P 38 were true.

The learned Additional District Judge has held that the Respondent has prescribed the premises in suit. It seems from the said judgment that the learned Additional District Judge has come to the said conclusion upon an incident which occurred on or about 19.10.1981. (V 1) It must be noted that when arriving at the said conclusion the learned Additional District Judge failed to consider P 36.

P 36 was a rent receipt dated 5th December 1984. (At pages 179 of the brief) The Respondent has admitted the rent receipt produced marked P 29 to P 36. (At page 181 of the brief) It appears from P 36 that even in 5th of December 1984 the Respondent has admitted the title of the Respondent. There has been no evidence adduced by the Respondent to prove that he has commenced an undisturbed and uninterrupted possession or a title adverse to or independent of that of the Appellant after December 1984. This case has been instituted in 6th of December 1994.

Section 3 of the Prescription Ordinance in no-uncertain words stipulates that "Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs."

The Appellant in his evidence has produced notices of assessments and receipts for payments of tax and rates marked P 8 to P 28. At the trial said documents have been admitted by the Respondent. (At page 181 of the brief) P 23 is a receipt of payment of tax for the year 1981. P 24, P 25, P 26, P 27 and P 28 are receipts of payment of tax for the years 1984, 1985, 1986, 1987, 1993 and 1994 respectively.

It was common ground that the Respondent had been in possession of the premises in suit as the tenant of the Appellant's father. Since the Respondent had entered in to the occupation of the premises belonging to the father of the Appellant on payment of rent the Respondent cannot acquire title by prescription to such property unless he get rid of character in which he commenced to occupy by doing some overt act showing an intention to possess adversely to the Appellant. When there is a significant absence of clear and specific evidence of such acts of possession as would entitle a party to a decree in his favour in terms of Section 3 of the Prescription Ordinance, such a party cannot succeed on a plea of prescription.

In the case of The government Agent, Western Province vs. Ismail Lebbe (1908) 2 Weer. 29 (Full Bench) it was observed that "where a person who has obtained possession of a land of another in a subordinate character, e.g. as tenant or mortgage, seeks to utilize that possession as the foundation of a title by prescription, he must show that by an overt act, known to the person under whom possesses he has got rid of his subordinate position, and commenced to use and occupy the property *ut dominus.*"

G.P.S. De Silva CJ in the case of Sirajudeen and two oyhers vs. Abbas (1994) 2 Sri L. R. 365 (SC), observed that "Where the evidence of possession

lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.

Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights. A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner."

The Respondent has not led evidence of any witnesses or has not produced any supporting documents to prove that he has commenced a title adverse to or independent of that of the Appellant. In this regard he has produced a certified copy of a Magistrate's Court case record bearing No 19383/3 marked V 1. Shamali Devika Gammaddegoda, the accused of the said case has been charged

under Section 315 of the Penal Code. Said case also has been settled between the parties. Such an act cannot be considered as a starting point of a prescriptive title adversely to the Appellant.

There are two points regarding the law of prescription that should be always well borne in mind; (1) a possessor is always presumed to hold in his own right and as proprietor until the contrary be demonstrated; (2) the contrary been once established, and it being shown that the possession commenced by virtue of some other title, such as that of tenant than the possessor, is presumed to have continued to hold on the same terms, until he distinctly proves that his title has been changed. Hence no inference can be drawn from the said Magistrate's Court case with regard to a title adverse to or independent of that of the Appellant. Hence the Respondent's evidence as a whole does not show that his possession was adverse in the sense that his possession is incompatible with the title of the Appellant and his predecessors in title.

The learned Additional District Judge has overlooked said requirements of Section 3 of the Prescription ordinance. In the said circumstances I am of the view that the learned trial Judge has failed to consider the evidence of the Appellant on correct perspective. Hence I set aside the said judgment of the learned Additional District Judge dated 17.02.2000 and enter a decree in favour of the Appellant as prayed for in the plaint. Therefore I allow the appeal of the Appellant with costs.

Appeal allowed.

Judge of the Court of Appeal