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

C.A. No. 764/99(F)

D.C.Trincomalee No. 547/95

A.A.Jeyaratnam of 91/1 Arunagiri Road

Trincomalee

Managing Trustee, Villoondy Kovil

Trincomalee

Plaintiff

Va

Mrs T. Konesamsny of No. 133, College Street,

Trincomalee

Defendant

NOW BETWEEN

Mrs T. Konesamany, 133 College Street

Trincomalee

Defendant Appellant

Vs

A.A.Jeyaratnam No.91/1 Arungiri Road

Trincomalee

Managing Trustee, Villoondy Kovil, Trincomalee

Plaintiff Respondent

BEFORE : Deepali Wijesundera J

M.M.A. Gaffoor J

COUNSEL N. Arumugam Jegasothy for the Defendant Appellant

N. Vishnu Kanthan for the Plaintiff Respondent

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ARGUED ON: 22.10.2015

DECIDED ON : 24.03.2016

Gaffoor J.,

The Plaintiff Respondent (hereinafter referred to as the Respondent) filed this action for a declaration of title to the land described in the schedule to the plaint, and for the ejetment of the Defendant Appellant and possession of the said land described in the schedule to the plaint and for damages and for a declaration that the purported deed of gift No. 2790 dated 1.9.1988 and attested by M.K. Sellarasa, N.P., of Trincomalee, is null and void.

The Defendant Appellant filed her Answer denying the averments contained in the plaint and claimed that the land which is the subject matter of the action originally belonged to her husband's relative S. Vaithialingam and thereafter her husband occupied the land and by virtue of prescriptive right under section 3 of the Prescription Ordinance has prescribed title to the same and has thereafter executed the said deed of gift No. 2790 to her and thus prayed for declaration of title in her favour and in a sum of Rs. 500,000/- for having made improvement to the said land. Also she averred that the Plaintiff has failed to disclose that the disputed property has been vested in terms of Section 472 of the Civil Procedure Code.

According to the Plaintiff, one Subramaniam Sithamparapillai Alagarajah and Subramaniam Shanmugam as Trustees by deed of Lease No. 1250 daed 28th May 1947 leased the property to Periyatamby Sinnathamby. After the demise of the said Sinnathamby, his son Thambirajah succeeded to the leasehold rights.

The said Thambirajah by deed No. 2790 dated 1988.09.01 and attested by M.K. Selvarajah, executed a prescriptive deed. The Plaintiff by letter dated 14.07.1995 requested the Defendant to attorn to the said property as a Lessee. The Defendant refused to attorn to the said property, contrarily as lessee of the said property. As a result of such refusal parties came before court.

After trial the learned District Judge delivered judgment dated 27.09.1999 in favour of the Plaintiff respondent. Being aggrieved by the said judgment of the learned District Judge of Trincomalee the Defendant Appellant had preferred this appeal to this court. .

It was the position of the Plaintiff Respondent that the Defendant Appellant's husband has come to occupy the said premises with their permission. That by Lease Agreement. It is to be observed that by producing the receipts which were marked as ...6 to ..9 plaint has evidence that the Plaintiff's has established this fact.

(01) பற்றுச்சீட்டுப் புத்தகத்தின் அடிக்கட்டை அடங்கிய பகுதி முழுவதும் 'வ – 6' என்று அணைக்கப்பட்டது. 'வ – 6அ' என்ற பற்றுச்சீட்டில் எதிரியின் கணவரான தம்பிராசாவால் 10.01.1981இல் மார்கழி மாதத்திற்கான பணமாக ரூபா 50/- இல. 133, கல்லூரி வீதி திருகோணமலை என்னும் முகவரிக்கு செலுத்தியுள்ளார்.

(02) 13.05.1981இல் பற்றுச்சீட்டு 'வ – 6ஆ' என்று அடையாளம் இடப்பட்டது. எதிர்வாதியின் கணவரான தம்பிராசா இல. 133, கல்லூரி வீதி திருகோணமலை என் காணி தொடர்பில் 1981, தை மாதத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(03) 31.05.1981இல் எதிர்வாதியின் கணவரான தம்பிராசா பற்றுச்சீட்டு 'வ – 6இ' மூலம் இல. 133, கல்லூரி வீதி திருகோணமலை என்ற இடத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(04) 'வ – 6எ' என்ற பற்றுச்சீட்டு மூலம் இல. 133, கல்லூரி வீதி திருகோணமலை என்ற இடத்திற்கு 12.07.1981இல் சித்திரை மாதத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(05) 'வ – 6ஈ' என்ற மூலம் இல. 133, கல்லூரி வீதி திருகோணமலை என்ற இடத்திற்கு எதிர் வாதியின் கணவரான தம்பிராசா 1981 வைகாசி மாதத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(06) 06.09.1891இல் எதிர் வாதியின் கணவரான தம்பிராசா இல. 133, கல்லூரி வீதி திருகோணமலை என்ற இடத்திற்கு ஆனி மாதத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(07) 'வ – 6ஊ' மூலம் 06.09.1981இல் இல. 133, கல்லூரி வீதி என்ற காணி தொடர்பாக ஆடி மாதத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(08) 'வ – 6ஏ' 05.11.1891இல் இல. 133, கல்லூரி வீதி தொடர்பாக புரட்டாதி மாதத்திற்கு தம்பிராசா ரூபா 50/- ஐச் செலுத்தியுள்ளார்.

