IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. No. 611/98(F) **D.C. Case No. 5934/L**

Abeygunawardana Liyanarachchige Dinadasa,

Defendant-Appellant

Vs.

Kulawathi Jayasinghe,

Plaintiff-Respondent

BEFORE : K.T. CHITRASIRI, J.

COUNSEL : Rohan Sahabandu, P.C. with M. Jayaratne for the Defendant-Appellant

Milhan Ikram Mohamed for the Plaintiff-Respondent

Argued &

Decided on : 28.11.2013

K. T. CHITRASIRI, J.

Heard both Counsel in support of their respective cases. This is an appeal seeking *inter alia* to set aside the judgment delivered on 13.08.1998 of the learned District Judge of Matara. By this appeal, Defendant-Appellant (hereinafter referred to as the defendant) also sought to have the reliefs prayed for in his answer filed in the district court in addition to have the judgment set aside.

The plaintiff-respondent (hereinafter referred to as the plaintiff) filed this action seeking for a declaration declaring that she is the owner of lots 3, 4 and 5 referred to in the plan bearing No. 3016 marked as X in evidence and to have the defendant evicted therefrom. The plaintiff also has sought to have damages as averred in paragraph 11 of the amended plaint dated 06.08.1985.

In the answer, whilst seeking to dismiss the action of the plaintiff, the defendant claimed prescriptive title to the aforesaid lots 3, 4 and 5. Issues of the respective parties were framed to fall in line with those pleadings and then the case proceeded accordingly. Thereafter, learned district judge decided the case in favour of the plaintiff having rejected the prescriptive claim of the defendant.

Learned district judge concluded that the plaintiff became entitled to the aforesaid lots 3, 4 and 5 referred to in the plan marked X, by virtue of the final decree entered in the partition action P/794 and by the deed bearing No.2481 marked P4. The said decision that was arrived at relying upon the aforesaid final decree and the deed has not been challenged by the defendant either in this Court or in the Court below. Therefore, it is correct in answering the first issue of the plaintiff affirmatively having decided that the title of the land in question is with the plaintiff.

Then it is necessary to consider whether the learned District Judge is correct or not in rejecting the prescriptive claim of the defendant. To claim prescriptive rights, it is the burden of the defendant to establish undisturbed and uninterrupted possession to the land he claims for a period of ten years previous to the filing of the action. [Section 3 of the Prescription Ordinance] Before venturing into the prescriptive claim of the defendant, it is necessary to determine the identity of the land to which the defendant claims prescriptive rights.

Pursuant to filing of this action, the plaintiff has moved Court to issue a commission in order to obtain a clear picture as to the identity of the premises in suit. Accordingly, the plan bearing No. 3016 was prepared and filed by N.G.E.Dias, Licensed Surveyor. [vide J.E.9 dated 04.07.1985/page 25 of the appeal brief] It was produced in evidence marked as X. [vide page 101 in the appeal brief] Consequently, the parties have accepted that the land in suit comprises Lots 3, 4, and 5 of the aforesaid plan marked X and therefore the identity of the corpus was not in issue even in the Court below. Furthermore, it is also accepted that the land to the north of those 3 lots which is marked as lot 2 in the plan X belongs to the plaintiff whilst the land to the south of those 3 lots which is given the marking B4 belongs to the defendant.

The defendant took up the position that he possessed lots 3, 4 and 5 together with the land marked Lot B4. In support of this contention,

learned President's Counsel for the defendant referred to the fence found between the lot 2 which is under the control of the plaintiff and the land consisting of lots 3, 4 and 5. Accordingly, he contended that the defendant had been in possession of lots 3, 4 and 5 together with lot B4 as one separate land of which the northern boundary is shown as the fence referred to above. Similar stand had been taken up by the defendant in the original Court as well. This point was carefully looked at by the learned District Judge and his observations in this regard read thus:

"මිනින්දෝරු ඩයස් මහතාගේ සාක්ෂිය අනුව අංක 2 සහ 3, 4, 5 කැබලි අතර වූ පොදු මායිම අවුරුදු 4 සිට 5 දක්වා වයසැති පැල ඉනි වැටකි. මෙම වැටේ වයස පිලිබඳව විත්තිකරු සහ විත්තිකරුගේ සාක්ෂිකාර ගුණදාස වෙනත් ස්ථාවරයක් ගැනීමට උත්සාහ දරා ඇතත් සාක්ෂි සමස්ථයක් වශයෙන් සලකා බලන කල වැටේ වයස පිලිබඳ විත්තියේ ස්ථාවරය සමබර සාක්ෂි සිද්ධාන්තය අනුව පිලිගැනීමට නොහැක. මෙම තීරණයට එළඹීමට තුඩු දුන් හේතූන් සමහරක් මෙසේය.

