907/99(F)

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

Miss L.U.C.Kuruppu,

(Administratrix of the Estate

Of late Mr. D.B.M.Kuruppu)

No. 19/10A, High Level Road,

Colombo 5.

Plaintiff-Appellant

C.A.CASE No:-907/99(F)

D.C.Colombo Case No:- 16382/L

Vs

S. Jayaratne,

No. 5B, High Level Road,

Kirulapona, Colombo 5.

Defendant-Respondent

Before:- H.N.J.perera, J.

Counsel:- P.L.A.Anura Shantha for the Plaintiff-Appellant

Ranjan Suwandaratne with Anil Rajakaruna for the

Defendant-Respondent

Argued On:-02.09.2013

Written Submissions:- 13.03.2013/26.04.2013/24.09.2013

Decided On:-07.05.2014

H.N.J.Perera,J.

The Plaintiff-Appellant filed this action in the District Court of Colombo seeking inter alia for a declaration that the property described in the schedules to the plaint belongs to the estate of late Mr. D.B.M.Kuruppu, to eject the Defendant-Respondent and all others holding under him from property described in the 2nd schedule to the plaint and to recover damages and costs.

According to Plaintiff-Appellant the Defendant-Respondent prior to 1992 was occupying the pavement in front of the property in question and in 1992 he encroached in to the property in suit.

The Defendant-Respondent filed answer denying inter alia the purported title set out in the plaint and stated that his elder brother Sammu Gnanadasa was the owner of the property described in the schedule to the answer by prescription. The said Gnanadasa died on 13.01.1981 and thereafter the Defendant-Respondent in accordance with a family arrangement possessed the said property since the death of his brother and carried on a furniture shop business at the said premises.

The learned District Judge after trial delivered his judgment on 20-10-1999 dismissing the Plaintiff's action and upheld the contention of the Defendant-Respondent that he has prescribed to the land in suit. Aggrieved by the said judgment of the learned District Judge of Colombo the Plaintiff-Appellant had preferred this appeal to this Court.

In D.A.Wanigaratne Vs Juwanis Appuhamy 65 N.L.R. 168, it was held that in an action *rei-vindicatio* the Plaintiff should set out his title

on the basis on which he claims a declaration of title to the land and must, in court, prove that title against then defendant in the action. The defendant in rei vindication action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant' s title is poor or not established. The plaintiff must prove and establish his title.

In Leisa and another Vs Simon and another [2002] S.L.R. 148, the plaintiff-Appellants instituted action seeking declaration of title and ejectment of the defendants from the premises in question. The defendants claimed prescriptive rights. The plaintiff' s action was dismissed. It was held that:-

(1) The contest is between the right of dominium of the plaintiffs and the declaration of adverse possession amounting to prescription by the defendants.
(2) The moment title is proved the right to possess it, is presumed.
(3) For the court to have come to its decision as to whether the plaintiff had dominium, the proving of paper title is sufficient.
(4) Once paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them.

The action from which this appeal arises, being a rei vindication action, the onus was clearly on the plaintiff-Appellant to prove how she derived title to the land described in the schedule to the plaint.

Wille in his book "Principles of South African Law" (3rd edition) at page 190 discussing the right to possession, states:-

"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he s illegally deprived of his possession, he may by means of vindication or reclaim

recover the possession from any person in whose possession the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant."

The learned District Judge has in his judgment concluded that the Plaintiff-Appellant had proved her title to the land described in the schedule to the plaint. In his judgment the learned District Judge has very clearly held that by the deeds marked P1 to P4 the plaintiff has proved that the said premises in question was owned by the deceased D.B.M.Kuruppu. The Plaintiff-Appellant had produced deeds marked P1 to P4 to which no objection was taken at the close of the Plaintiffs case. The *cursus curiae* of the original Civil Court followed for more than three decades in this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law.

The moment title to the corpus in dispute is proved, like in this case, the right to possess is presumed. The burden is thus cast on the defendant to prove that by virtue of an adverse possession he had obtained a title adverse to and independent of the paper title of the plaintiff.

The Defendant-Respondent in this case filed answer claiming prescriptive title to an "undivided 2 perches" . It was contended by the Counsel for the Plaintiff-Appellant that the defendant failed to identify the land he claimed to have prescribed.

Section 41 of the Civil Procedure Code states that:-

When the claim made in the action is for some specific portion of land or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint as far as possible by reference to physical metes and bounds, or by reference to a sufficient

sketch, map, or plan to be appended to the plaint, and not by name only.

In Dayawathie Vs Baby Nona Panditharatne (C.A. 728/93(F) D.C.Kautara case Non 3597/L, C.A.Minute 10.05.2001, it was held that:-

"A party who claims prescriptive title to a particular allotment of land is obliged to clearly describe it either by boundaries or extent of the land that he claims to have prescribed. Section 41 of the Civil Procedure Code requires to define such land with reference to physical metes and bounds or by map or sketch."

The learned District Judge has very clearly held in his judgment that the defendant-Respondent has failed to prove prescriptive title to a specific portion of land and yet had proceeded to enter judgment in favour of the defendant-Respondent in this case.

In Sirajudeen and others Vs Abbas [1994] 2 Sri L.R 365, it was held that:-

"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 that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period 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 has to be decided thereupon by court.

One of the essential elements of the plea of prescriptive title as provided for in Section 3 of the Prescription Ordinance is proof of possession by title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be such character as is incompatible with the title of the owner.

In Hassan Vs Romanishamy 66 C.L.W 112, it was held that:-

"Mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and also vegetable," are not sufficient to entitle him to a decree under Section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section."

The burden was cast on the defendant to prove that by virtue of an adverse possession he had obtained title adverse to and independent of the paper title of the Plaintiffs. According to Section 3 of the Prescription Ordinance such a possession must be undisturbed, uninterrupted, adverse to or independent of that of the former possessor and should have lasted for at least ten years before he could transform such possession into prescriptive title. There must be proof that the defendant' s occupation of the premises was such character as is incompatible with the title of the Plaintiff.

In my view in the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the Defendant to a decree in favour in terms of Section 3 of the Prescription Ordinance. The findings of fact by the learned District Judge are mainly based on the trial judge' s evaluation of facts.

In De Silva Vs Seneviratne (1981) 2 Sri L.R. 7, it was held that:-

(1) Where the findings on questions of fact are based upon the credibility of witnesses on the footing of the trial judge' s perception of such evidence, then such findings are entitled to

great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest consideration that it would be justified in doing so.

(2) That however where the findings of fact are based upon the trial judge' s evaluation of facts, the Appellant Court is then in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge;

(3) Where it appears to an Appellate Court that on either grounds the findings of fact by a trial judge should be reversed then the Appellate Court "ought not to shrink from that task."

For reasons stated above I am of the opinion that the Plaintiff-Appellant has proved her title and the Defendant-Respondent unsuccessful in proving or establishing prescriptive title to the said property. Consequently, I set aside the findings, judgment and decree of the learned District Judge and answer issues No 1 to 8 in favour of the Plaintiff-Appellant and issues No 8 and 9 in the negative.

Accordingly the learned District Judge is directed to enter judgment for the Plaintiff as prayed for in paragraph 1 to 4 in the prayer to the plaint. The Plaintiff-Appellant is entitled to the costs of this appeal.

Appeal allowed

JUDGE OF THE COURT OF APPEAL