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

CA Case No. 02 / 2000

DC Avissawella Case No. 394/L

Neina Marikkar Umma Suleyha,

No.437,

Gurugalla Road, Thalduwa,

Avissawella.

Plaintiff

-Vs-

Rathubadalge Ensohami,

No.537,

Gurugalla Road, Thalduwa,

Avissawella.

Defendant

AND

Neina Marikkar Umma Suleyha (deceased),

No.437,

Gurugalla Road, Thalduwa,

Avissawella.

Plaintiff - Appellant

Mohamad Tawufeek Zeenathul Munauvara,

No.63,

Kumarimulla,

Pugoda.

Substituted Plaintiff - Appellant

Rathubadalge Ensohami (deceased),

No.537,

Gurugalla Road, Thalduwa,

Avissawella.

Defendant - Respondent

1a. Dewanarayana Acharige Ariyawathee

1b. Dewanarayana Acharige Kamalawathee

1c. Dewanarayana Acharige Siriyalatha

1d. Dewanarayana Acharige Sunil

1e. Dewanarayana Acharige Wansawathie

All of them

No.537,

Gurugalla Road, Thalduwa,

Avissawella.

1f. Dewanarayana Acharige Thilak Premalal

No.69/20,

Malwrusawa,

Dehiowita.

Substituted Defendant - Respondents

BEFORE	:	**A.H.M.D. Nawaz, J.**
COUNSEL	:	Palitha Gamage with Rasika Wellapili for the Substituted Plaintiff-Appellant. Lakshman Perera, P.C. with Niluka Dissanayake for the Defendant-Respondents.
Argued on	:	18.03.2015
Written Submissions on	:	05.06.2015 (For Substituted Plaintiff-Appellant) 11.08.2015 (For Defendant-Respondents)
Decided on	:	31.08.2016

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

The original Plaintiff-Appellant (hereinafter referred to as "the Plaintiff") filed this action on 17.02.1988 against the Defendant-Respondent (hereinafter referred to as "the Defendant") for a declaration of title and ejectment. When the trial commenced on 17.11.1993, the Plaintiff raised issues no.1-6 and the Defendant raised issues no.17-18. As is evident the Plaintiff's issues are based on the fact that she was the owner of the land in which the premises, as described in the plaint, were situated and it was given to the Defendant's husband Girigoris for occupation upon the Plaintiff's leave and license. After the death of Defendant's husband, the Defendant was allowed to be in occupation of the premises by the Plaintiff on the same terms and conditions. The Defendant's occupation, according to the Plaintiff, was not subject to any payment of compensation and the Defendant agreed to vacate the house whenever it was needed by the Plaintiff.

The Defendant did not deny the Plaintiff's ownership to the land in which the house was situated, but raised a dispute that the house which was in the land was destroyed by floods in 1977 and the Defendant built a new house in its place and she had prescribed to the house and in the circumstances the Plaintiff was not entitled to the house. The Defendant also raised an issue as to whether the Rent Act applied to the area where the house was situated and whether the Defendant was entitled to the protection of the Rent Act.

It is clear from the issues raised in this case that the Plaintiff is the owner of the land where the house is situated. After the death of the Defendant's husband the Defendant went into occupation of the land and premises with the leave and license of the Defendant and that explains why the Defendant was seeking the protection of the Rent Act.

Hence the questions that this Court has to consider are;

1. Whether the house alleged to have been built by the Defendant can be separated from the land and if not, whether it goes with the soil.

2. Since Plaintiff's ownership of the land is accepted by the Defendant, can the Defendant prescribe only to the house?

3. Since the death of her husband, as the Defendant has accepted the position that the Plaintiff is the owner of the land and premises, is the Defendant estopped from claiming prescriptive title under Section 116 of the Evidence Ordinance?

4. Whether the Defendant is a *bona fide* or *mala fide* improver?

According to the Plaintiff's evidence she became entitled to lot E in Plan No.1315 A filed in the Partition Action No.8638. In the partition case, the Plaintiff was the 3rd Defendant, the Defendant's husband Girigoris was the 7th Defendant and one

Roselin Nona was the 15th Defendant. The Plaintiff was ordered by court to pay Rs.350/- to Girigoris and Roselin Nona, which amount, the Plaintiff stated, was given to one Abdul Latheef to be given to Girigoris-the Defendant's husband. Since 1995, she had been objecting to the Defendant who was trying to renovate the house in dispute. In reexamination the Plaintiff's counsel attempted to mark two complaints made by the Plaintiff but as the defence objected, the court did not allow the production of the complaints.

The Grama Sevaka Jayasena Virasagoda testified that in March 1997 the Plaintiff had made a complaint against the Defendant court but it was not available with him as the DS office had been burnt by the JVP. Consequent to the Plaintiff's complaint, the Grama Sevaka had gone to inspect the place and he saw the house being broken and a new house being built -*see* page 67 of the Brief. Although the defence suggested to the witness that he was giving false testimony, it must be stated that the falsity suggested has not been established.

The Defendant Ensohami admitted in her evidence that the land in dispute belongs to the Plaintiff and she put up a new house in place of the old house. When the new house was built, the Plaintiff objected but her objections notwithstanding, the Defendant proceeded to put up the new house as she had no place to go. She continued to live in the house as the Plaintiff failed to pay her the sum of Rs.350/ which was the compensation.

Section 337 of the Civil Procedure Code has been referred to by the Counsel for the Defendant in the written submission filed before the District Court. According to this submission, the final decree in D.C. Avissawella 8638/P had ordered the Plaintiff to pay compensation in a sum of Rs.350/- to the Defendant. The decree had been entered on 12.02.1965. The Plaintiff had to pay this compensation before she could apply for a writ of possession. The Defendant's submission before the learned District Judge had been that Section 337 of the Civil Procedure Code as

amended by Act No.53 of 1980 would not permit execution of a writ ten years after the decree. The gravamen of the argument is that since the instant case was instituted in 1988, there had been a long lapse of time from the date of the partition decree and Section 337 of the Civil Procedure Code would not permit the Plaintiff to make an application to have the decree executed. In the circumstances, the argument has been urged that the Defendant has prescribed to the land and premises in question. But according to Section 337 of the Civil Procedure Code as amended by Act No.53 of 1980, the default of payment must be from a specified date and ten years has to be reckoned from that date of default. It is quite evident upon a reading of Section 337(1) (b) of the Civil Procedure Code which reads thus:

> *"No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from-*
>
> *(a) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same, or*
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> *(b)* ***where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date*** *or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree."*

In terms of Section 337(1), as amended by Act No.53 of 1980, the ten year bar becomes applicable to all decrees, other than a decree granting an injunction, subject to the exceptions that are provided. The period of ten years referred to in Section 337(1) of the Civil Procedure Code commences to operate only from the

date on which the judgment creditor becomes entitled to make an application for writ ***Jayasekera v. Herath.***[1]

It must be noted here that the partition decree in the instant case did not specify a date on which payment of compensation should be made. Although the final decree was entered on 12.02.1965, the decree did not specify a particular date on or before which the Plaintiff must pay the compensation to the Defendant. As such the ground of non-payment of compensation for preclusion of the Plaintiff from seeking a writ of execution cannot be accepted as valid in terms of Section 337 of the Civil Procedure Code, as the ten year bar has not operated against the Plaintiff.

Furthermore, when the Defendant's husband Girigoris entered into occupation of the premises in dispute, he did so with the leave and licence of the Plaintiff and with the understanding that he would not pay any rent for the occupation. If the Plaintiff had been in default of payment of compensation, the Defendant's husband should have demanded payment thereof at that time. It appears that he had waived the compensation and wanted to occupy the premises without any rent. Since the husband of the Defendant had gone into occupation with the leave and licence of the Plaintiff, the Defendant cannot take up the position that she has prescribed as her husband waived the compensation when he went into occupation. A plea of prescription is inconsistent with permissive user subject of course to ouster as a result of an overt act that puts paid to the character of permissive user.

The Court had ordered a sum of Rs.350/- for the old house in the land in dispute. But the Defendant said in her evidence that in 1967, the old house was destroyed by the floods and therefore she built a new house. If the compensation was for the old house, and the old house was destroyed by floods, the Defendant's right to compensation had also extinguished with the floods. She has no right to claim

[1]C.A. Application No. 1382/98, D.C. Matale Case no. 2697/L - B.L.R. p.56, B.A.S.L. News Letter, April 2000 p. 6.

compensation for a house which was destroyed due to floods, a natural cause or *vis major* for which the Plaintiff cannot be held accountable.

The other question is whether the Defendant is entitled to claim Rs.100,000/- as compensation for the new house. She has failed to adduce any evidence as to how she expended this amount to build the new house. In the absence of any evidence, I hold that the Defendant is not entitled to claim Rs.100,000/- as compensation for the house.

The Defendant while claiming ownership to the land and premises has also sought the protection of the Rent Act. If she asks for protection of the Rent Act, it clearly shows that she is a licensee or tenant of the Plaintiff. The Defendant cannot blow hot and cold in the same breath and she would therefore be estopped from taking up the two inconsistent positions under Section 115 of the Evidence Ordinance. It is apposite to bear in mind the provision which embodies the law of estoppel-

> *"When a person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."*

Section 116 of the Evidence Ordinance too would bar the Defendant from taking up the two contradictory positions. Section 116 of the Evidence Ordinance enacts,

> *"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny*

that such person had a title to such possession at the time when such licence was given."

With regard to the house standing on the land in the dispute, the Defendant's position is that the previous house was destroyed by the floods and she put up a new house. But this house was built in spite of the Plaintiff's objections. In this event, the Defendant is a *mala fide* improver and she would not be entitled to get any compensation for the improvements.

Furthermore, when one builds a house on another's land the house goes with the soil. Since the Defendant has built the house on the land belonging to the Plaintiff, the house goes to the land with the Plaintiff. Accession was a primary mode of acquisition of property recognized by the Civil law.[2] Exceptions were admitted in regard to movable property for cogent reasons of policy,[3] but as far as land was concerned, it was an absolute principle that structures and plantations acceded to the soil and enured to the benefit of the owner of the soil[4].

In the case of ***De Silva v. Haramanis***[5] it was held:

> *"the builder of the house on another's land does not acquire a stable rights to the house, but the house becomes the property of the owner of the soil. Between the owner and the builder there may exist equities such as a right to compensation etc, but the ownership of the building cannot ordinarily be in one man, and that was the soil on which it stands to be in another man"*. Also *see Katherina v. Jandris*[6].

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[2] *Quidquid in nostro solo aedificaturet plantatur ex-iure naturalinostrum fit qioa superficies solo cedit;* cf. Inst. 2.1.31. 32.
[3] Works of art were an example. Inst. 2.1.34.
[4] Inst. 2.1.29.
[5] 3 N.L.R. 160
[6] 7 N.L.R. 133

Accordingly, in this case the owner of the soil is the Plaintiff. The Defendant cannot claim ownership to the house which is standing on Plaintiff's land. If at all her right is only for compensation. The Defendant has built the house on a land to which she has not title.

If that be so, the Defendant cannot claim ownership to the house by excluding the land on which it stands.

Jus Retentionis

It is submitted on behalf of the Defendant that the Defendant has a right of *Jus Retentionis* until the compensation is paid. But the right to compensation for improvements made is applicable under the Roman-Dutch Law only to a *bona fide* improver who made the improvement with the intention that he would become the owner of the land.

A lessee or a person who has no such intention cannot be considered as having *possessio civilis*. In ***Wijeyesekere v. Meegama***[7], it was held that under the Roman-Dutch Law the right of retention is only granted to persons who have the *possessio civilis* and to certain special classes for persons whose position has been held to be akin to that of a possessor.

In ***Sediris v. Dingirimenika***[8], it was held that possession under a *Jus Retentionis* is not adverse possession and cannot found a title by prescription. Nor can the right to tender compensation for the improvements be barred by limitation. In this case the possession of the Defendant cannot be considered as *bona fide* possession and such possession cannot proceed to confer prescriptive title to the Defendant. The learned Trial Judge has misconceived the law and the question of adverse possession. The Defendant's possession in this case cannot be considered adverse

[7] 40 N.L.R. 340
[8] 51 N.L.R. 6

possession to give rise to prescriptive title to her in view of the decision in Sediris's case above.

I therefore set aside the judgment entered in this case and proceed to enter judgment in favour of the Plaintiff.

JUDGE OF THE COURT OF APPEAL