413/99(F)

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

Nandawathie Kodithuwakku nee
A.R.Nandawathie, Landewelawatta,
Karagahawela,Bandarawela.

Plaintiff-Appellant

C.A.Case No:-413/99(F)

D.C.Kegalle Case No:-378/L

V.

1.Wanigasinghe Arahchige Piyadasa
Waharakada, Ussapitiya.

2.Ananda Ajith Chandralal
Landewelawatta, Karagahawela,
Bandarawela.

3.Sumith Prasanna Rohitha,
Landewelawatta, Karagahawela,
Bandarawela.

Defendant-Respondents

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

Counsel:-W.Dayarathne P.C with R.Jayawardena for the Plaintiff-Appellant

D.M.G.Dissanayake with R.Gunasena and L.M.C.D.Bandara

For the 1st defendant-respondent

Agued On:-05.11.2013/14.07.2014

Written Submissions:-13.09.2013/24.08.2014

Decided On:-17.12.2015

H.N.J.Perera, J.

The plaintiff-appellant filed this action in the District Court of Kegalle seeking a declaration of title and ejectment of the 1st defendant from the land described in the schedule to the plaint and for damages.

According to the plaintiff her father one Alexander Reed was the owner of the corpus of this land called "Arambahena" which is in extent of 2 acres situated at Waharakgoda.

The said Alexander Reed gifted the corpus to his three sons namely A.R,Jayawardene, A.R.Ananda Ajith Chandralal (2nd defendant) and A.R Sumith Prasana Rohitha (3rd defendant) under and by virtue of the deed No 5746 dated 14.12.1980 marked P1. Alexander Reed died on 28.12.1980 and the son A.R.Jayawardene who became entitled to a 1/3 share of the said corpus too died unmarried and issueless and upon his death his rights devolved on his sister, the plaintiff-appellant and his two brothers the 2nd and the 3rd defendant-respondents. Thereafter the plaintiff-appellant became entitled to a 1/9th share of the corpus and the 2nd and 3rd defendants to 4/9 shares each.

It was the position of the plaintiff-appellant that during the life time of her father and even thereafter the said corpus was leased out to several persons and in 1977 her father Alexander Reed gave permission to the 1st defendant-respondent to live in the cadjan house in the said land and

to cultivate chena cultivation in the corpus by agreement dated 07.01.1977 marked and produced P2 at the trial.

According to the terms of agreement, the 1st defendant-respondent entered into the corpus with the leave and license of the plaintiff-appellant's father and agreed to handover the corpus whenever the owner requested to do so. It was the position of the plaintiff-appellant that thereafter she informed the 1st defendant-respondent to hand over possession of the cadjan house in the corpus which was held by him and the 1st defendant-respondent refused to leave the corpus in 1986 and denied the title of the plaintiff-appellant and her father's rights to the corpus. It is the position of the plaintiff-appellant that after she became a co-owner of the said property, the plaintiff-appellant requested the 1st defendant-respondent to leave the land but however the 1st defendant-respondent continues illegally and forcibly to remain in occupation of the said property. The 1st defendant-respondent in his answer has denied the title of the plaintiff-appellant and claimed that he was in possession of a land called 'Egodahena" and claimed title to it from a deed and also claimed prescriptive title to the said land.

After trial the learned trial Judge delivered judgment on 23.04.1999 dismissing the action of the plaintiff-appellant and held in favour of the defendant-respondent on the basis that the 1st defendant-appellant had acquired prescriptive tile to the said land in dispute. Aggrieved by the said judgment of the District Judge of Kegalle the plaintiff-appellant had preferred this appeal to this court.

The main contention for the Counsel for the plaintiff-appellant was that the learned trial Judge erred in law when she dismissed the plaintiff-appellant action on the basis that the plaintiff-appellant had failed to prove that she is the owner of the land described in the schedule to the plaint. The learned trial Judge in her judgment has held that the plaintiff-

appellant is only a co-owner of the subject matter of this action and therefore has failed to prove that she is the owner of the said land as claimed by her in this case.

In paragraph 2 had 3 of the plaint the plaintiff-appellant had clearly averred that the original owner of this land was her father Alexander Reed and he has gifted the said land during his life time to his three sons by the deed of gift marked P1 at the trial. It is also stated that one of the beneficiaries of the said deed namely A.R.Jayawardena died unmarried and issueless and the said rights devolved on the remaining heirs, the plaintiff-appellant and the other two brothers. Therefore it was the position of the plaintiff that she became entitled to a 1/9 share of the corpus after the death of her brother A.R.Jayawardene and she and the 2nd and the 3rd defendant-respondents became co-owners of the said corpus. In paragraph 5 of the plaint it is also stated that she has made the 2nd and the 3nd defendants parties to the case because they are co-owners and that plaintiff-appellant does not expect any relief from court against them. The third issue raised on behalf of the plaintiff-appellant at the trial too had been raised on the basis that the plaintiff and the 2nd and the 3rd defendants are the co-owners of the said corpus. It is to be noted that the 2nd and the 3rd defendant-respondents had in their answer in paragraph 4 clearly stated that the plaintiff and the 2nd and the 3rd defendants are the co-owners of this land and also had prayed that the plaintiff and the 2nd and the 3rd defendants be declared entitled to the said land described in the schedule to the plaint.