(I) විත්තියේ සාක්ෂියට වඩා මිනින්දෝරුවරයාගේ සාක්ෂිය විශ්වාසනීයභාවයෙන් ප්‍රබලය.

(II) විත්තියට, වැටේ වයස තවත් කොමිසමක් ලබාගෙන විශේෂඥ සාක්ෂි මගින් ඔප්පු කිරීමට අවස්ථාවක් තිබූ නමුත් එවන් පියවරක් ගෙන නොමැත.

(III) පැ. 2 හි බි4 සහ පී 1 පොදු මායිම සහ x පිඹුරේ 3, 4, 5 කැබලි වලට උතුරින් පෙන්වා ඇති කම්බි සහ පැල ඉනි වැට එකිනෙකට හාත්පසින් වෙනස්ය.

විත්තිකරුගේ සාක්ෂිය අනුවම ප්‍රශ්ණගත කැබැලි වල බොහෝ කලක් වගාවන් කර නොමැත. සිදුකරන ලද තේ වගාව වුවද අවුරුදු පහකට වඩා පැරණි නැත."

[vide proceedings at page 207 in the appeal brief]

The above reasoning of the learned District Judge shows that he was mindful of:

- the age of the fence;
- the discrepancies of the boundary between the three lots and the land possessed by the plaintiff;
- the fact that the subject matter was a bear land without a proper plantation and particularly;
- the evidence of the surveyor.

Hence, it is clear that the trial judge has evaluated the evidence, in connection with the fence referred to above very correctly when he decided on the issue of possession claimed by the defendant to the land in dispute. Then only he has decided to reject the claim of the defendant as to the possession of lots 3, 4 and 5.

The defendant also seems to have heavily relied upon the documents marked V1 to V7 to establish his claim of prescription. Having considered the evidence in connection with those documents, learned District Judge has concluded that those documents have been issued in relation to lot B4 referred to in the plan marked X to which the plaintiff does not make any claim. He has further held that those documents do not become relevant to the particular portions of the land in dispute namely lots 3,4 and 5.

In coming to the said decision, learned District Judge has considered the evidence of the surveyor and the evidence of Kalugamage Gunadasa and also the evidence of an officer from the Tea Small Holdings. Upon evaluating the evidence of those witnesses, learned trial judge, once again has found that those documents marked by the defendant are in respect of the aforesaid Lot B4 and not to the land comprising of 3 lots which are subjected to in this case.

At this stage it must be noted that this Court also is not in a position to look at those documents since those have not been tendered to Court after the conclusion of the trial. Plaintiff is unable to have those documents available for perusal even at this appeal stage.

Learned district judge, without looking at those documents due to its non-availability, has considered the oral evidence adduced in connection with those documents since those are marked documents in

evidence and has held that those documents do not relate to the disputed lots namely lots 3, 4 and 5 in the plan marked X. In addition to those findings learned District Judge has also given other reasons as to why he rejected the claim of prescription made by the defendant. Those reasons are found at pages 203,204 and 205 in the appeal briefs.

The aforesaid reasons of the learned district judge shows that he has carefully considered the claim of prescription having addressed his mind to the requirements referred to in Section 3 of the Prescription Ordinance. In doing so, he has even looked at the age of the plantation found on the disputed lots 3, 4 and 5 when he decided to reject the claim of prescription of the defendant.

I do not see any error in his findings and in the reasons assigned thereto. Accordingly, I am not inclined to interfere with the decision of the learned District Judge. For the aforesaid reasons, this appeal is dismissed with costs fixed at Rs. 50,000/=.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

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