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

Athauda Arachchilage Punci Appuhamy

Gannawe, Tholangamuwa.

Plaintiff-Appellant

C.A.Case No:-242/99(F)

D.C.Kegalle Case No:-3985/L

V.

1.Athauda Arachchilage Guneratne Menike

(deceased)

1A.Weerakkody Arachchilage Dharmakanthi

1B.Weerakkody Arachchilage Sujeewa

Deepani Weerakkody

2.Weerakkody Arachchilage Dharmasena

(deceased)

2A.Weerakkody Arachchilage Dharmakanthi

2B.Weerakkody ArachchilageDharmasiri

2C.Weerkkody Arachchilage Nishantha

Ranjith Weerkkody

2D.Weerkkody Arachchilage Sujeewa

Deepani Weerakkody

Defendant-Respondents

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

Counsel:-Rohan Sahabandu P.C with Hasitha Amerasinghe for the Plaintiff-Appellant

Thishya Weragoda with Niluka Dissanayake for the Defendant -Respondents

Argued On:-04.06.2014

Written Submissions:-17.12.2014/29.01.2015

Decided On:-19.10.2015

H.N.J.Perera, J.

The plaintiff instituted this action in the District Court of Kegalle seeking, inter alia, a declaration of title to the land more fully described in the schedule to the plaint belongs to the plaintiff, to eject the defendants from the said land and to recover damages and costs. By judgment delivered on 03.02.1999, the learned trial Judge dismissed plaintiff's action.

The case of the plaintiff was that the said lots were allotted to Dingiri Appuhamy by the Final Decree in 4192/P marked P3 at the trial. The said Dingiri Appuhamy transferred lot 1 and lot 3 in Final Plan 1050 dated 18.02.1985 marked P1 at the trial to the plaintiff by deed No. 1585 dated 12.07.1985 marked P3 . Lot 2 in the said plan marked P1 belonged to the defendants. The plaintiff claimed lots 1 and 3 in the said Final Plan.

The plaintiff's case was that Dingiri Appuhamy gave permission to the defendants to construct and use a temporary toilet and a firewood shed in lot 3.The plaintiff claimed that the defendant's on or about 01.03.1982 removed the boundaries that existed between lots 1 and 3 and lot 2 and

sought to annex lot 1 and 3 to lot 2 and possess the same. A complaint had been made by the plaintiff to the police on 01.03.1982.

The defendants filed answer and while denying the matters urged in the plaint, stated that lot 5 in the said plan marked P1 was given to Punchi Rala and Karolis Singho, Podi Appuhamy Banda, Jane Nona and Podi Nona and lot 1,3 and 4 were given to Siyathu Hamy and Dingiri Appuhamy, and that the said Dingiri Appuhamy and Siyathu Hamy relinquished their rights to lots 1,3 and 4 and exchanged lot 5 referred to above, with the owner of lot 5and in the circumstances , Punch Rala became the owner of lots 1,3 and 4.

The learned District Judge after trial dismissed the plaintiff's case holding that the defendants had prescribed lot 1 and 3. Aggrieved by the said judgment of the learned District Judge the plaintiff-appellant had preferred this appeal to this court.

The learned trial Judge had answered issues 1 and 2 in favour of the plaintiff holding that the plaintiff has paper title to the said lots 1, 3 and 4. Further the learned trial Judge had answered issue No.9 in the negative. In fact the defendants had failed to mark and produced any valid deed to prove such an exchange. But the trial Judge had proceeded to hold that the defendants had prescribed to the said lots 1,3 and 4.

In D.A Wanigaratne V. Juwanis Appuhamy 65 N.L.R 168, it was held that:-

"In a 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, in court, prove that title against the defendant in the action."

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

() 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 he 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.

In this case the learned trial Judge has come to a clear conclusion about the title of the corpus to the action. The trial Judge has very clearly held that the plaintiff had paper title to the land described in the schedule to the plaint. The learned trial judge after a very careful consideration and analysis of the evidence led before court by the parties has come to the conclusion that the defendants had failed to prove that there was an exchange of land as claimed by the defendants. Therefore it is very clear that the defendants had failed to prove the position that the plaintiff's predecessor and the defendant's predecessor had informally exchanged several lands and thereby the defendant's predecessor had come into exclusive possession of the land in suit. Therefore the main issue in this case is whether the learned trial Judge was right when she held that the defendants had prescribed to the said land.

The defendants did not contest or deny the title of the plaintiff to the said lot 1 , 3 and 4 in the said plan P1.The defendants also claims exclusive possession and prescriptive title to the said lots.

In Luwis Singho and Others V. Ponanamperuma [1996] 2 Sri.L.R320. 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 Vindicatio action the cause of action is based on the sole ground of the right of ownership, in such action proof is required that:-

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

(2)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.

The moment title to the corpus 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.

In Chelliah V. Wijenathan 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. 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.

The learned trial Judge in page 5 of her judgment has very clearly stated that from the evidence led in this case it could be clearly said that the defendants have possessed the said land from 1978. Therefore the learned trial judge has held that the defendants had possessed the land from 1978. Therefore the commencement of the prescriptive period is from 1978.This action had been filed by the plaintiff on 18.12.1987.

Therefore the learned trial Judge had clearly misdirected herself in holding that the defendants had acquired prescriptive title to the land. In my opinion the defendants had failed to prove adverse possession for ten years.

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

"mere statements of witnesses, "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"

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 is incompatible with the title of the owner.

The mere fact there was no definite boundaries between the said lots seems to have influenced the learned trial judge in holding that Punchirala had possessed this land. Mere possession by Punchirala is not sufficient for the defendants to succeed his claim on prescriptive title against the plaintiff in this case. 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 defendants to a decree in favour in terms of section 3 of the Prescription Ordinance.

The plaintiff in paragraph 2 and 3 of the plaint had stated that Dingiri Appuhamy became the owner of the lot 1 and 3 depicted in Plan No. 93 marked P2 and the defendants possessed the lot 2 of the said plan as owners. Further in paragraph 4 of the plaint the plaintiff had very clearly stated that as Dingiri Appuhamy and the defendants were relations and

the said Dingiri Appuhamy gave permission to the defendants to build a small toilet and a fire wood shed in lot 3 close to lot 2. It is to be noted that nowhere in the plaint the plaintiff had stated that the defendants came into possession of the said lots with leave and license of the said Dingiri Appuhamy. Further the plaintiff had raised the issue No 4 on that basis.

Therefore the contention of the learned Counsel for the Defendants that the Defendants had come into the said lots with the leave and license of the plaintiff and therefore the plaintiff should have terminated the said license before filing action against the Defendants is baseless.

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 utmost consideration and will be reversed only if it appears to the appellate court that the trial Judge has failed to make 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 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 ground the findings of fact by a trial Judge should be reversed then the appellate court "ought not to shrink from that task."

For the above reasons I set aside the judgment of the Learned District Judge dated 03.02.1999 dismissing the plaintiff's action and enter judgment as prayed for in the prayer(a),(b),(d) and (e) to the plaint. The damages claimed appear to be reasonable and therefore I have allowed prayer "d" together with taxed costs in both courts.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL