

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

Ganegama Liyanage Lindon,
No. 16/33,
Anagarika Dharmapala Mawatha,
Galle.

Plaintiff

Case No. C.A. 711 / 1996 (F)

D.C. Galle – 10554 / P

-Vs-

1 Ganegama Liyanage Samson,
No. 33,
Anagarika Dharmapala Mawatha,
Galle.

2. Ganegama Liyanage Halbert,
No. 1B/40,
Anagarika Dharmapala Mawatha,
Galle.

3. Ganegama Liyanage Piyasena,
No. 41,
Anagarika Dharmapala Mawatha,
Galle.

Defendants

And Now Between

Kosgoda Thantirige Dayawathie,
No. 16/33,
Anagarika Dharmapala Mawatha,
Galle.

Substituted Plaintiff - Appellant

-Vs-

1(a). Ganegama Liyanage Dayaratne,
No. 33,
Anagarika Dharmapala Mawatha,
Galle.

2. Ganegama Liyanage Halbert,
No. 1B/40,
Anagarika Dharmapala Mawatha,
Galle.

3. Ganegama Liyanage Piyasena,
No. 41,
Anagarika Dharmapala Mawatha,
Galle.

Defendants - Respondents

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Udaya Bandara for the Substituted Plaintiff-Appellant.

S.A.D.S. Suraweera for the Substituted 2nd Defendant-Respondent

Argued on : 19.03.2015 and 06.05.2015

Decided on : 27.11.2015

A.H.M.D. NAWAZ, J,

The original Plaintiff-Appellant Ganegama Liyanage Lindon (hereinafter sometimes referred to as "the Plaintiff") instituted this action on 05th July, 1988 to partition a land called Lot 1 of "KONGAHA WATTA", alias "POKUNUGODA" which was more fully described in the 2nd paragraph of the plaint. In fact the Plaintiff sought to partition this land and have shares allotted only between himself and his brother Ganegama Liyanage Samson-the 1st Defendant. After the plaint was filed a commission was issued to Ajith Ranjan Weeratunga, Licensed Surveyor, whose Plan bearing No. 282 dated 25th March, 1989 and his report were filed of record marked X and X1 respectively. The corpus to be partitioned is depicted as Lots D1, D2 and D3 in the said Plan containing in extent 18.33 perches.

The identity of the corpus was admitted by all the parties to the action. The 1st Defendant, who was a brother of the Plaintiff, only admitted the pedigree of the

Plaintiff. The Plaintiff alleged that the 2nd Defendant, Ganegama Liyanage Hulbert, in or about 1988 had encroached into the land sought to be partitioned and attempted to build a small house. It has to be observed that the 3rd Defendant, Ganegama Liyanage Piyasena had not claimed any right to the land but only claimed rights to certain plantations.

When this case was taken up for trial on 13th July 1993, the parties had agreed without any contest that the land shown in Plan No.282 was the corpus. Thereafter, issues 1 to 4 were raised on behalf of the Plaintiff, issues 5 and 6 on behalf of 2nd Defendant and issues No.7 on behalf of 3rd Defendant. According to the Plaintiff's pedigree, the Plaintiff proposed to partition the corpus between himself and the 1st Defendant only. The 2nd and 3rd Defendants were not part of the Plaintiff's pedigree, though they were also children of the same father, Ganegama Liyanage Salman.

The main contest was between the Plaintiff and the 2nd Defendant. Whilst the Plaintiff relied on his father Ganegama Liyanage Salman for his title, the 2nd Defendant claimed his rights by virtue of long and prescriptive possession. Though the 2nd and the 3rd Defendants were also children of the original owner Ganegama Liyanage Salman as stated above, the Plaintiff did not make them shareholders of his father in his pedigree. The Plaintiff stated in evidence that he did not know the 2nd Defendant at all, but he later admitted that the 2nd Defendant was living on the land, and the 3rd Defendant too was living on the adjoining land on the left side of the corpus.

According to surveyor's Report X1, there was situated within the corpus a well, a lavatory with cadjan leaves and a house made of 'wattle and daub' and tin-sheet. The Plaintiff admitted in evidence that the above were put up by the person living

there, namely the 2nd Defendant. When the 2nd Defendant tried to put up a permanent structure in 1988, the dispute arose for the first time. The Plaintiff made a complaint to the Grama Sevaka (P2) about this and later filed this action and obtained an enjoining order against the 2nd Defendant, who undertook not to build any permanent structure on the land. The Plaintiff filed this action in 1988.