In fact the learned trial Judge after considering the evidence led by the plaintiff in this case has held that she is a co-owner of the said land and that she owns 1/9 share of the land. Therefore it is very clear that the learned trial judge has dismissed the plaintiff's action on the ground that she is not the owner of the entire land but only a co-owner and therefore

she is not entitled to have a declaration as prayed for in the prayer to the plaint.

In Attanayake V. Ramyawathie [2003] 1 Sri.L.R 401 at page 409 Shirani Bandaanayake, J. held thus:-

"I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for a lessor share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief.....

In such circumstances the question raised by the counsel for the appellant is answered in the following terms. A co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to."

See also Unus Lebbe V. Zayee 1893 3 S.C.R 66, Hevawitharana V.Dangan Rubber Co.Ltd 17. N.L.R 49, 55.

Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land because the owner of the undivided share has an interest in every part and portion of the entire land.

It is very clear in this case that the plaintiff-appellant has instituted this action against the defendant-respondent on the basis that she is a co-owner of the said land and to eject the defendant-respondent who is in unlawful possession from the said land. The mere fact that she has not sought a declaration as a co-owner of the said land in the prayer in the

plaint should not prevent her from getting the lesser relief which she is entitled to.

The plaintiff-appellant had produced deed marked P1 and other documents marked P2 to P8 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 a particular party would render them as evidence for all purposes of the law. Sri Lanka Ports Authority V. Jugoliniga 1981 1 SLR 18.

It was contended on behalf of the 1st defendant-respondent that proving of title envisages the identification of the land and if the plaintiff-appellant is unable to identify the land she claims on deed then the action fails. After analyzing the evidence that was led before her by both parties the learned trial Judge has held that the plaintiff-appellant had proved the identity of the property described in the schedule to the plaint and that the plaintiff-appellant and the 2nd and the 3rd defendant-respondents are the co-owners of the said land. The 1st defendant-respondent admitted in his evidence that he resides in the land which was morefully described in the schedule to the plaint and the learned trial Judge has held in her judgment that lands which were described in the plaint and amended answers are similar to each other and there is no dispute about the identity of the corpus. I see no reason to interfere with the said conclusion arrived by the learned trial Judge on evidence.

The plaintiff-appellant has led evidence and proved that she is a co-owner of the land in dispute. The leaned trial Judge has clearly stated in her judgment (page 3 paragraph 2) that the plaintiff-appellant and the 2nd and the 3rd defendant-respondents are co-owners of the corpus.

Issue No.6 is to the effect whether the plaintiff and her predecessors in title had acquired prescriptive title to the said land. It is to be observed

that the learned trial Judge has held in her judgment that the plaintiff-appellant is a co-owner of the said land but has answered the issue No.6 in the negative.

In Leisa and another V.Simon and another 2002 (1) SLLR 148 it was observed that:-

"An averment of prescription by a plaintiff in a plaint after pleading paper title is employed only to buttress his paper title. Such pleading also acts as advance assertion against any averment of prescription that may be claimed by the defendants. For court to have come to its decision as to whether the plaintiffs in this case had dominium over the corpus, the proving of paper title was sufficient. The mere fact that title was claimed both by deeds as well as by long possession amounting to prescription did not entail the plaintiffs to prove prescriptive title thereto. Their possession was presumed on proving paper title. The burden was 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 plaintiffs."

Therefore it is clear that the learned trial Judge has erred in answering issue no 6 in the negative.

The learned trial Judge has in her judgment concluded that the plaintiff-appellant has proved that she is a co-owner to the land described in the schedule to the plaint. Thus the only issue that the learn trial Judge had in this case whether the defendant-respondent was in lawful occupation of the said land.

In Luwis Singho and others V. Ponnamperuma 1996 2 S.L.R 320 it was held that:-

1.Actions for declaration of tile and ejectment (as in this case) 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 violation of the right of ownership. In such action proof is required that:-

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

(ii)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.

In Theivendran V. Ramanathan Chettiar 1986 (2) S.L.R 219 it was held that:-

"In a vindicatory action the claimant need prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession without his consent. Hence, when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession."

