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

Godayalage Hawadiya
Halmassa. Morontota

8th Defendant-Appellant

C.A.No.677/97 (F)
D.C.Kegalle No.23209

Vs.

The President
Development Sabawa
Kegalle
And 07 others.

Defendants-Respondents

Before : M.M.A.Gaffoor,J. and
S.Devika de L.Tennekoon,J.

Counsel : Chathurika Sadamali for the Defendant-Appellant.

Chula Bandara with Gayathri Kodagoda for the Plaintiff-Respondent.

Argued on : 22.03.2017

Written submissions

Filed on : Defendant-Appellant on 25.06.2017

Plaintiff-Respondent on 07.06.2017

Decided on : 29.09.2017

M.M.A.Gaffoor,J.

This appeal has arisen from the judgment of the learned District Judge of Kegalle in respect of a partition action No.23209/P, wherein the learned District Judge had held with the Defendant-Appellant, that he had not prescribed Lot 1 of Plan bearing No.920 dated 15.11.1982 of T.M.T.B. Tennakoon, Licensed Surveyor.

The facts germane to the issue are whether the said Defendant-Appellant had prescribed the said Lot 1 in terms of Section 3 of the Prescription Ordinance.

It is trite law that in order to invoke the Provisions of Section 3 of the Prescription Ordinance 2 of 1889. The claimant has to establish the following ingredients.

1. Undisturbed and uninterrupted possession.

2. Such Possession to be independent or adverse to

   the claimant plaintiff and

3. Ten years previous to the bringing of such action

In ***Leisa and other Vs. Simon and others 2002 1SLR 148*** Justice Vigneswaran had clearly stated that long period possession alone could not establish any prescriptive title to the land.

> "Possession and occupation must be distinguished.... The long period of occupation would not make it an adverse possession unless there had been an over act of ouster as in the case of prescription among co-owners. The learned Judge also seems to have

overlooked the difference between long occupation as a licensee and adverse possession".

Also in ***Siriyawathie and Alwis and others 2002 2 SLR*** Justice Dissnayake J had discussed as to what amount to as an over act. In doing so, he held that the appellant's had prescribed to the land.

We have taken into consideration of the cases referred to us in ***Tilakaratne Vs. Bastain 21 NLR 12, Wickremaratne Vs. Perera 1986 1 SLR 190.***

In ***Simpson Vs. Omeru Lebbe 48 NLR 112, Soertsz SPJ, & Jayethileke, J.***

> " As between co-owners separate possession on grounds of convenience cannot be regarded as adverse possession for the purpose of establishing prescriptive title".

In *Abdul Majeed Vs. Umma Zaneera 61 NLR 361* Court took up the view that long continued possession of the property owned in common is not sufficient to draw an assumption of ouster. It is relevant to consider matter such as

a. Income derived from the property.
b. The value of the property.
c. The relationship of the co-owners and where they reside in relation to the situation of the property.
d. Document executed on the basis of exclusive possession.

In *Maria Fernando & Others V. Anthony Fernando (1997) 2 SLR 356* Court of Appeal held that:

> " Long possession, payment of rates and taxes, enjoyment of produce, filling suit without making the adverse party a party, preparing plan and building house on land renting it are not enough to establish prescription among co –owners in the absence of an over act of ouster. A secret intention to prescribe may not amount to ouster".

Regarding buildings claimed under prescription it is submitted that the buildings claimed by the Defendant- Respondent, had been built the said structure after the institution of the partition action, and this issue had not been contested by the said Defendant-Respondent.

In ***Dias Abeysinghe Vs. Dias Abeysinghe & Two Others 34 CLW 69*** **(SC) Keuneman SPJ., & Canakaratne, J**. Held that:

> "That, where a co-owner erects a new building on the common land and remains in possession thereof for over ten years, he does not acquire a prescriptive right to the building and the soil on which it stands as against the other co-owners merely by such possession".

We note that in the case of *Sirajudeen and Two Others V. Abbas (1994) 2 SLR 365* the Supreme Court has observed thus:

> "As regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period 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".

> "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 tile of the owner".

We have perused the evidence adduced by the said Defendant-Appellant in claiming the said prescriptive title, and see no valid reason to interfere with this considered judgment.

Appeal dismissed with costs fixed at Rs.25000/=.

JUDGE OF THE COURT OF APPEAL

Devika de L. Tennekoon,J.

I agree.

JUDGE OF THE COURT OF APPEAL