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

C.A.No.882/97

D.C.Kegalle 2423/L

Dannoruwalage Gunasekera

Weragala

Plaintiff

Vs

Wahumpurage Bebi

Weragala, Warakapola

Defendant (Now deceased)

AND NOW BETWEEN

1A Dannoruwalage Nimal Jayatissa,

1B Dannoruwalage Malini Kusumalatha,

1C Dannoruwalage Malini Sumanalatha,

1D Dannoruwalage Malini Premalatha,

1E Dannoruwalage Nimal Weerasinghe,

1F Dannoruwalage Sriyani Hemakanthi,

All of Weragala, Warakapola

Substituted Defendant-Appellants

Vs

Dannoruwalage Gunasekera

Weragala

Plaintiff-Respondent

BEFORE Deepali wijesundera J.,

M. M. A. Gaffoor, J.,

COUNSEL Kaushalya Molligoda for the Defendant Appellant

Chandrasiri Wanigapura for the Plaintiff Respondent

ARGUED ON 28.10.2015

DECIDED ON 10.05.2016

Gaffoor J.,

The Plaintiff had instituted these proceedings seeking a declaration of title to the land morefully described in the schedule "C" of the amended Plaint dated 8.9.1986, and for the ejectment of the defendants and those holding under him and for damages.

The Plaintiff stated in his Plaint inter alia that:

i) The land called "Hitinawatta" was partitioned in the partition action bearing No. 7018/P;

ii) Lots 3B and 3C of the Plan No. 1577 in the said partition action were respectively allotted to Thepanis, the 4th Defendant and Thomis, the Plaintiff in the said action;

iii) After the demise of the said Thepanis lot 3B devolved on his three children namely, Siriwardena, William and Piyasena;

iv) Said Siriwardena, William and Piyasena transferred their title to the Plaintiff under and by virtue of deed bearing No. 146 dated 06.07.1979;

v) The Defendant has encroached part of Lot 3B belonging to the Plaintiff which is depicted as Lot 02 of the Plan bearing No. 420 and

morefully described in the 3rd schedule (   ) to the Plaint and thereby caused loss to the Plaintiff.

The Defendant averred in her answer by way of counter claim that

a) In view of the partition decree lot 3C of the said Plan No. 1577 was allotted to Thomis, the Plaintiff in the said partition action;
b) The said Thomis transferred his title to the Defendant;
c) Lot 2 of Plan No. 420 which is morefully described in the 3rd schedule was possessed by her since 1959 and accordingly has the prescriptive rights;

The Plaintiff's claim for the title to the land in dispute is based on the deed of transfer bearing No.146 dated 6.7.1979 and was marked as P3 and prescriptive title on the basis of 10 years of undisturbed and uninterrupted exclusive possession of the land.

In a rei-vindication action the Plaintiff must prove and establish his title to the disputed land. In Wanigaratne vs Juvanis Appuhamy – 65 NLR 167_ and the Defendant has been in possession of the disputed land. In Peeris etel vs Savahamy 54 NLR 2007.

In this case the Plaintiff relied primarily on the paper title based on the title deed marked as P3 along with P1 and P2 at the trial before the learned District Judge. In addition to his paper title to the disputed land she pleaded prescriptive title to the disputed land.

In Karunadasa vs Abdul Hameed 60 NLR 352, it was held that in a re-vindicatio action it is highly dangerous to adjudicate on a issue of prescription without first going in to and examining the documentary title of the parties. In the instant appeal it is to be noted that the Defendant has no title deed for her claim but her claim based exclusively on prescriptive possession.

At the trial before the learned district Judge the Plaintiff and his two witnesses testified, whereas the Defendant had not called any witnesses on her behalf except her. The evidence given on behalf of the Plaintiff has plausibly proved that the title deed marked as P3 along with P1 and P2 to the disputed land and also the execution of the said P3 was not challenged by the Defendant when it was tendered in evidence at the trial.

In Wadduwage Dharmadasa vs Manthree Vithanage Jinasena 2012 (BLR) at page 336 it was held that in a rei-vindicatio action if no objection is taken at the close of a case where documents are read in evidence they are all evidence for all purposes of the law and therefore the Defendant in appeal for the first time not entitled to challenge execution of the title deed marked as P3 at the trial before the learned District Judge.

The Plaintiff had proved in addition to his paper title, prescriptive title to the land in dispute. In an action for the prescriptive title the burden of proof lies on the Plaintiff. In Sirajudeen and two others vs Abbas – 1994 2 SLR at page 365. The Defendant at the appeal submitted that the evidence given by William and the surveyor is contradicting each other. This contention is not tenable in law, since the trial Judge is the Judge of facts. This position in law clearly stated in

Alwis vs Piyasena Fernando (1993) 1 SLR at 119 – where His Lordship G.P.S.de Silva, C.J held thus :

"It is well established that findings of primary facts by a trial Judge who hear and sees the witness are not to be lightly disturbed in appeal"

Accordingly, in this case the Plaintiff had established a starting point for his acquisition of prescriptive right over the disputed land by which the onus of proof on the Plaintiff has prima facie been discharged and he shifted to the Defendant to establish her title by prescription. In that process the Defendant gave evidence on her behalf, which would not commensurate with her claim for prescriptive title.

In the circumstances the Judgment of the learned District Judge is, in my view eminently just and I affirm his findings on issues raised by the parties before him. I therefore, in conclusion affirm the order of the learned trial Judge in its entirety and I dismiss the appeals of the Plaintiff and of the Defendant.

The parties will bear their own costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera, J.,

I agree.

JUDGE OF THE COURT OF APPEAL.