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

Wanniarachchi Kanganange Meraya

Harannagala, Weragoda.

Plaintiff

V.

1. Gurusinghe Gunapala,

Harannagala, Weragoda.

2. Kaggoda Arachchi Dharmadasa,

Harannagala, Weragoda.

Defendants

C.A.Case No:- 46-47/99(F)

D.C.Balapitiya Case No:-1398/L

AND NOW

1.Gurusinge Gunapala,

Harannagala, Weragoda.

1st Defendant-Appellant

2. Kaggoda Arachchi Dharmadasa'

Harannagala, Weragoda.

2nd Defendant-Appellant

V.

Wanniarachchi Kanganange Meraya

Harannagala Weragoda.

Plaintiff-Respondent

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

Counsel:-Ranjan Guneratne for the 1st Defendant-Appellant

N.I.M. Naleem with Kelum Marasinghe for the 2nd Defendant-Appellant

Argued On:-24.09.2013

Written Submissions:-10.12.2013/19.12.2013/21.01.2014

Decided On:-23.07.2015

H.N.J.Perera, J.

The plaintiff-respondent instituted action in the District Court of Balapitiya praying for a declaration of title to the land described in the schedule to the plaint as Lot 10 in Plan No.1245A, for the ejectment of the said 1st defendant-appellant and for damages. The land was also shown as Lot 10A and 10B in Plan 915.The encroached portion was shown as lot 10B in the said Plan.

The 1st defendant-appellant in his answer claimed that he was the owner of the adjacent Lot 9 shown in plan 3176 prepared by Surveyor D.G.Mendis marked 1V1 and that he also possessed Lot 10B which is a part of lot 10 in Plan P1 for over 25 years and had prescribed to it. The 2nd defendant-appellant intervened in the action and claimed lots 10B and 10C in Plan No.3400 prepared by Surveyor D.G.Mendis marked Y on prescriptive title.

It is the position of the plaintiff-respondent that she is the owner of the land described in the schedule to the plaint and that on or about the 9th

August 1988 entered into the disputed portion of the said land and disputed the title of the plaintiff-respondent to the said land.

It is not in dispute that in Partition action No. 29654 of the District Court of Galle lot 10 in Final Plan No,1245A marked P1 was allotted to the 3rd defendant Kariya wasam Masachchi Christian de Silva and Cyril de Alwis was later substituted in place of the said 3rd defendant deceased and the said lot was sold to one T.P.Podisingho on 03.11.1938 by the Fiscal Conveyance marked P2 and P3 at the trial. Podisingho sold the said land to K.M.Leela Karelenthina Alwis on 19.01.1943 by the deed marked P4 and she on 17.10.1943 sold the said land by deed marked P5 to the mother of the plaintiff K.L.Podinina. It is the plaintiff's position that her mother thereafter sold the said property to her on 1972.08.16 by deed marked P6 and she became the owner of the said premises in 1972. Further it was the plaintiff's position that she in 1976 sold half share to one K.H.Jayasekera by deed marked P7 and the said Jayasekera had re-transferred the said half share back to the plaintiff in 1979 by deed marked P8.

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

In D.A.Wanigaratne V. Juwanis Appuhamy 65 N.L.R 168, it was held that in an action rei vindication the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, prove that title against the 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.

The learned District Judge has in his judgment concluded that the plaintiff-respondent had proved title to the land described in the schedule to the plaint. In his judgment the learned District Judge has very clearly held that by deeds marked P2 to P8 the plaintiff-respondent has proved her title to the land in dispute. The plaintiff-respondent had produced deeds marked P2 to P8 to which no objection was taken at the close of the plaintiff-respondent's 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 .It is clearly seen that the defendant-appellants had not seriously challenged the ownership of the plaintiff-respondent to the said lot 10 in Plan 1245A(P1).

Willi 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, if he has the possession he may retain it. If he is 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 thing is in the possession of the defendant."

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-appellants to prove that by virtue of an adverse possession they had obtained a title adverse to and independent of the paper title of the plaintiff-respondent.

The 1st defendant-appellant in this case filed answer claiming prescriptive title to a part of the land owned by the plaintiff-respondent.

The plaintiff-respondent had proved title to the said lot 10 in Plan 1245A. The said lot 10 had also been shown as Lot 10A and 10B in Plan 915 prepared by Surveyor R.Chandrasiri marked X. The 1st defendant-appellant claimed lot 10B in Plan 915 on prescriptive title.

The 2nd defendant-appellant claimed prescriptive title to lots 10B and 10C in Plan 3400 prepared by Surveyor D.G.Mendis marked Y at the trial. The said lots are to the South of Lot 10 and are not the land claimed by the 1st defendant-appellant. Both claimed title to lot 10B on prescription. The two Surveyors who was summoned to give evidence in this case had categorically stated that lot 10B is a portion of lot 10 in Plan marked P1 which is owned by the plaintiff-respondent.