The corpus, admittedly, belonged to one Ganegama Liyanage Salman, who was allotted this land by an earlier Partition decree entered in case No. P/4127, (P1). The evidence in the case discloses that the said Ganegama Liyanage Salman, was married to one Heenatigala Kanattage Johanna and by this wedlock the Plaintiff and the 1st Defendant were born. After his wife's death Ganegama Liyanage Salman took one Lisi Nanayakkara as his mistress and was cohabiting with her. The 2nd and 3rd Defendants were born to this second woman Lisi Nanayakkarana. It is therefore, as the evidence shows, clear that the parties to this case are all children of the same father but different mothers. The Plaintiff and the 1st Defendant are the children of Johanna whilst the 2nd and 3rd Defendants are the children of Lisi Nanayakkara.

The 2nd Defendant claimed his right to the land not from his father's title but on an independent and prescriptive title. The 3rd Defendant also did not claim any right to the land other than plantation rights. According to the evidence in this case, the Plaintiff and the 1st Defendant had never possessed this land, except for the fact that they claimed they were entitled to the corpus by virtue of their father's right.

The subject matter of this action had been surveyed on 25th March 1989 by surveyor Ajith Ranjan Weerasuriya. He states in his report X1 that at the time of survey the Plaintiff, 1st and 2nd Defendants were present. Though the 3rd Defendant was present and claimed some plantations, the surveyor has not mentioned his

presence in his report. According to the surveyor's Report X1, all the plantations were claimed by the 2nd and 3rd Defendants only. The wattle and daub house, the lavatory, kitchen and the well were claimed by the 2nd Defendant. The Plaintiff has not claimed any of these items and the plantations. Furthermore, when the 2nd Defendant's counsel posed the following question to the Plaintiff under cross-examination,

'the 2nd defendant says that you (the plaintiff) had never possessed the land even for a day'

No answer was forthcoming from the Plaintiff. This silence in the face of a material question clearly demonstrates that the Plaintiff has never lived on this land and therefore his story that he has prescriptive title in his favour is totally false and he has failed to adduce any evidence to prove his claim. The learned District Judge has correctly answered issue No.2 raised by the Plaintiff that he and the 1st Defendant had no prescriptive title.

While the Plaintiff was giving evidence some further issues were raised with regard to some plantations, raising the question whether they belonged to the 2nd Defendant or to the parties according to their soil rights. But as the Court decided to give the corpus to the 2nd Defendant, the plantations were also given to him.

It is in evidence that the father of the Plaintiff lived in the 'mahagedera' in a land called Pokunagodawatte, which was adjoining the corpus. His father died whilst living on this land and the Plaintiff categorically stated that he did not know in which year his father and mother passed away. But on the second day of his evidence, he stated that his father had passed away on 07th July 1970. His father died whilst living on the land bearing No.41, but the number of the corpus happens

to be No.41/1. The Plaintiff further stated (*sic*) “now in the ‘mahagedera’, Piyasena (3rd Defendant), who is the brother of 2nd Defendant is living. He has been living there for the last 25 years”. From this evidence it is clear that the Plaintiff’s father Salman Appuhamy also never lived on the corpus, but on the adjoining land.

After the Plaintiff’s evidence, his wife Dayawathie has given evidence. According to her she married the Plaintiff in 1961 and came to live in the mahagedera which bears No.41A. In or about 1963 or 64 she left the mahagedera and went on to reside at No.33/16, which is a few yards away. She went to the funeral of Lisi Nanayakkara (the mother of 2nd and 3rd Defendants) which took place at house No.41. She did not answer the following questions posed to her i.e,

- (1) that Lisi Nona was described as Salman Appuhamy’s wife in the funeral notice,
- (2) that the 2nd Defendant was a son of Salman Appuhamy,
- (3) that the informant of the funeral was Piyasena (3rd Defendant) and
- (4) that she was giving false evidence when she stated that she did not know 2nd Defendant’s family.

