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

C.A.513/98(F)

D.C.Moneragala 11/L

1. Talagedera Kiripannikaya
2. Thalagedera Podisira

Both of Bulugewattegedera,
Dahagoni
Medagama

Plaintiffs

Vs

1. T.M.Sugathadaa
7th Mile Post, Medagama

2. Ven.P.Dhammadassi
Viharadhipathi, Thimbiriya,
Rajamahaviharaya, Medagama
Bibile

Defendants

AND

T.M.Sugathadasa
7th Mile Post, Medagama
1st Defendant-Appellant

vs

1. Talagedera Kiripannikaya
2. Thalagedera Podosir

Both of Bulugewattegedera,
Dahagoni
Medagama
Plaintiffs-Respondents

BEFORE Deepali Wijesundera J.,
M.M.A.Gaffoor J

COUNSEL: J.Mansoor instd. by Legal Aid Commission for the 1st Defendant Appellant.

K.Asoka Fernando with A.R.R.Siriwardena for the 2nd Plaintiff Respondent.

ARGUED ON : 25.05.2015

DECIDED ON: 19.11.2015

M.M.A. Gaffoor J

Originally the Plaintiff filed this action by his plaint dated 22.07.1981 against the Defendant for :

(i) declaration that he is entitled to the land described in schedule III to the plaint;

(ii) to eject the Defendant and all those claiming under him to be ejected therefrom and to give possession to him;

(iii) to order the Defendants to pay the 2nd Plaintiff a sum of Rs. 1000/- as damages;

(iv) to order the Defendant to pay Rs. 30/- per month as damages from the date of the Plaint until possession of the land is given and for costs;

The Defendant has filed answer denying the averments in 2-10 paragraphs of the Plaint and suggested that to identify the land claimed by the Defendant and the Plaintiff a survey plan and Report are necessary after such plan and Report, he may be allowed to file a full answer. He has relied on prescriptive right to the said land. After a long delay with regard to commission to survey the land in dispute, a commission had been issued and a Plan No. 269 dated 14.02.1990 and Report dated 20.03.1990 by W.N.Silva, Licensed Surveyor are filed of record.

On 02.101971 trial had commenced, plaintiffs have raised 6 Issues and the Defendant raised 7-12 Issues. After the Plaintiffs and their witnesses evidence was closed and the case was awaiting the defendant's evidence, on 28.07.93, one Pambure Dhammadassi Himi had applied to intervene in the case which was allowed by court. He is named s the 2nd Defendant, who in his answer dated 27.10.1993 claimed right to the disputed land by some deeds and also suggested for a commission to survey the land.

On 14.3.1996 when the case was taken up for further trial before the successor to the earlier District Judge, parties agreed to proceed with the trial from the stage it was stopped before the Judge's predecessor and the Plaintiff raised a further issue as Issue No. 8. That is : Is the land claimed by the Defendant and the land claimed by the Plaintiff one and the same land?

The trial Judge delivered the judgment on 24.06.1998declaring the Plaintiffs are entitled to the land described in the 3rd schedule to the

plaint and damages at Rs. 30/- from the date of the Plaint until possession is given to them and ejectment of the 1st Defendant and all those claiming under him from the said land. Accordingly decree has been entered on 06.10.1998.

Being aggrieved by this judgment, the 1st Defendant only has preferred this appeal. The 2nd Defendant has not preferred an appeal. The grounds of appeal are mainly about the procedure followed by the District Judge in recording the evidence of the parties and the witnesses. It must be noted that the plaintiff's evidence oral and documentary and the evidence of this witness was recorded not by the Judge who delivered the judgment but by his predecessor. Only the Defendant's evidence and his witnesses evidence was recorded by the incumbent Judge. It must also be noted that when the incumbent judge commenced hearing of the case, all parties agreed to adopt the evidence already led and to proceed therefrom to further trial. The 1st Defendant at that stage did not make an application about the ground urged in paragraphs 5(a), (b) and (h) of the petition of Appeal and ask for trial de novo. Hence, the reasons urged in paragraphs 5(a),(b) and (h) cannot be accepted as valid grounds. These are mere technicalities.

The main contest is about the identity of he land in dispute.While the Plaintiff say that their land is known by the name "Udalanda" the 1st and 2nd Defendants claimed that the land they are entitled to is "Udalanda Hena". In this respect, the Plan and Report and the oral evidence of Surveyor Wilmot Silva is very clear. He has said that the land depicted as Lot 1 in his Plan No. 269 dated 14.02.1990 is the land

described in the 3rd schedule to the plaint which is known as "Udalanda".

The learned District Judge hs carefully analyzed the oral and documentary evidence relating to the identity of the land and has come to the correct finding that "after considering all the evidence, I determine that the subject matter of the action is lot 1 in Plan No. 269 dated 14.2.1990 of Licensed Surveyor Wilmot Perera, containing in extent 1Acre 2 Roods and 20 Perches." See pages 6,7 of the judgment

Having identified the land in dispute which is morefully described I the 3rd schedule to the Plaint as the land known s "Udalanda" the next question arises whether parties have established their title to the said land.

The 1st Plaintiff in claiming title to this land by documents marked P2 and P3. The 1st Plaintiff is the father who allowed his son the 2nd Plaintiff to cultivate the said land. While the land being possessed by the 2nd Plaintiff, the 1st Defendant in the year 1973 had forcibly entered the land and thereby ousted the Plaintiffs therefrom. The 1st Defendant has admitted in his evidence that he came into the land in dispute in 1973, and claim right to the land by prescription, But in 1981, the Plaintiffs have instituted the action ..... in the District Court of Moneragala. By filing this action the Defendant has failed to establish a continuous and uninterrupted prescriptive possession as stipulated in Section 3 of the Prescription Ordinance.

Whilst the Plaintiffs claimed right to land called "Udalanda" by P2 and P3 which refer to services rendered as "Hevisi" duties to the

Monrawana Keerthi Bandara Devalaya by their predecessors in title, the Defendants claim right to a land called "Uda;ada Hena" by prescription. The learned District Judge, had carefully analysed the evidence of the witnesses summoned by the Plaintiffs and the evidence of the witnesses summoned by the Defendants and arrived at a finding that the land called "Udalanda" and land called "Udalanda Hena" are separate and distinct lands, and answered the issues 1-6 raised by the plaintiffs in the affirmative and the Issues 7-12 raised by the 1st Defendant in the negative and the subsequent issue raised on 14.3.1996 to the effect whether the land claimed by the Plaintiffs and the land claimed by the Defendant is one and the same? In the negative.

After considering evidence of the Defendants as against the documentary title of the Plaintiffs, the learned District Judge has clearly decided that the 1st Defendant has not proved uninterrupted and undisturbed possession for 10 years and he is not entitled to prescriptive rights.

IN an action for declaration of title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant – See. Siyaneris vs Jayasinghe Udenis de Silva 52 NLR 289(PC) . In the present case, the Defendant has failed to establish his prescriptive right for over 10 years as the law demands.

In the circumstances, I agree with the findings of the learned District Judge that the Defendant Appellant had not acquired

prescriptive title to the land morefully described in the 3rd schedule to the Plaint.

This action has been filed on 22nd July 1981 which is almost 34 years ago. The counsel for the Defendant Appellant in his written submissions has requested to dismiss the Plaintiff's action or in the alternative to order a re-trial.

For the reasons stated above, I decline to accept both these suggestions. It is not advisable to order re-trial after 34 years, which might take considerable time.

Furthermore, the grounds set out for re-trial are untenable. I therefore dismiss this appeal with costs fixed at Rs. 25,000/-.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL