

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

Nethanial Soloman
No.66/2, Aniewatta,
Kandy

1st Plaintiff-Appellant

And others

Vs

C.A.No.1224/98 (F)

D.C.KANDY CASE NO.3227/L

Ranjith Ramyasiri Uduwela
No.38, George E.de.Silva Mawatha,
Kandy.

Defendant-Respondent

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : W.D.Weeraratne for the Plaintiff- Appellants
R. Chula Bandara with Sidath Bandara for
the Defendant-Respondent

ARGUED ON : 28.05.2013, 29.05.2013 and 04.11.2013

WRITTEN : 28th June 2013 by the Plaintiff Appellants
SUBMISSIONS : 28th June 2013 by the Defendant Respondent
FILED ON

DECIDED ON : **03.12.2013**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 10th September 1998 of the learned District Judge of Kandy. In addition to the said relief, the plaintiff-appellants (hereinafter referred to as the plaintiffs) also sought for a judgment in their favour though they have failed to specify the reliefs that they seek, in their petition of appeal. Apparently, in the plaint dated 29th September 1989, the plaintiffs have sought inter alia for a declaration of title to the land referred to in the schedule to the plaint and to have the defendant-respondent (hereinafter referred to as the defendant) evicted therefrom.

The defendant in his answer dated 24th May 1990, sought to have the plaint dismissed stating that his wife namely Dayangani Sandya Athurupana and her father Upali Tissa Athurupana became entitled to the land referred to in the first schedule to the answer by virtue of the deed bearing No.140 dated 30.06.1980 and the decree entered in the case bearing No.L/9123, respectively. The vendor to the said deed 140 had been her mother Leelawathie who is the daughter of one T.M.Tikiri Banda alias Ranawaka who was declared entitled to the land referred to in the first schedule to the answer along with said Upali Tissa Athurupana. The defendants, in the aforesaid action L/9123 included 7 children of one Narayan Nathaniel amongst whom 5 are the plaintiffs in this case.

The issues framed, having regard to those facts referred to in the pleadings, were directed basically to determine whether the plaintiffs do entitle to have a declaration declaring them as the owners to the land referred to in the schedule to the plaint.

The plaintiffs whilst claiming prescriptive title to the land referred to in the schedule to the plaint have also produced one deed namely the deed bearing No.664 marked P4 in evidence to prove their title. By the said deed P4, the land referred to therein had been gifted by Narayan Nethaniel to the plaintiffs who are his five children amongst seven. (vide page 125 of the appeal brief). However, in that deed nothing is mentioned as to the way in which Narayan Nethaniel became entitled to the land. In other words, owners of that land prior to Narayan Nathaniel are not been described in that deed marked P4. However, in evidence it is stated that Narayan Nethaniel became entitled to the land by the letter dated 1st June 1956, signed and issued by one Nandasena and the said letter has been marked "X" in evidence. Apparently, the title claimed by the defendants to the land in dispute also had emanated from the rights of said Nandisena.

In terms of Section 2 of the Prevention of Frauds Ordinance, the said document marked "X", not being a notarially executed document, is not capable of transferring title of immovable property. Hence, Narayan Nethaniel who gifted the property to the plaintiffs had no valid title for him to transfer

the property to the plaintiffs by the aforesaid deed marked P4. Therefore, it is clear that the plaintiffs cannot claim clear title to the land referred to in the schedule to the plaint on the strength of the deed bearing No.664 marked as P4. Hence, the learned District Judge is correct when he decided to reject the claim of the plaintiffs made relying upon the deed bearing No.664 marked P4.

Then the next issue is to ascertain whether the plaintiffs were able to establish prescriptive title to the land they claim. For them to have prescriptive title to the land, it is necessary to prove the requirements referred to in Section 3 of the Prescription Ordinance. Accordingly, they should have established undisturbed and uninterrupted possession of the land they claim for a period of 10 years previous to the bringing up of this action. This action was filed on 29th September 1989. Therefore, it is the burden of the plaintiffs to establish that they were in undisturbed and uninterrupted possession for 10 years prior to 29th September 1989.

The position taken up by the defendant is that the predecessors in title of the wife of the defendant commenced possessing the land subjected to in this case or to a part thereof, as a result of the decision in the case bearing No.L/9123. Having taken up this position, he has taken immense pain to show that the possession of the plaintiffs to the land in question had been interrupted by the execution of the decree entered in the aforesaid action

L/9123. Accordingly, the defendant had attempted to establish that there had been interruptions or disturbances to the land been possessed by the plaintiffs and therefore they are not entitled in law to claim rights in terms of Section 3 of the Prescription Ordinance.

Plaintiffs have not denied having the writ been executed in the case L/9123. This fact is also supported by the report marked V7 filed by the Fiscal in the District Court of Kandy. The witness Saloman Nathaniel who gave evidence on behalf of the plaintiffs too, has referred to the execution of Writ in L/9123. In his evidence he has stated thus:

ප්‍ර: ඊට පස්සේ ඇස්කිසියක් අරගෙන පිස්කල් ගියා නේද?

උ: ඔව්

ප්‍ර: ඒ ගියේ කවදද?

උ: මතක නැහැ.

ප්‍ර: 1983 ඔක්තෝම්බර් මාසේ නේද ගියේ?

උ: ඔව්

ප්‍ර: මේ පිස්කල් එක්ක පාර්ශවකරුවොත් ගියා නේද?

උ: පාර්ශවකරුවෝ ගියේ නැහැ.