In sirajudeen and others V. 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 C.L.W 112, it was held:-

"Mere statements of a witness, 'I possessed the land' or 'we possessed the land' and 'I planted plantain bushes and also vegetables' 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 on the defendant-appellants to prove that by virtue of an adverse possession they had obtained title to and independent of the paper title of the plaintiff-respondent. 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 they could transform such possession into prescriptive title. There must be proof that the defendant-appellants occupation of the premises were such character as is incompatible with the title of the plaintiff-respondent.

The 1st defendant-appellant claims prescriptive title to lot 10B in Plan 3176 prepared by Surveyor D.G.Mendis marked 1V1. The said plan was prepared at the instance of the 1st defendant-appellant. Lot 9 which belonged to the 1st defendant-appellant and the lots 10A and 10 B which belonged to the plaintiff-respondent are too shown in the said plan. It was the position of the 1st defendant-appellant that he possessed lot 10B which is to the west and south of lot 9 for over 25 years. The evidence led in this case clearly establish the fact that lot 10B is a part of lot 10 which belonged to the plaintiff-respondent. The said lot 10B, the encroached portion is about 3.22 perches. The two Surveyors who gave evidence adverted to the face that lot 10B is a portion of lot 10.

The evidence in this case disclosed the fact that the first defendant-appellant had purchased lot 9 in 16.06.1980. This action had been filed in 30.08.1988. The 1st defendant-appellant's position was that he was the owner of lot 9 and he possessed lot 9 as well as lot 10B and claimed prescriptive rights to lot 10B owned by the plaintiff-respondent in this case. The 1st defendant-appellant had claimed that he possessed lot 9 and 10B as one lot from 1942.The learned trial Judge had come to a clear conclusion that lot 10A and 10B remained a separate lot and had refused to accept the position that the 1st defendant-appellant had possessed lot 9 and 10B together as a separate lot and has acquired prescriptive title to the said lots. Another fact had been considered by the learned trial Judge in plaintiff-respondent's favour was that when a Jak tree from the lot 10 belonging to the plaintiff-respondent fell on to the defendant-appellants land lot 9 , the plaintiff had sought permission from the Grama

sevaka to remove the said tree to which the defendant-appellant had not objected.

The learned trial Judge also had considered the evidence that was before him regarding the buildings marked A and B in lot 9, in plans marked X and 1V1, the fact that the eves of the said buildings jut out to lot 10B owned by the plaintiff-respondent. The building marked C is entirely within the lot 10 owned by the plaintiff-respondent. The plaintiff-respondent had in fact had made a complaint to the police when the 1st defendant-appellant laid the foundation for this latrine in 1988.

The learned trial judge had after considering the evidence placed by the parties before him has come to a clear conclusion that the said lot 10 is owned by the plaintiff and that lot 10B is a part of lot 10 and that the 1st defendant appellant had failed to lead evidence and satisfy court that he had possessed the said lot 10B as a part of lot 9 and had acquired prescriptive title to the said lot 10B.

The 2nd defendant-appellant who is the owner of the land called Haraunahala Thotupala Langa and Gangodagederawatte and claimed that lots 10B and 10C in Plan 3400 prepared by Surveyor D.G.Mendis on prescription. The 2nd defendant-appellant had claimed that he possessed the said lots for more than 50 years. The learned trial Judge had come to the conclusion that the 2nd defendant-appellant had purchased the said land after the institution of this action in 1990 and that he had no title till then. This action had been filed in 1988 and the 2nd defendant-appellant had no title to the said land before 1990 and that he has failed to lead independent evidence to prove prescriptive title to the said lots10B and 10C. The learned trial Judge had come to a clear conclusion that the 2nd defendant-appellant had failed to prove that he possessed and acquired prescriptive title to the said lots in dispute.

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-appellants 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.

The District Judge has correctly analysed the evidence before him and has come to the conclusion that the plaintiff-respondent was the owner of lot 10 in Plan 1245A. He had come to a clear conclusion that the 1st and the 2nd defendant-appellants had failed to establish that they have possessed and prescribed to lot 10B as claimed by them. The learned District Judge has arrived at certain factual matters or has decided on primary facts. I have considered the entire judgment and see no reason to interfere with the primary facts of this case. Trial Judge has arrived at a correct conclusion. Appellate Court should not without cogent reasons interfere with primary facts

In M.P.Munasinghe V. C.P.Vidanage 69 N.L.R 98 it was held that the jurisdiction of an appellate court to review the record of the evidence in order to determine the conclusion reached by the trial Judge upon evidence should stand has to be exercised with caution.

Further in Gunewardene V. Cabral and others (1980) 2 Sri. L.R 220 it was held that the appellate court will set aside the inferences drawn by the trial Judge only if they amount to findings of fact based on:-

(1)Inadmissible evidence; or

(2)After rejecting admissible and relevant evidence; or

(3)If the inferences or the conclusions are not rationally possible or

Perverse.

In the case before me I do not see that the findings of the learned District judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeals of the 1st and the 2nd defendant-appellants are dismissed with costs.

Appeals dismissed.

JUDGE OF THE COURT OF APPEAL