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 1st defendant to prove that he is in lawful occupation of this land. The learned trial Judge has held that the 1st defendant in this case gets no title to the land from the deed marked V1. I see no reason to interfere with the said finding of the learned trial Judge. The deed marked V1 had been executed in 1989 after the institution of this action by the plaintiff-appellant in this case. In his original answer the 1st defendant has claimed prescriptive title to the said corpus but has amended his answer and had claimed title to a

land called Egodahena and also prescriptive title to the same. The learned trial Judge has come to a clear finding that the 1st defendant has failed to prove title to the land in dispute. The learned trial Judge has answered the issue No 9 in the negative.

The only point this court has to consider is whether the learned trial Judge was right in the conclusion at which she arrived on the question of prescription.

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 or prescriptive rights."

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the defendant possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witness should speak to specific facts and question of possession has to be decided thereupon by court.

In Hassan V. Romanishamy 66 C.L.W 12, 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."

One of the essential elements of the plea of prescriptive title as provided for in 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 is incompatible with the title of the owner.

In De Silva V. Commissioner General of Inland Revenue 80 N.L.R 292 it was held that:-

"A person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

The burden was cast on the 1st defendant to prove that by virtue of an adverse possession he had obtained title adverse to an independent of the paper title of the plaintiff. 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 1st defendant's occupation of the premises was such character as is incompatible with the title of the plaintiff.

The Plaintiff-appellant has led evidence to prove that her father Alexander Reed leased the said land to one G.R.Wijeratne in 1965 for five years by deed of Lease No.20690 dated 03.07.1965 and that thereafter the said Alexander Reed and G.R.Wijerayne filed a case bearing No 17673 in the District Court of Kegalle to eject three people who were in unlawful possession of the corpus and at the conclusion of the said case , decree was entered holding that the Alexander Reed is the owner of the said land. The decree dated 04.03.1968 of the said case bearing No 17673 was produced marked as P5.

The plaintiff-appellant also led evidence to prove that the said land was again leased by Alexander Reed to one W.A.David in 1972 for two years

under Deed No.21439 dated 28.09.1972. In 1972 Alexander Reed filed case bearing No 1273/L to eject W.A.David and one namely T.D.Andiris from the said land and at the preliminary investigation of the said case, W.A.David and T.D Andiris admitted that Alexander Reed leased the said land to them and he was the owner of the said land. The plaint of the said case bearing No. 1273/L was produced marked as P6(B) and the terms of settlement was produced marked as P6 and P6(A).

It was the position of the plaintiff-appellant that after ejecting said people in 1977 Alexander Reed gave permission to 1st defendant-respondent to live in the cadjan house and to cultivate chena cultivations in the said corpus by agreement marked P2 at the trial.

The plaintiff-appellant also led evidence to prove that the said land had been leased by deed of Lease bearing No. 984 dated 13.02.1978 (P4) and by deed of Lease No. 7922 dated 16.10.1992 (P7) to one Warshakone who gave evidence at the trial. The said lessee Warshakone giving evidence at the trial, has stated that, he enjoyed the possession of the land whilst the 1st defendant-respondent Piyadasa was occupying the thatched house.

All the said documents marked and produced by the plaintiff-appellant had been marked and produced without any objection from the 1st defendant-respondent at the closure of the plaintiff-appellants case. The plaintiff-appellant has lead oral as well as documentary evidence to prove the fact the said land belonged to her father Alexander Reed and he and thereafter the plaintiff–appellant herself had leased out the said premises to various people from time to time from the year 1965.

The 1st defendant-respondent and two other witnesses namely Punchi Banda and Nimal Ariyaratne who was an Agrarian Services Officer gave evidence on behalf of him and his case was closed, marking documents 1V1 and 1V2.

In my view in the present case there is a significant absence of clear and specific evidence on such facts of possession as would entitle the 1st defendant-respondent to a decree in favour in terms of section 3 of the Prescription Ordinance.

The findings of fact by he learned trial Judge are mainly based upon the trial Judge's evaluation of facts. In De Silva V. Seneviratne (1981) 2 Sri. L.R 7, it was held:-

(1)Where the finding 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 it if 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 position as the trial Judge to evaluate such facts and no sanctity attaches to such findings of facts 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 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.

For the above reasons I set aside the judgment of the learned trial Judge dated 23.04.1999 dismissing the plaintiff's action and answer issues No. 1 to 7 and 8 in favour of the plaintiff-appellant and issue No. 9 to 12 in

the negative and enter judgment as prayed for in the prayer to the plaint. The damages claimed appear to be reasonable and therefore I have allowed prayer (C) together with taxed costs in both court.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL.