**IN THE COURT OF APPEAL**

**OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

P.M.Gunarathna Banda
No.2/76, Keenawala, Nungamuwa,
Pallewela.

**Deceased-Defendant-Appellant**

K.Anulawathie
No.76/2, Nungamuwa,
Pallewela

**And others**

**Substituted-Defendant-Appellants**

**Vs**

**C.A.No.1270/2000 (F)**

**D.C.GAMPAHA CASE NO.38010/L**

G.Carolis Appuhamy
No.36, Nungamuwa,
Pallewela.

**Plaintiff-Respondent**

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|---|---|---|
| **BEFORE** | : | **K.T.CHITRASIRI, J** |
| **COUNSEL** | : | A.Devendra with S.Jayasooriya for the Substituted-Defendant-Appellants<br>Daya Guruge for the Plaintiff-Respondent |
| **ARGUED ON** | : | 25.06.2013 |
| **WRITTEN SUBMISSIONS FILED ON** | : | 26th July 2013 by the Substituted –Defendant Appellants<br>17th October 2013 by the Plaintiff- Respondent |
| **DECIDED ON** | : | **10.12.2013** |

**CHITRASIRI, J.**

This is an appeal seeking to set aside the judgment dated 29th November 2000 of the learned District Judge of Gampaha. By that judgment, the case was decided in favour of the plaintiff-respondent (hereinafter referred to as the plaintiff) as prayed for in the plaint dated 23rd November 1994. In that plaint, the plaintiff sought *inter alia* to have a declaration, declaring that he is a co-owner of the land referred to in the first schedule to the plaint and also to have a declaration stating that he is entitled to use the roadway referred to in the second schedule to the plaint. He has even sought to have the defendant-appellant (hereinafter referred to as the defendant) evicted from the land referred to in the two schedules to the plaint.

Whilst claiming prescriptive rights to the land in dispute, the defendant sought to have the plaint dismissed. He has also moved for damages for improvements alleged to have been made by him on this land, in the event an order is made to evict him. Having framed the issues in accordance with the pleadings filed, the matter was taken up for trial, and the learned District Judge then decided the case in favour of the plaintiff having rejected the prescriptive claim of the defendant. He has not awarded damages for the improvements claimed by the defendant either.

The land put in suit had been subjected to a partition action and both parties had no dispute as to the entering of the decree in that partition case bearing No.19330/P. The 1st defendant in that partition action, namely W.A.Abilin Nona was declared entitled to 3/9 shares of the corpus in that case and her rights had been confirmed by allocating lot A to her which is being referred to in the Final Plan filed and accepted in that action 19330/P. Relying upon the rights given to Abilin in that partition action, the plaintiff claims that he became a co-owner to the said Lot A in Plan No.1198 dated 25.03.1981, having succeeded to the rights of said Abilin Nona, she being his mother.

The mother of the defendant also had been a party in the aforesaid partition action and she was the 4th defendant in that case. She was allotted Lot B in the aforesaid partition plan 1198. The said partition plan and the final decree entered in that case 19330/P had been marked as P1 and P2 in evidence adduced in this case. Contents of those two documents had never been in dispute.

Accordingly, there has been no dispute as to the co-ownership of the plaintiff to Lot A and the ownership of the defendant's mother to Lot B in the plan 1198. Plaintiff does not claim rights to Lot B. Accordingly; the dispute in this case is in respect of Lot A and the right of way referred to as Lot F in plan

1198, where the plaintiff claims that the defendant is in unlawful possession to which the defendant claims prescriptive title.

Learned District Judge having carefully considered the evidence led before him, has decided that the defendant is in unlawful possession of the land in dispute having rejected his prescriptive claim. As mentioned hereinbefore, the plaintiff is a co-owner to the land in dispute. It is settled law that a co-owner to a land has the right to have a trespasser evicted therefrom. **[Hevawitarane et al. V Dangan Rubber Company Limited (17 NLR 49), Rockland Distilleries V Azeez 52 NLR 430 and Hariette V Pathmasiri 1996 (1) SLR 358]** Therefore, the plaintiff being a co-owner to the land put in suit has the right to have the defendant evicted therefrom on the basis of the title derived from the partition decree entered in the case 19330/P provided the defendant fails to establish his claim of prescription.

Then the next issue is to ascertain whether the defendant was able to establish his claim of prescription successfully. Section 3 of the Prescription Ordinance requires a defendant to prove undisturbed and uninterrupted possession in respect of the land he claims for a period of ten years previous to the bringing of the action. Defendant has claimed that he commenced possessing this land in the year 1970. (vide proceeding at page 66-75 of the appeal brief) He has also stated that he was in possession of the land, despite the pendency of the aforesaid partition action bearing No.19330/P. However,

the position of the plaintiff is that he allowed the defendant to cultivate the land in the year 1989 enabling him to have a pineapple plantation on the land.

At this stage, it is necessary to note that the blocking out of the land in terms of the final plan filed in the partition action 19330/P had been carried out by a Surveyor having shown the boundaries physically on the ground though there is no evidence to show that the decree in that case had been executed by the Fiscal in that Court. Therefore, taking over of the possession of the partitioned land including the land in dispute by the respective parties, who became entitled to the land in the partition action should not be disregarded in this instance. Accordingly, it is clear that the possession of the land in dispute namely Lots A and F in the plan 1198 had been under the control of the respective parties in the partition action at least soon after the blocking out of the land pursuant to the interlocutory decree entered in the partition action. In the circumstances, it is correct to decide that the defendant had no continuous and undisturbed possession of the land claimed by the plaintiff. Accordingly, it is my opinion that the learned District Judge is correct when he rejected the defendant's prescriptive claim to Lots A and F in the partition plan drawn pursuant to the decree entered in the partition action 19330/P.

Learned District Judge, has also carefully considered the evidence led on behalf of the defendant in relation to his claim on prescription. His reasons and findings on this issue are as follows:

"විත්තිය වෙනුවෙන් සාක්ෂිදුන් විත්තියේ සාක්ෂිකාර සුගතදාස ට අනුව, විත්තිකරු මෙම ඉඩමේ අන්නාසි වගාව පටන්ගෙන ඇත්තේ 1989 වර්ෂයේදී පමණ ය. ඔහු ඉඩමෙන් කොටසක් වෙන් කර ගෙන 1989 දී පමණ එම අන්නාසි වගාව ආරම්භ කර එතැන් පටන් පවත්වා ගෙන පැමිණ ඇත. එසේවුවත්, විත්තිකරුගේ නඩුවේ සෙසු සාක්ෂිකරුවන්ගේ සාක්ෂි විභාගයේදී විශේෂයෙන්ම විත්තිකරු සහ තවත් එක් සාක්ෂිකරුවෙකු පැවසීමට උත්සාහ කළේ විත්තිකරු 1970 තරම් ඇත අවදියක සිට මෙම ආරවුලට භාජිත ඉඩමේ පදිංචිවී වගා කර ගෙන පැමිණි බවයි. විත්තිකරු මේ බව සනාථ කිරීම සඳහා වි.1, වි.2, වි.3, වි.4 වශයෙන් මැතිවරණ නාම ලේඛණයෙන් උපුටාගන්නා ලද උපුටනයන්ගේ සහතික පිටපත් ඉදිරිපත් කරන ලදී. වි.1 1980 ජන්ද නාම ලේඛණයේ උපුටනයකි. වි.2 1985 ජන්දනාම ලේඛණයේ උපුටනයකි. වි.3 1990 ජන්ද නාමලේඛණයේ උපුටනයක් වේ. වි.4 1995 ජන්ද නාමලේඛණයේ උපුටනයක් වේ. මේ මගින් ඔහු උත්සාහ කළේ ඒතරම් ඇත අවදියක සිට ඔහු ඉඩමේ පදිංචිවී ඉඩම භුක්තිවින්ද බව දැක්වීමට ය. වි.1, වි.2, වි.3, වි.4 යන උපුටනයන් අනුව සඳහන් කරන්නේ, ගම්පහ - මීරිගම අංක.36 දරණ කොට්ඨාශයේ, නුංගමුවේ අංක. 76/2 දරණ ගෘහ අංකයේ පදිංචි පිරිසක් ගැන ය. **මෙම ගෘහ අංකය සහිත ගෘහය වර්තමාන ආරවුලට භාජිත පැමිණිල්ලේ '1වන' උපලේඛණයේ සඳහන් ඉඩම තුළ පිහිටා ඇද්ද ? යන්න, එකී වි.1, වි.2, වි.3, වි.4 ලේඛණ වලින් සනාථ නොවේ. වෙනත් ලේඛණ වලින්ද ඒඛ ව සනාථ නොවේ.** විත්තිකරු සඳහන් කරන අන්දමට අංක.76/2 ගෘහය මෙම ආරවුලට භාජිත කැබැල්ල තුල තිබුනානම්, එය පැහැදිලි ලෙසම පැ.2 දරණ අවසාන තීන්දුවට අදාළ අංක. 19330 දරණ බෙදුම් නඩුවේ මුලික පිඹුරේ සහ අවසාන

පිඹුරේ සටහන් වියයුතුව තිබුණි. නමුත් පැ.1 දරණ පිඹුරේ 'ඒ' අක්ෂරය වශයෙන් දක්වා ඇති ගොඩනැගිල්ල සහ ළිඳ, පැ.2 දරණ අවසාන තීන්දු ප්‍රකාශයට අනුව හිමිවී ඇත්තේ, එම නඩුවේ 3 වන විත්තිකරු වූ මියුරියල් ටය. විත්තිකරුගේ මව යයි සඳහන් කැනු ලැබූ පොඩිහාමිනේ ට හෝ විත්තිකරුට, එකී පැ.1 සැලැස්මේ 'ඒ' අක්ෂරයෙන් දක්වා ඇති ඉඩම් කැබැල්ලේ පිහිටි ගොඩනැගිල්ල හිමිවූ බවක් සඳහන් නොවේ. එසේම අනෙක් අතට පැ.1 හි හෝ පැ.2 හි, පැ.1 සැලැස්මේ අංක 'ඒ' අක්ෂරයේ පිහිටි ගොඩනැගිල්ල, විත්තිකරු ඉදිරිපත් කරනු ලැබූ වි.1, වි.2, වි.3, වි.4 දරණ ලේඛණ වල සඳහන් අංක.76/2 දරණ ගෘහය බවට සනාථ කෙරෙන සාධක කිසිවක් නොමැත. එබැවින්, වි.1, වි.2, වි.3, වි.4 දරණ ලේඛණ ඉදිරිපත් කළත්, එහි ඇති ගෘහය ආරවුලට භාජිත ඉඩමේ ඇති බවට සනාථ කෙරෙන කිසිදු සාධකයක් මේ අනුව සොයාගත නොහැකිය. වි.5, වි.6, වි.7, වි.8 දරණ ලේඛණ මගින් ද පෙන්නුම් කෙරෙනුයේ එවැනිම තත්ත්වයකි. එම ලේඛණ වලින් මෙම ආරවුලට භාජිත ඉඩමේ, විත්තිකරු විසින් තනනු ලැබූ නිවසක් තිබූ බව හෝ, එවැනි නිවසක විත්තිකරු පදිංචි වී සිටි බවක්, එකී ලේඛණ වලින් සනාථ නොවේ.

එසේම අනෙක් අතට විත්තිකරු, ඔහු සඳහන් කරන අන්දමට සහ ඔහුගේ සාක්ෂිකරුවන් සඳහන් කරන අන්දමට, 1970 හෝ 1973 වසරේ පමණ සිට මෙම ඉඩමේ පදිංචිවී, නිවසක් තනාගෙන, වගා වැඩිදියුණු කිරීම් කරගෙන පැමිණියා නම්, ඔවුන් පැ.2 හි අවසාන තීන්දුවට අදාළ අංක. 19330 දරණ බෙදුම් නඩුවේ පාර්ශ්වකරුවන් නොවුයේ මන්ද? යන ප්‍රශ්නද මතුවේ. ඒතරම් වගා, වැඩිදියුණු කිරීමක් සිදුකර ගෙන, භුක්තියේ සිටියානම්, ඉන්පසුව විසඳා අවසන් වී ඇති අංක.19330 දරණ බෙදුම් නඩුවට ඔවුන් ඉදිරිපත් විය යුතුව තිබුණි. පැ.2 දරණ අවසාන තීන්දුව ඇතුළත්කර ඇත්තේ 1982.03.04 වෙනි දිනදී ය. මේ අනුව මෙය සිදුවී ඇත්තේ, විත්තිකරුවන් සඳහන් කරන අන්දමට ඔවුන් මෙම කැබැල්ලේ භුක්තියේ සිරින අවදියේදී ය. කරුණු එසේ වුවත්, ඔවුන් එකී බෙදුම්

නඩුවට ඉදිරිපත් නොවීම තුළින් පෙනියන්නේ, විත්තිකරු සඳහන් කරන කරුණු පැහැදිලිවම සත්‍ය කරුණු නොවන බවයි."

(Vide proceedings at pages 115,116 & 117 of the appeal brief)

The aforesaid documents marked V1 to V4 produced by the defendant to show that he had been living on this land do not support his contention as to the possession of the land in dispute since no house is found on the land at material times. It is more so, in view of the aforesaid material referred to in the partition action 19330/P that was produced as evidence in this case. The partition plan marked P1 does not indicate that a house was in existance on that land during the year 1981. Therefore, I do not see any error when the learned District Judge rejected the evidence adduced by the defendant to establish prescriptive possession to the land in question. In the circumstances, I am not inclined to interfere with the findings of the learned District Judge.

At this stage, it is also necessary to note that the Appellate Courts are always slow to interfere with the decisions arrived at, by the trial Judges as far as the facts of the case is concerned. This position had been accepted and upheld by the Superior Courts in many occasions. In **Alwis v. Piyasena Fernando [1993 (1) SLR at page 119],** His Lordship G.P.S.de Silva, J held thus:

> *"It is well established that findings of primary facts by a trial Judge who hears and sees the witnesses are not to be lightly disturbed on appeal".*

I also wish to refer to a few other decisions that support this view. Those are namely;

- ***De Silva and others v. Seneviratne and another [1981 (2) SLR 8]***
- ***Fradd v. Brown & Co.Ltd. [20 NLR at page 282]***
- ***D.S.Mahawithana v. Commissioner of Inland Revenue [64 NLR 217]***
- ***S.D.M.Farook v. L.B.Finance [C.A.44/98, C.A.Minutes of 15.3.2013]***
- ***W.M.Gunatillake vs. M.M.S.Puspakumara [C.A.151/98 C.A.Minutes of 9.5.2013]***

In this case too, the grounds of appeal are restricted to the facts of the case. Indeed, when this matter was mentioned in this Court on 25.06.2013, learned Counsel for the appellant submitted that he is not relying on questions of law in respect of this appeal. He has further stated that his contention is to argue the appeal as to the manner in which the District Judge has considered the evidence in relation to the facts of the case.

Since the appellant has confined this appeal to the manner in which the learned District judge has looked at the facts of the case and also in keeping with the authorities referred to above, this Court is not inclined to reverse the impugned judgment unless it is perverse. Having examined the evidence relating to the facts of this case, it is impossible for me to state that it is a perverse judgment either. Accordingly, I do not see any error on the part of the learned District Judge of the manner in which he has considered the evidence in relation to the facts of the case.

In the circumstances, I do not wish to interfere with the findings of the learned District Judge.

For the aforesaid reasons, this appeal is dismissed with costs fixed at Rupees Fifty Thousand (Rs.50,000/-).

*Appeal dismissed.*

JUDGE OF THE COURT OF APPEAL