922/99(F)

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

Wijesekera Ekanayake Mudiyanselage
Somalatha Podimenike,
Dethawa, Dambadeniya.

Plaintiff-Appellant

C.A.Case No:-922/99(F)

D.C.Kuliyapitiya Case No:-6500/L

V.

(1) Sethunga Mudiyanselage Tikiri Banda,
Dethawa, Dambadeniya.

(2) Wijesekera Ekanayake Mudiyanselage Kusumawathie,
Podimenike,
Dethawa, Dambadeniya.

Defendant-Respondents

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

Counsel:-M.C.Jayaratne with D.J.Bandara for the Plaintiff-Appellant

D.H.Siriwardene with Sunil Mallawarachchi for the

Defendant-Respondents

Argued On:-10.02.2014

Written Submissions:-10.03.2014/09.06.2014

Decided On:-31.08.2015

H.N.J.Perera,J.

This was an action filed by the plaintiff-appellant in the District Court of Kuliyapitiya for a declaration of title and ejectment of the 1st defendant-respondent and all those holding under him from the property described in the schedule to the plaint and for damages.

The 1st defendant-respondent filed answer stating that he has been possessing a land called Keenagahapitiya watta in extent about two Lahas of Kurakkan sowing area under and by virtue of deed of Gift bearing No 19013, gifted to him by his mother , the 2nd defendant-respondent and prayed that the 2nd defendant-respondent be added as a party to the action and also stated that he cannot identify the land in question and tendered an amended answer claiming an extent of One Acre One Rood and 18 Perches .

The plaintiff-appellant moved for a commission to survey the subject matter of the action and also amended the plaint accordingly adding the new party disclosed. Accordingly, the Commissioner A.B.M.Weber Licensed Surveyor submitted a plan bearing No.934/Kuli/86 dated 10.03.1986 and confirmed the land depicted in the same as identical to the land described in the plaint.

The learned District Judge after trial delivered her judgment on 26.11.1999 dismissing the plaintiff's action and upheld the contention of the defendant-respondents that they have acquired title to lots 1,2,6,7

& 8 of the Plan 943/Kuli/86 by prescription. Aggrieved by the said judgment of the Learned District Judge of Kuliyapitiya the plaintiff-appellant had preferred this appeal to this court.

It was contended on behalf of the plaintiff-appellant that the Learned trial Judge has accepted the paper title of the plaintiff-appellant in respect of lots 14B & 16B depicted in Crown Plan N0.216 as described in the schedule to the plaint and also in the Crown Grant, which is identical to the land in the Commissioner's Plan and had answered issues No's 1,2,3,4,5 and 6 in the plaintiff-appellant's favour. It was further submitted that the learned trial Judge has misdirected herself when she held that the plaintiff-appellant did not have the possession of the said land in question, as the evidence led in this case clearly indicates that the plaintiff-appellant's father who was a close relative of the 2nd defendant-respondent, possessed the land on behalf of the plaintiff-appellant who was a minor at the time of executing the said deed of Transfer No.3997 (P3). It was also contended that once the plaintiff-appellant established that she had paper title to the land in dispute the burden was on the defendant-respondents to prove prescriptive title which they have failed to prove.

In D.A.Wanigaatne V. 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 the defendant in the action. The defendant in rei-vindication action need not prove anything, still less, his own title.

In Leisa and another V. 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. 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 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 has in dependent 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 he derived title to the land described in the schedule to the plaint.

The learned District Judge has in her judgment concluded that the plaintiff-appellant had proved her paper title to the land described in the schedule to the plaint. In her judgment the learned trial Judge has very clearly held that by deeds marked P1 to P3 the plaintiff-appellant had proved her title to the land in question. The plaintiff-appellant had produced deeds marked P1 to 3 to which no objection was taken at the close of the plaintiff-appellant'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.

Further the Learned trial Judge had stated that although the plaintiff-appellant had proved title to the land she had failed to possess it. The moment the title is proved the right to possess is presumed.

In Luwis Singho and others V. Ponnamperuma [1996] 2 Sri.L.R 320, it was held that:-

(1)Actions for declaration of title and ejectment and Vindicatory actions are brought for the same purpose of recovery of property. In Rei-Vindication action the cause of action is based on the sole ground of the right of ownership, in such action proof is required that:-

(a)The plaintiff is the owner of the land in question, i.e he has the dominium and,

(b)That the land is in the possession of the defendant;

Even if an owner never had possession it would not be a bar to a vindicatory action.

Willie 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 is illegally deprived of his possession, he may by means of vindication or reclaim recover possession from any person in whose 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 moment the title to the corpus is proved, like in this case, the right to possess is presumed. The burden is thus cast on the defendants 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. In this case the plaintiff had clearly proved her paper title. The Learned District Judge has answered the plaintiff's issues No 1 to 4 and 6 in plaintiff's favour. The learned trial Judge had answered the issue No 5 issue in the negative on the basis that Punchi Nilame did not have the possession of the land.

In my view this issue too should be answered in favour of the plaintiff-appellant.

In Leisa and another V. Simon and another [002] 1 Sri.L.R 148, it was further held that an averment of prescription by a plaintiff after pleading paper title is employed to buttress his paper title. The mere fact that the plaintiff claimed both on deeds as well as by long possession did not entail the plaintiff to prove prescriptive title thereto. His possession was presumed on proving paper title. The averment in the plaint did not cast any burden upon the plaintiff to prove a separate title by prescription in addition to paper title. In this case the plaintiff has clearly proved her paper title.

In Chelliah V. Wijenthan 54 N.L.R 337 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."

In Hassan V 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 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."

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 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 a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be such character as incompatible with the title of the owner.

The burden was cast on the defendant-respondents 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-appellant. According to section 3 of the Prescription Ordinance such 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. In my view the defendant-respondents had failed to establish a starting point for their acquisition of prescriptive title.

The plaintiff's mother in her evidence has stated that Dharmapala having paid money to Punchi Nilame got the land in her daughter's (plaintiff's) name. It is an established fact that the defendant-respondents are close relatives of the plaintiff-appellant and W.E.M.Dharmapala, the father of the plaintiff-appellant who paid the consideration to the said deed of Transfer marked P3 was possessing the land in question on behalf of the plaintiff-appellant who was a minor at that time. It was the contention of the Counsel for the plaintiff-appellant that the defendant-respondents cannot in law acquire title by prescription against a minor.

Further it is evident by the document marked as V2 by the 1st defendant-respondent which is a Certificate issued by the Conciliation Board of Murutenge dated 14.12.1976 that the 1st defendant-respondent has agreed to have an amicable survey to demarcate the lands owned by

S.M.Tikiri Bandara and W.E.M Dharmapala. This amounts to an admission by defendants of the title of the plaintiff's father. The plaintiff-appellant has instituted this action after about 4 ½ years after the said agreement. Therefore one cannot accept the defendant-respondents' position that they have acquired prescriptive rights to the said land owned by the plaintiff-appellant.

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-respondents 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 V. 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 Appellate 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 facts 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-respondents has been unsuccessful in proving or establishing that they have prescriptive title to the said land. Consequently I set aside the finding, judgment and decree of the Learned District Judge and answer issues N0 1 to 7 in favour of the plaintiff-appellant.

Accordingly Learned District Judge of Kuliyapitiya is directed to enter judgment in favour of 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