(09) 05.11.1981 இல் 'வ – 6ஒ' மூலம் இல. 133, கல்லூரி வீதி ஆதனம் என்ற தொடர்பில் 1981 ஆண்டு ஐப்பசி மாதத்திற்கு ரூபா 50/- செலுத்தியுள்ளார்.

(10) 'வ – 6ஓ' மூலம் எதிர்வாதியின் கணவரான தம்பிராசா இல. 133, கல்லூரி வீதி என்ற இடத்திற்கு கார்த்திகை மாதத்திற்காக ரூபா 50/- செலுத்தியுள்ளார்.

In Ruberu and Another Vs. Wijessooriya (1998) 1 Sri L.R 58 DE Z. GUNAWARDANA, J. held that:-

"Whether it is a licensee or lessee, the question of title is foreign to a suit in ejectment against either, the licensee obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the Plaintiff without whose permission he would not have got it. The effect of Section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee obtained possession from the Plaintiff is perforce an admission of the fact that the title resides in the Plaintiff."

Further it was held that :

"It is an inflexible rule of law that no lessee or licensee will never be permitted either to question the title of the person who gave him the lease or the license or the permission to occupy or possess the land or set up want of title in that person."

In Pathirana vs Jayasuriya 58 NLR 169, the supreme Court held that the lessee who has entered into occupation must first restore the property to his landlord in fulfillment of his contractual obligation which the defendant in this case has failed to fulfil.

In the case of Alvar Pillai vs Karuppan – 4 N.L.R 321 it was held that :

"I am of the view that the Defendant is not entitled to dispute the title of the Plaintiff. In this case the defendant was permitted to occupy the premises with the permission of the Plaintiff. In my opinion the defendant has no defence to this action. He must give up possession to the Plaintiff."

In Visvalingam vs Gajaweera -56 NLR 111 it was held that :

"Even assuming that the Defendant had become owner of the entire premises, it was not open for him to refuse to surrender possession to the landlord. He must first give up possession and then it would be open to him to litigate about the ownership."

On a consideration of the totality of the aforementioned circumstances and evidence and on a balance of probability I am inclined to accept the position taken by the Plaintiff that the defendant came into the land in question with the leave and license of the Plaintiff.

The Defendant further took up the position that she has prescribed the property. The legal position which governs prescription for immovable property is contained in section 3 of the Ordinance No. 22 of 1871.

It has been pointed out in the decided cases and the principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence to succeed in a claim of prescriptive possession.

In the case reported in 80 NLR 292 – De Silva vs Commissioner of Inland Revenue it was held that the the principle of law is well established 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.

As we held in the case of Sirajudeen and two others vs Abbas 1994 SLR vol. 2 page 365, where a party invokes the provisions of section 3 of the Prescription Ordinance, in order to defect the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish starting point for his or her acquisition of prescriptive rights. As regards the mode of proof of prescriptive possession, mere general statements of witnesses as to possession 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 the question of possession has to be decided thereupon by court.

In M.Rasiah vs I Somapala – C.A. 786/98(F) decided on 21.02.2008 A.W.A. Salam J held that :

"As has been pointed out in the decided cases the principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence to succeed in a claim of prescription the possession must be a denial of the title of the true owner. Further the evidence must prove that the acts of the person in possession is irreconcilable with the rights of the true owner, in other words the person claims to he possessed the corpus should maintain his clam as of right as against the true owner. Where thee is no hostility to or denial of the title to the true owner, as has occurred in this case there can be no adverse possession.

In Eileen Eunice de silva vs G. Liyanage Jayanona C.A 43/2000(F) decided on 02.07.2013 (page 375) Upaly Abeyratne J.,. held that :

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 of such character as is incompatible with the title of the owner.

The Appellant has not led evidence of any witnesses or has not produced any supporting documents to prove that she or her husband commenced a title adverse to or independent of that of the Respondent.

I am of the view that for a claim of prescriptive possession to succeed such claim need to be established by assertive evidence of uninterrupted and undisturbed possession for a period of over 10 years and as the clam totally lacks such assertive evidence except probably the mere fact of occupation only. In all the circumstances of this case I would therefore hold that the defendant's claim to prescriptive title must necessarily fail.

Although the defendant is claiming prescriptive rights on theproperty in question she has not demonstrated as to the date when she began adverse possession and how such adverse possession commenced. Without adducing any evidence as to the date of commencement of adverse possession, the Defendant will not be in a position to make a claim on prescription to the property in question. Accordingly, the defendant has not established the requirement of

uninterrupted and undisturbed possession which are explicitly adverted to in section 3 of the Prescription Ordinance. In such circumstances it is quite apparent that the Petitioner cannot base any claim on prescription.

I have considered the entire judgment and see no reason to interfere because the trial Judge has given cogent reasons. I do not wish to interfere with the primary facts of this case. Trial Judge hs arrived at a correct conclusion. Appellate court should not, without cogent reasons interfere with primary facts (1993(1) SLR 332 & 282).

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the Defendant-Appellant is dismissed with costs fixed at Rs. 25,000/-.

Registrar is directed to forward the original case record together with the copy of the judgment to the District Court of Trincomalee.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL