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

CA Case No. 389 / 2000 (F)

DC Colombo Case No. 16392/L

Kapuruge Don Jayapala Somasiri,

No. 106,

Thalangama North,

Battaramulla.

Plaintiff

-Vs-

Gamini Karunaratne,

No.162,

Himbutana, New Town,

Mulleriyawa.

Defendant

AND NOW BETWEEN

Kapuruge Don Jayapala Somasiri,

No.106,

Thalangama North,

Battaramulla.

Plaintiff - Appellant

-Vs-

Gamini Karunaratne,

No.162,

Himbutana, New Town,

Mulleriyawa.

Defendant - Respondent

BEFORE	:	**A.H.M.D. Nawaz, J.**
COUNSEL	:	Chanaka Kulathunga for the Plaintiff-Appellant. Athula Perera with Chathurani de Silva for the Defendant-Respondent.
Argued on	:	31.08.2015
Decided on	:	05.10.2016

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

The Plaintiff-Appellant (hereinafter referred to as "the Plaintiff"), instituted this action on 07.09.1993, against the Defendant-Respondent (hereinafter referred to as "the Defendant") in the District Court of Colombo for a declaration of title to Lot 12 and Lot 3 in Plan No.1446 dated 07.07.1998 made by K.P. Wijeweera, Licensed Surveyor. The Plaintiff further averred that on or about 19.12.1992 the Defendant had encroached upon the said Lot 3 which was part of his land and thereby prevented the Plaintiff from having access to his land.

The Defendant filed answer on 21.09.1994 denying the claim of the Plaintiff and stating that he was entitled to and in possession of Lot 11 and he had not encroached on the said Lot 3 but had been in long and prescriptive possession of that portion with his main land Lot 11.

The Plaintiff stated that he had made a complaint about this encroachment to the police and the Mediation Board which could not settle the matter and the non-settlement resulted in the institution of action.

On 13.01.1997, when the case was taken up for trial, the Plaintiff raised issues 1-6 and 12-14 and the Defendant raised issues No.7 to 11. It is admitted by the parties that by a final partition decree entered in case No.5387/P in the District Court of Colombo, the Plaintiff's predecessors in title became entitled to Lot 12 and the Defendant's predecessors in title became entitled to Lot 11 in Plan No.188 dated 02.02.1954 made by G.W. Fernando, Licensed Surveyor and filed of record in the said partition action.

A perusal of the pleadings indicates that the Plaintiff has described Lot 12 in the schedule to the plaint and the Defendant has described Lot 11B in the schedule to his answer. The issues No.1 and 2 raised by the Plaintiff refer to his title and possession of Lot 12, that is to say whether, as stated in paragraphs 3, 4 and 5 in the plaint the Plaintiff is entitled to the land in suit and whether he has prescriptive title to the said land.

Both these issues have been answered in the affirmative by the learned District Judge. Hence, admittedly, the Plaintiff has proved his paper title as well as prescriptive title and possession to the said Lot 12. If that be so, the Plaintiff is entitled to the whole of Lot 12, including Lot 3 in Plan No.1446, which is alleged to be encroached upon by the Defendant.

Issue 12 refers to the title of the Plaintiff to Lot 12 and Lot 3. It has to be recalled that issue no.1 in relation to lot 12 (the main land) had already been raised. Therefore I observe that joining Lot 12 with Lot 3 and framing issue no.12, as has been done in this case, is erroneous. The learned District Judge having answered issue no.1 in the affirmative and thereby holding the Plaintiff is entitled to the schedule to the Plaintiff has contradicted himself by answering issue no.12 against the Plaintiff. Issue No.1 as to ownership of Lot 12 has been answered in the affirmative in favor of the Plaintiff. Issue No.12 too raised the ownership of the

Plaintiff to Lot No.12 which included Lot No.3. Thus the answer given by the learned District Judge that the Defendant has a right to Lot 12 and 3 is erroneous. I have to point out that issue no.12 should been split or disjunctively framed pertaining to lot 3, which was in dispute.

In fact issue no.12 raised by the Plaintiff went as follows–

> ***"Is the defendant, though he is entitled to Lot 11B by deed No. 3155 dated 15.05.1961 and attested by S. Wickramasinghe, Notary public, not entitled to Lot 12 or a portion on the Northern boundary of Lot 12 belonging to the plaintiff?"***

It is this issue which was answered in the affirmative by the learned District Judge. When the Plaintiff is admittedly proved to be entitled to Lot 12, (as issues 1 and 2 are answered in the affirmative), how can he be declared not entitled to Lot 12 or a portion thereof? Thus the answer of the learned District Judge to this issue is quite inconsistent with the answer he gave to issue no.1.

It is very clear that there is no dispute between the parties as to their respective title to the said Lot 12 by the Plaintiff and lot 11B by the Defendant. The dispute is only about the allegedly encroached portion which is identified by surveyor K.P. Wjeweera as Lot 3 in his Plan No.1446. Hence, this Court has to consider only this matte in this appeal.

Whilst the Plaintiff states that the Defendant has encroached on this Lot 3 on or about 19.12.1992 and thereby obstructed his right of way which existed in the North of his main land (Lot 12), the Defendant states in evidence that he has been in possession of the said portion for over 30 years -*see* page 6 of proceedings dated 05.01.2000. The question is "when did this obstruction and encroachment take place?" Did it take place recently or a long time ago? For this purpose, the Court should not take into consideration the age of the Defendant's house. The alleged encroachment is nothing to do with the house. This case is about the portion of the land on the Northern boundary of the Plaintiff's land where no house is standing. This is a vacant lot as the evidence has unfolded.

It is clearly established by the evidence of the surveyor Wijeweera that the said portion marked as Lot 3 in his Plan (P8) is a portion of the Plaintiff's land. He has very clearly stated that this Lot 3 is encroached upon by the Defendant. This evidence is not contradicted by the Defendant or by any other evidence. It is also

clear that the eaves of the roof of the Defendant's house is protruding into this portion for a length of 3 feet and 3 inches. The Surveyor Wijeweera has clearly stated that a portion of the roof of the Defendant has extended to the Plaintiff's portion. (*see* pp.164 to 167 of proceedings of 10.11.1997).

I am of the view that though the house was built a long time ago by the Defendant, at that time the common boundary was not correctly laid down and therefore the foundation of the house might have been laid within his land but when the roof was constructed, it had protruded into the Plaintiff's land, and thereby the protrusion cannot give rise to the ownership of the land below the protrusion. One cannot resist posing the irresistible question - was the Defendant trying to include that portion below the protrusion into his land, which act resulted in the present dispute?. There is the prayer in the plaint for an order of Court to ascertain the northern boundary of the Plaintiff's land which is described in the schedule to the plaint.

The Defendant in his evidence has stated that he has not encroached upon any portion of the Plaintiff's land and he does not ask for any portion of the Plaintiff's land -*see* proceedings on 04.06.1999 pp.177, 180-181). But the surveyor's evidence clearly states that Lot 3, which is the encroached portion by the Defendant, is a portion of the Plaintiff's land.

It must be noted that the Defendant, nowhere in his evidence, has stated that he has prescribed to Lot 3, which is proved to be a portion of Lot 12-the land which belongs to the Plaintiff.

The Plaintiff's evidence that on or about 19.12.1992 the Defendant encroached on his land, and that resulted in his making a complaint to the Mediation Board has not been contradicted by the Defendant. The institution of the present action followed thereafter. The Defendant has admitted the Plaintiff's title to Lot 12. If title is admitted the presumption is in favor of the person who has title unless the contrary is established. The Defendant has failed to establish either title or prescriptive possession to the disputed Lot 3, which is part of lot 12.

When the Defendant has not disputed the Plaintiff's title to Lot 12 it clearly shows that the Defendant has admitted that the Plaintiff is entitled to Lot 3 which is part of his main land. Once this has been established, the burden is on the Defendant to

prove that he has prescribed to Lot 3 or that he has adverse possession of that lot. In this regard Section 110 of the Evidence Ordinance is quite pertinent.

Section 110 of the Evidence Ordinance states:

> ***"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."***

Accordingly, the burden is on the Defendant to prove that the Plaintiff is not the owner of Lot 3. In the case of ***Bandulhamy v. Tikirihamy***,[1] it was held that where the Plaintiffs and their predecessors have been proved to be in possession of a land the burden of proving that they were not the owners lies upon the Defendant. The Defendant has failed to discharge this burden satisfactorily. Therefore, the Plaintiff must succeed in his claim.

Considering the evidence led in this case, I am of the view that the Plaintiff, by his oral and documentary evidence (documents marked P1 to P8) has satisfactorily proved his title to the land described in the schedule to the plaint. He has also proved that the Defendant has encroached upon a portion of his land which is identified as Lot 3 in Plan No.1446 (P8). This evidence of the Plaintiff has been accepted and favorably commented upon by the learned District Judge in his judgment -*see* pages 199 to 201.

I take the view that the learned District Judge misdirected himself with respect to the material issues before him which resulted in his arriving at a wrong decision in the case. The judgment of the learned District Judge is therefore set aside and the appeal is allowed granting judgment for the Plaintiff as prayed for in the plaint.

JUDGE OF THE COURT OF APPEAL

[1] 44 N.L.R 539