IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Palliyaguruge Gnanawathie
No.22, Pamankada Road, Wellawatta
Plaintiff – Appellant in 932/98 and the Plaintiff-Respondent in 932A/98

C. A. Appeal No.932/98(F)

C. A. Appeal No.932A/98(F)

D.C. MT.LAVINIA CASE No.105/92/L

VS

Pothupitiyage Demond Silva
No.22, Palliyadora Road, Dehiwela
Deceased Defendant-Respondent

Palluwa Arachchige Sumanalatha and two others of No.22,Palliyadora Road, Dehiwela.
Substituted-Defendant-Appellant in 932A/98 and Substituted-Defendant-Respondent in 932/98

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

COUNSEL : Padma Bandara with S.Rajapakshe, L.Ariyadasa and M.I.Mohamed for the Plaintiff-Appellant in C.A.932/98(F) and for the Plaintiff-Respondent in C.A. No.932A/98(F))

C.J.Laduwahetti for the Substituted-defendant Respondents in C.A.932/98(F) and for the Substituted-Defendant-Appellants in C.A.No.932A/98(F)

ARGUED ON : 12.06.2013

WRITTEN SUBMISSIONS : 9th July 2013 by the Defendant-Respondent.

FILED ON 16th July 2013 by the Plaintiff-Appellant

DECIDED ON : 06.02.2014

CHITRASIRI, J.

Being aggrieved by the judgment dated 03.07.1998 of the learned District Judge of Mt.Lavinia, both the plaintiff and the defendant have sought to set aside the aforesaid judgment by filing these two appeals bearing Nos.932/98(F) and 932A/98(F). They also sought to have the respective reliefs, as prayed for by them in those two appeals.

This is an action filed by the plaintiff-appellant (hereinafter referred to as the plaintiff) to have a judgment declaring that she is entitled to the land referred to in the 3rd schedule to the plaint by virtue of the deeds bearing Nos.2692 and 421 marked as P1 and P2 respectively. Having opposed to the said claim of the plaintiff, the defendant-respondent (hereinafter referred to as the defendant) too, has claimed prescriptive rights to the same land referred to in the 3rd schedule to the plaint.

As mentioned before, there is no dispute as to the identity of the land subjected to in this case. The land claimed by the plaintiff as well as the defendant is the land referred to in the 3rd schedule to the plaint. It is the "Lot 8" in the plan bearing No.617 dated 3.1.1985 drawn by A.E.C.Fernando, Licensed Surveyor. The extent of which is 21 perches. It was marked as P6 in evidence.

At the outset, both Counsel brought to the notice of this Court that the learned District Judge has dismissed the case of the plaintiff and also the defendant's claim of prescription having set out only a mere narration of the evidence without it been evaluated. Indeed, the learned District Judge has not at all looked at the prescriptive claim of the defendant. He has dismissed both the plaint of the plaintiff and the prescriptive claim of the defendant without assigning reasons for his findings. Therefore, on the face of the impugned judgment, it demands re-considering the merits of the case.

Looking at the merits in a case of this nature is basically a matter for the original court judge. However, the circumstances present in this case, particularly the delay that had occurred having filed the case in year 1982, requires considering the possibility of determining the rights of the parties by this Court, upon looking at the available evidence without remitting the case for re-trial though this is a Court exercising appellate jurisdiction. Hence, I decide to consider the merits of the case by looking at the evidence available in this case, to ascertain whether this Court is in a position to determine the

rights of the parties and then to see whether it is necessary to vary/set aside the findings of the learned District Judge accordingly.

Also, it must be noted that in the event, the prescriptive claim of the defendant is accepted then the plaintiff's claim that was made depending on the title deeds will have no effect or force since prescriptive rights would prevail over the rights derived from title deeds. Hence, I will first consider whether the defendant was able to establish his claim on prescription to the land in suit.

The plaintiff in her evidence has admitted that she never possessed this land (*vide proceedings at page 88 in the appeal brief*). In fact she has first seen this land only after the execution of the deed P1 on 1.12.1986. Having purchased the property, the plaintiff had attempted to obtain possession of the land. Consequent upon such attempts, a complaint had been made to the Police and as a result of which, an action had been filed in the Primary Court of Mt.Lavinia in terms of the provisions contained in the Primary Courts procedure Act. In that action bearing No.44268 filed in the Primary Court, an order was made in favour of the defendant who was the 1st respondent in that case and accordingly he was placed in possession of the land without being obstructed by the others. The plaintiff in this case is the 2nd respondent in that application filed in the Primary Court. A person by the name of Mohamed Hussain, who gave evidence in this case, also was a party to that application filed in the Primary Court. He is the person from whom the plaintiff has

purchased this property. The order in the said action filed in the Primary Court was marked as V1 in evidence.

There was no dispute as to the identity of the corpus even in the application filed in the Primary Court and in that action; the learned Primary Court Judge has clearly stated that the land in dispute is Lot 8 in the Plan 617. He, in his order has clearly stated that the defendant in this case had been living on this land since the year 1985. The aforesaid circumstances had not been controverted or challenged by the plaintiff. Therefore, it is clear that the defendant had been living with his family members in the house alleged to have situated on Lot 8 shown in plan 617 marked P6.

Even though there is unambiguous and unchallenged evidence to show that the defendant had been in possession of the land in question, adverse to the rights of the plaintiff or her predecessors-in-title, since the year 1985 on the basis of the aforesaid order made in the case filed in the Primary Court, such period of adverse possession is insufficient for the defendant to succeed in his claim on prescription since such period of time falls short of 10 years. This action had been filed on 21.7.1982 and therefore it is not sufficient for the defendant to succeed in his prescriptive claim. It is because, in terms of Section 3 of the Prescription Ordinance, our law requires to have undisturbed and uninterrupted possession for a period of ten years, adverse to the rights of the others who claim rights to the land. Therefore, the defendant should have established that he was in possession of the land adverse to the rights of the

plaintiff and her predecessors in title at least for a period of ten years from 20.7.1982 for him to have prescriptive rights to this land.

Person by the name of Mohammed Hussain, from whom the land was purchased by the plaintiff, has given evidence. He has bought this property only on 30.1.1985. In his evidence he has stated that he sold the aforesaid lot 8 containing 21 perches to the plaintiff from the larger land he had purchased which is being referred to in the plan marked P6. Aforesaid Hussain had been called as a witness by the plaintiff herself. In his evidence-in-chief, he has said that the defendant along with his brothers was occupying the larger land that he bought. He has further stated that some of those blocks of land which were occupied by other persons at that point of time, had left those premises upon receiving money. (*vide proceedings at page 105 in the appeal brief*) In answer to Court the aforesaid witness Mohamed Hussain, has also said that the possession of those blocks of land that were sold by him was not handed over to anybody physically. (*vide proceedings at page 116 in the appeal brief*) He has replied in the following manner to a question posed by the Counsel for the defendant:

ප්‍ර. ලොට් 8 දේමන් සිල්වා විතරයි සිරියේ ?

උ. ඔව්.

(*vide proceedings at page 116 in the appeal brief*)

In the circumstances, it is clear that the evidence adduced on behalf of the plaintiff herself, has indicated that the defendant had been living on this land even before she purchased the land, subjected to in this case.

I will now quote a few item of the evidence given by the defendant in connection with the possession of the land prior to the order made in the case filed in the Primary Court.

" එම ලොට් 8 හි වෂී 1945 සිටම මා පදිංචිව සිටිනවා. මීට පෙර ලොට් 08 හි මාගේ මවත්, පියාත්, සහෝදර සහෝදරීයන් සහ මමත් පදිංචිව සිටියා. එම කැබැල්ලේ ගෙයක් තියෙනවා. එම ගෙයි අංකය 22 ය. නොම්මර 22 ය කියා තිබිලා ඊට පසුව එම අංකය වෙනස් කළා නගර සභාවෙන් අංක. 22 බී වශයෙන්."

(*Vide proceedings at page 128 in the appeal brief*)

"මෙම ඉඩමේ තිබෙන ගොඩනැගිල්ල හැදුවේ මමයි. ඒ සඳහා මට වියදම් දරන්න සිද්ධ වුනා. එම ගොඩනැගිල්ල ඉදි කලේ දැනට අවුරුදු 5 - 6 කට ප්‍රථමයි. පියා ඉන්න කාලේ මේ ගොඩනැගිල්ල තිබුනේ පොඩියටයි. මීට වඩා පොඩි එකක්."

(*Vide proceedings at page 136 in the appeal brief*)

ප්‍ර. තමාල ලොට් 8 කියන කැබැල්ල එනම් පැ.6 තමා සමඟ තමන්ගේ පවුලේ කට්ටිය කොයි කාලයේ ද සිටියේ ?

උ. 1945 සිට ලොට් 8 තමයි සිටියේ.

ඒ කාලයේ සිට මට ලොට් 8 ට කාලාවරෝධි අයිතිවාසිකම් කියන්න හිමිකම් තිබෙනවා.

(අධිකරණයෙන්):

ප්‍ර. තමා පර්. 78 විත්තේ කැබලි අංක 8 ඇතුලුවද නැතිවද ?

උ. කැබලි අංක 8 නැතිව.

ප්‍ර. කවදාද ඔය ගෙය හදන්න පටන් ගත්තේ තමන් ?

උ. 1990.

ප්‍ර. ගෙය හදන්න ඉස්සෙල්ල තමා කොහෝද පදිංචි වී සිටියේ ?

උ. ඒකෙමයි. ඒක පොඩි ගෙයක්.

ප්‍ර. ඒ ගෙයි කොච්චර කල් සිටියා ද ?

උ. 1945 සිට පදිංචිව සිටියා.

(*Vide proceedings at pages 150 and 151 in the appeal brief*)

Moreover, the defendant has produced in evidence a copy of the Assessment Register marking it, as V16. In that document the name of the defendant is found and it had been issued in respect of the premises bearing No.22. Similarly, the document marked V17 also had been produced to show the name of the defendant appearing in the Assessment Register for the year 1982. The document marked V20 shows that a notice had been sent by the Municipality to the defendant directing him, he being the son of Aponso Arnolis, to pay the taxes for the year 1980. The receipt issued by the Municipal Council to the defendant for the payment of the rates also had been marked in evidence. The document marked V20 also is a document to show that the defendant had been living at the premises No.22. The address given to the Registrar of Marriages by the defendant at the time he married also is No.22, Palliyadora Road, Dehiwela. The Death Certificate of his father marked in evidence also shows that even the father of the defendant had been living at 22, Palliyadora Road, Dehiwela.

The officer who gave evidence from the Municipal Council, Dehiwela has stated that the premises No.22 appearing in the Registers maintained at the Municipality was the obsolete number and the new number allocated to this premises is No.18. (*vide proceedings at page 98 in the appeal brief*). He was subjected to cross-examination at length. However, he has categorically stated that No.22 is the obsolete number and the new number allocated to the premises is No.18. (*vide proceedings at page 102 in the appeal brief*). In the plan marked V3 too, it clearly shows that there had been a house and it was given the Assessment No.22. The said plan had been prepared in the year 1959. In that plan, there are number of buildings and it is a larger land. The land referred to in the plan marked P6 is a land within the said larger land. Disputed lot 8 falls within both the plans marked V3 and P6.

However, it must be mentioned that the plan which was marked as P6 by the plaintiff, indicates only the divisions of a larger land without showing the buildings found thereon. Therefore, the plan marked P6 can only testify to the extent of the land and not in respect of the buildings found thereon. However, a few numbers of buildings are also shown in the plan bearing No.2288 marked as V3 which had been prepared earlier to P6. Therefore, it is impossible to conclude and it will not even support that there had been no buildings on the land subjected to this action merely because no buildings are found on Lot 8 in plan 617 marked P6,

In the circumstances, having looked at the totality of the evidence, it is crystal clear that the defendant had been living on this land since his birth. He had never allowed the plaintiff or her predecessors in title to possess the land. Overwhelming evidence is available to show that the defendant was living on this land adverse to the rights of the plaintiff and her predecessors in title. Therefore, it is incorrect, not to have accepted the prescriptive claim of the defendant by the learned District Judge.

In view of the above circumstances, it is my opinion that the defendant has established that he is entitled to claim prescriptive rights to the land referred to in the 3rd schedule to the plaint. Accordingly, he is entitled to have the reliefs prayed for in his answer dated 29.1.1993. Now that this Court has decided that the defendant is entitled to the land claimed by the plaintiff on the basis of prescription, the plaintiff cannot claim title to the land by the two deeds marked P1 and P2. Therefore, the action of the plaintiff is to be dismissed. For the aforesaid reasons, I allow the appeal of the defendant whilst dismissing the appeal of the plaintiff. Accordingly, judgment dated 03rd July 1998 of the learned District Judge is set aside. The defendant is entitled to the reliefs prayed for in his answer dated 29.1.1993 and also for the costs of this appeal.

Plaintiff's appeal is dismissed.

Defendant's appeal is allowed.

JUDGE OF THE COURT OF APPEAL