Dayawathie did not answer these questions. Her evidence is that the 2nd Defendant got into the land only in 1988 and laid the foundation for a house. But she asserted that her husband Lindon (the Plaintiff) and the 1st Defendant are the only children of Salman Appuhamy and not the 2nd and 3rd Defendants. Her evidence as to possession of the corpus by her husband-the Plaintiff is utterly unsatisfactory.

As opposed to the evidence given on behalf of the Plaintiff, the 2nd Defendant stated in his evidence that “his father Salman lived in the house bearing No.41, where he and all other children, the Plaintiff and Defendants lived. The Plaintiff

married and brought his wife also to that house. He was emphatic-"When father was living he told me to build a house in the adjoining lot which is 41A. It was in 1962. The Plaintiff was living in another house which could be seen from my house. Now I live in the house which bears the No.41A, which is the subject matter of this action. Since my marriage my family and I have lived in that house which is situated in the corpus, which is marked as Lot 'D' in extent about 16 perches".

I am fortified in my view that this evidence remains unimpugned and unassailable.

The evidence of one David Obada Mudalige, a retired Grama Sevaka supports the above position of the 2nd Defendant that he lived in the house on the corpus for about 30 or 35 years. (This was prior to 1995 when this witness gave evidence). Thus the 2nd Defendant discharged the burden of proving his long and prescriptive possession to the satisfaction of court.

Considering the evidence led in this case it was established that the 2nd Defendant has been in possession of the corpus for well over ten years. The Plaintiff, though he claimed that he and the 1st Defendant were the only children of his father Salman Appuhamy, yet failed to establish any evidence against the long and prescriptive possession of the 2nd Defendant. From 1962 the 2nd Defendant had been occupying the land without any disturbance from the Plaintiff or the 1st Defendant, and it appears that only in 1988 when he was trying to build a permanent house the dispute had arisen. Other than this dispute there was no other dispute that is manifest between the Plaintiff and the 2nd Defendant. Upon a perusal of evidence, apart from the disturbance that took place in 1988, I do not observe any item of evidence that goes to show the contrary.

Under the law of Sri Lanka, possession relied upon in support of a prescriptive title is required to be "by a title adverse to or independent of that claimant or Plaintiff in the action".¹ The parenthetical clause which follows, reads thus:

*"that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred."*²

It is apposite to recall what the Privy Council declared in the case of ***Cadija Umma and another vs. Don Manis Appu and others***³

*"The purpose of the parenthetical clause is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription".*⁴

The approach of the Judicial Committee in ***Cadija Umma's*** case is altogether consonant with the tenor of the subsequent opinion of their Lordships, delivered in 1969, in ***Nonis v Peththa***⁵. Lord Wilberforce, speaking for the Privy Council, observed thus:

*"Section 3 of the Prescription Ordinance contains, by the words in parenthesis, what is in effect a definition of what is commonly, for convenience, referred to as adverse possession."*⁶

¹ Prescription Ordinance, section 3.

² Ibid

³ (1938) 40 N.L.R. 392

⁴ Ibid at p 396.

⁵ (1969) 73 N.L.R 1.

⁶ Ibid at p 3.

The learned District Judge has analyzed all the material points of the evidence in his judgment. I am unable to doubt that the possession of 2nd Defendant satisfies the indicia connoted in the above pronouncements.

In a nutshell the legal battle between the half-brothers boiled down to a contest between “paper title” and “prescriptive title”. Though the Plaintiff relied on paper title from his father, the 2nd Defendant’s prescription has overwhelmingly been established over the paper title. This position has been rightly decided by the learned District Judge, who has also gone into the question of devolution of title and the persons who are entitled to the buildings and plantations. In this regard, the learned Judge has considered the oral evidence as well as the surveyor’s report. Though the 3rd Defendant had raised an issue (issue No.7) as to 4 perches of land and plantations, he has not led any evidence to prove his claim. Accordingly, the trial Judge has decided that the 2nd Defendant is only entitled to the corpus and the rights to plantations and improvements have also been decided in his favour as there are no other claims against his.

In the circumstances I hold that the learned District Judge’s conclusion to allot the corpus and the plantations standing thereon in favour of the 2nd Defendant is a correct finding which is supported by evidence. I do not opine that this finding having regard to the evidence and conclusions thereon is capable of being impugned or faulted. Accordingly I affirm the judgment of the trial Judge and dismiss this appeal with costs.

Judge of the Court of Appeal