

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

C.A. No. 879/98(F)

D.C. Matugama Case No. 2464/P

W. Francis Perera

Pissawatte,

Mathugama.

Appellant

Vs.

Dewara Kottage Premawathi

“Nandana”,

Mathugama.

Respondent

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

C.A. No. 879/98(F)

D.C. Matugama Case No. 2464/P

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

COUNSEL : Prinath Fernando for the substituted 2A, 2B, 2C & 2D
Defendant - Appellants
Amanthi Jayasinghe for the Plaintiff - Respondent.

ARGUED &

DECIDED ON : **10.03.2014**

K.T. Chitrasiri, J

This is an appeal seeking to set aside the judgment dated 18.09.1998 of the learned District Judge of Matugama. This case being a partition action, learned District Judge made order to partition the land referred to in the Preliminary Plan bearing No.330 marked "X", having allocated 40 perches to the plaintiff and the balance land to the 1st defendant-respondent who is the father of the plaintiff-respondent.

Whilst allocating the land to the plaintiff and to the 1st defendant, learned District Judge also made order rejecting the prescriptive claim of the

2nd defendant-appellant which claim of the 2nd defendant was in respect of the entire land sought to be partitioned. Being aggrieved by the said decision, the 2nd defendant-appellant filed this appeal seeking to set aside the judgment and also to have the reliefs prayed for in his statement of claim filed in the District Court.

When the matter was taken up for argument this morning, learned Counsel for the appellant contended that the 2nd defendant-appellant though he came as a licensee to the premises in suit in the year 1943 has subsequently changed the character of the licensee in the year 1973, by becoming him a trespasser to the land. In support of this contention, learned Counsel submitted that there had been an action filed in the Magistrate's Court in Matugama in which the 2nd defendant-appellant was charged under Section 433 of the Penal Code for the offence of trespass. The said charge filed in the aforesaid action in the Magistrate's Court is evident by the document marked 2V2 found at page 174 in the appeal brief. He then submitted that the filing of the action in the Magistrate' Court should be treated as an act of the 2nd defendant for him to become a trespasser. He, accordingly submitted that such circumstances should be considered as an "overt act", of the 2nd defendant for him to commence possession adverse to the rights of the plaintiff-respondent. Learned Counsel, therefore submitted that the 2nd defendant-appellant had been in possession adverse to the rights of the land sought to be partitioned since the year 1973 having become a trespasser to the land sought to be partitioned in the manner stated above.

Therefore, the issue in this instance is to ascertain whether the filing of action by the Police in the Magistrate's Court charging the 2nd defendant for the offence of trespass could be treated as an "overt act"; and whether such an action by the Police is sufficient for the 2nd defendant-appellant to change his character to become a trespasser from been a licensee of the 1st defendant.

Admittedly, the 2nd defendant-appellant had been a licensee of the father of the plaintiff-respondent since the year 1943. It was soon after the execution of the deed bearing No.5623 dated 22.09.1943 marked P5 which was executed in favour of the father of the plaintiff-respondent who is the 1st defendant-respondent. Those facts have been admitted by the 2nd defendant himself in his evidence. He also has admitted in evidence that there had been a house which was more than 100 years old, by the time they came into occupation as licensees of the 1st defendant-respondent, who is the father of plaintiff-respondent. [*vide proceedings at page 116 in the appeal brief*].

In Law, a licensee does not become entitled to claim prescriptive rights under Section 3 of the Prescription Ordinance since no adverse possession can be established under such circumstances. Law in this regard is found in the case of **RASIAH Vs SOMAPALA** [Court of Appeal] [2008 B L R at page 226]. In that decision it was held thus:

"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.” “As regards the mode of proof of prescriptive possession, mere general statements of witnesses regarding possession 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 should be decided thereupon by Court.”

Submission of the learned Counsel for the appellant is that the filing of action in the Magistrate’s Court referred to above shows that the 2nd defendant became a trespasser terminating his character as a licensee. As mentioned before, the charge framed against the 2nd defendant-appellant in the case filed in the Magistrate’s Court was under Section 433 of the Penal Code which is the charge of trespass. Merely, because the charge of trespass had been filed against the 2nd defendant-appellant, it is not possible to decide whether the character as a licensee came to an end. Indeed, the filing of action was not by the 2nd defendant, but by the Police of the area. Neither the summons nor the charge sheet marked as 2V1 and 2V2, reveal the identity of the person who made the complaint to file those charges. [*vide at pages 172 and 174 in the appeal brief*]. Even assuming that the case filed in the Magistrate’s Court had been a result of a complaint made either by the plaintiff-respondent or by the 1st defendant-respondent, even then it is not possible to ascertain the manner in which the complaint was made since the said complaint to the police had not been produced in evidence. Under those circumstances, Court could not have decided that the 2nd defendant-appellant possessed the land adverse to

the rights of the plaintiff having done an “overt act” in the year 1973 as alleged by the 2nd defendant-appellant.

Similar findings have been made by the learned District Judge when he rejected the prescriptive claim of the 2nd defendant-appellant. His reasoning in this regards is as follows:-

“ එසේ වුවත් මෙම චෝදනාවට අදාලව, අදාල වූදිනයන්ට එරෙහිව චෝදනාව ඔප්පු නොවීමෙන් ඔවුන් නිදහස් කර ඇති අතර, ඊට ප්‍රධාන හේතුව වී ඇත්තේ එම මහේස්ත්‍රාත් අධිකරණයේ නඩුවේ පැමිණිලිකරු එන මෙම නඩුවේ 1 වන විත්තිකරු අධිකරණයේ පෙනී නොයීම්බව බවටද පෙනී යයි. ඒ අනුව එම චෝදනාවට අදාලව එම නඩුවේ විත්තිකරුවන් එන මෙම 2 වන විත්තිකරු ඇතුළු ඔහුගේ මව සහ සහෝදරයා ඉඩමට අසුභු ඇතුළුවීමක් සිදුකල බවට හෝ අනර්ථයක් සිදුකල බවට ඔප්පු කර නැති හෙයින්, ඔවුන් බලහත්කාරයෙන් ඇතුළු වූ බවට පැමිණිල්ලේ හෙවත් මෙම නඩුවේ 1 වන විත්තිකරුගේ පිළිගැනීමක් තිබුණු බවටත් සැලකිය නොහැකිය. එයට හේතුව නම් පැමිණිලිකරු ඊසානම භූ මහේස්ත්‍රාත් අධිකරණයේ තිබුණ නඩුව ඉදිරියට ගෙන යාම අත්හැර දමන ලද හේතුව මත නිසා බව පෙනී යයි. “

[Vide proceedings at page 133 in the appeal brief]

Upon considering the above reasons of the learned District Judge, I do not see any error on his part when he decided to reject the prescriptive claim of the 2nd defendant-appellant. Moreover, the 1st defendant who gave evidence has stated that there were no incidents took place even after filing the aforesaid action in the Magistrate’s Court. Such attitude of the parties also show that the 2nd defendant had been in possession in the same capacity namely as a

licensee in which capacity he came in to possession, despite the filing of the action in the Magistrate's Court. In fact, the evidence is that the 2nd defendant-appellant was discharged in the case filed in the Magistrate's Court. Hence, he cannot be considered as a trespasser [vide proceedings at pages 107 & 109].

It is also necessary to note that the 2nd defendant-appellant has not made any claim before the Surveyor who came to the land to carry out the preliminary survey except for the temporary kitchen and the foundation found in Lot 1 in plan marked "X", (vide proceedings at pages 85 & 86). Neither has he made any claim to the lots 2, 3, 4 and 5 and to the improvements found thereon. He has not made a claim to the plantation even in Lot 1. Such a restrictive claim to the land sought to be partitioned by the 2nd defendant-appellant shows that his possession to the land sought to be partitioned had not been adverse to the rights of the two respondents.

For the aforesaid reasons I do not see any error on the part the District Judge when he rejected the prescriptive claim of the 2nd defendant-appellant. Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

Judge of the Court of Appeal

Na/-