ප්‍ර: අතුරුපානත් ගියා නේද?

උ: ඔව්.

ප්‍ර: පිස්කල් ගිහින් ගෙදරින් බඩු අයින් කරගන්න කිව්වා?

උ: ගේ ඔක්කෝම කඩලා දාලා ගියා. පිස්කල් ඇවිල්ලා බුක්තිය දීලා ගියා පැමිණිලිකරුව බාර දීලා. ඒ කරලා එයාලා ගියා. ඒක වුනේ 1983 අවුරුද්දේ.

ප්‍ර: ඒ කොටස තමයි 9123 හි අතුරුපාන ඉල්ලුව කොටස?

උ: කඩපු කැල්ල අපි ඉන්න කැල්ල.

[vide proceedings at page 142 in the appeal brief]

Identity of the two lands involved in this case and in the case L/9123, is established by the evidence of Surveyour Aththanayake. He has clearly stated that the land referred to in the schedule to the plaint is depicted in his plan marked P1. [vide proceedings at page 93 in the appeal brief] He has further stated that the plan marked V4 also was drawn by him having superimposed the plans marked P1 and V3 on to the plan V4. [vide proceedings at pages 99 and 105 in the appeal brief] The plan marked V4 is found at page 292 in the appeal brief. The 1st plaintiff himself has stated that the land claimed by the plaintiffs which is referred to in the schedule to the plaint, is the land shown in the plan bearing No.778 dated 10.10.1986 marked P1 drawn by T.B.Aththanayake L.S. [vide proceedings at page 201 in the appeal brief]

The plan marked V4 which is identical to the plan P1 shows that the land referred to therein includes the land referred to in the plan bearing No.165 dated 20.08.1963 marked as V3. As described by the surveyor, the land shown

in plan 165 marked V3 is the land subjected to in the case L/9123. Hence, it is clear that the land shown in V3 that refers to the corpus in L/9123 is a part of the land shown in the plan marked P1 which depicts the land claimed by the plaintiffs in this case. This plan is also referred to in the *Decree Nizi* entered in that case L/9123 which was marked and produced in evidence. Hence, it is clear that the land subjected to in the case L/9123 falls within the land claimed by the plaintiffs in this case.

Admittedly, the decree entered in the aforesaid case bearing No. L/9123 had been executed by the Fiscal in the District Court of Kandy. This fact is evident even by the documents marked V6 and V7. The document marked V6 is the writ issued to the Fiscal while the document V7 is the report submitted by the said Fiscal to show that he successfully executed the decree entered in that case. The Fiscal report clearly indicates that the subject matter in the case L/9123 was handed over to the decree holders evicting the wife of the 6th defendant in that case namely Sundararaja Nathaniel. Admittedly, he is one of the brothers of the five plaintiffs in this case. As mentioned above in this judgment, the land subjected to the execution of the decree in L/9123 forms part of the land claimed by the plaintiffs in this case.

Aforesaid Sundararaja Nathaniel who is a brother of the plaintiffs and against whom the writ was executed is not a party to this action. Neither is his wife Amarawathie who was evicted by the Fiscal. Therefore, it is seen that a major part of the land claimed by the plaintiffs had been in the hands of the

family members of Sundararaja Nathaniel until the execution of the decree in L/9123. As stated above they are not parties to this action. No evidence is found to show that the plaintiffs possessed the land along with his brother Sundararaja Nathaniel either. Therefore, it is seen that there is clear evidence to show that a major part of the land sought to be partitioned in this case had not been possessed by the plaintiffs.

More importantly, clear evidence is forthcoming to show that the possession of the land subjected to in the case L/9123 which forms part of the land referred to in the schedule to the plaint had been handed over to the plaintiffs in that case by the Fiscal on 20.10.198. [V6 and V7] Hence, once again it is clear that there exists undisputed evidence to show that the possession of the land in question had been in the hands of the persons other than the plaintiffs, during the period, the case L/9123 was pending which period falls within the required 10 years to prove prescriptive title as claimed by the plaintiffs.

At this stage, it is noteworthy to refer to the decision in **Saiman Appu vs. Christian Appu [I N.L.R. at page 288]** which is directly on this point. In that decision Withers, J held thus:

“Possession is disturbed either by an action intended to remove the possessor from the land or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous into a disconnected and divided user.

Such, roughly speaking, are the consideration which I should be disposed to look to in deciding the question whether there has been such a disturbance or interruption of possession of a land as would defeat a claim to a decree of title by prescription”.

Facts of the case at hand also show that pursuant to the execution of the decree in the case bearing No.L/9123, there had been clear interruption to the possession claimed by the plaintiffs. Such interruptions and disturbances in respect of a major part of the land claimed by the plaintiffs would prevent them claiming title in terms of Section 3 of the Prescription Ordinance even though the learned counsel for the appellants submitted that the parties who were placed in possession by the Fiscal in L/9123 had been dispossessed soon thereafter.

For the aforesaid reasons, it is correct to decide that the plaintiffs have failed to establish prescriptive title to the land they claim. As mentioned hereinbefore in this judgment, they have also failed to prove title to the land by producing the deed bearing No.664 marked P4. Hence, I do not see any reason to interfere with the decision of the learned District Judge. Therefore, I am not inclined to disturb the findings of the learned District Judge of Kandy.

For the aforesaid reasons, this appeal is dismissed. Considering the circumstances of the case, I make no order as to the costs of this appeal. Parties are to bear their own expenses.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL