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

CA 954/97 (F)

D.C. Galle Case No. 12205/L

Nihal Panditharathna
Gothatuwawtta
Ganegama North,
Beddegama.

Plaintiff

Vs.

Buddhadasa Adihetti
Ganegama North,
Beddegama.

Defendant

AND NOW

Nihal Panditharathna
Gothatuwawtta
Ganegama North,
Beddegama.

Plaintiff – Appellant

Buddhadasa Adihetti
Ganegama North,
Beddegama.

Defendant – Respondent

BEFORE: M.M.A. GAFFOOR J

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Widura Ranawaka with Chinthaka Kohomban for the Plaintiff – Appellant**

C.A.M. Jayamaha with Kalpa Virajith Gamage for the Substituted - Defendant – Respondent

ARGUED ON: **23.11.2016**

WRITTEN SUBMISSIONS – **Plaintiff – Appellant & Substituted - Defendant – Respondent – 23.02.2017**

DECIDED ON: **19.10.2017**

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Appellant (hereinafter referred to as the Appellant) instituted action in the District Court of Galle by Plaint dated 12.02.1992 seeking *inter alia* to eject The Defendant – Respondent (hereinafter referred to as the Respondent) from the land morefully described in the 2nd paragraph of the Plaint and for the restoration of possession to the Appellant.

The Respondent filed Answer dated 07.09.1993 denying the cause of action of the Appellant and prayed for a dismissal of the Plaint of the Appellant on the basis *inter alia* that he came to possess the corpus by virtue of a temporary grant under

the provisions of the Land Grants (Special Provisions) Act No. 43 of 1979 (marked as V3) dated 23.01.1992.

The trial commenced on 14.03.1995 with recording of issues in the case. No admissions were recorded and issue Nos. 1 – 4 were raised on behalf of the Appellant and the Respondent did not raise any issues.

The Appellant, Dayananda Tennakoon and Piyasena Weerasinghe gave evidence on behalf of the Appellant and documents marked as P1 and P2 were produced as evidence.

The Respondent, one U. K. Hemawathi and Dammika Jayasinghe gave evidence on behalf of the Defendant and documents marked as V1 – V6 were produced as evidence.

At the conclusion of the case the learned District Judge of Galle delivered is judgment in favour of the Respondent and dismissed the case of the Plaintiff on the grounds that he had failed to prove his case to the satisfaction of Court.

Being aggrieved by the said judgment the Appellant preferred the instant appeal by Petition dated 22.09.1997 to *inter alia* set aside the impugned judgment dated 25.07.1997.

The case for the Appellant in brief is that he entered into possession of the corpus in 1972 (paragraph 3 of the Plaint contradicts this position as it referrers to the year 1977 as been the year on which the Appellant came to possess the corpus) and used

the land for keeping cattle. He had also cultivated the land until the Respondent forcibly dispossessed the Appellant from the corpus in January 1992 after which the Appellant preferred Police complaints marked as P1 and P2.

The case for the Respondent is that the corpus was owned by the Land Reform Commission and that the Respondent came to possess the corpus on the strength of a temporary grant under the provisions of the Land Grants (Special Provisions) Act No. 43 of 1979 (marked as V3) dated 23.01.1992.

At the outset this it is fit for this Court to determine the nature of the original action of the Appellant i.e. whether it is a possessory action or if the action claims prescriptive rights. Considering the fact that there is no prayer for a declaration of title on the basis of prescription in favour of the Appellant in the Plaint and since the Appellant has prayed for restoration of possession ejecting the Respondent from the corpus it is clear that the matter at hand relates to a possessory action under Section 4 of the Prescription Ordinance. The nature of the action being a possessory action has been acknowledged by Counsel on behalf of both the Appellant and Respondent.

The learned Counsel for the Appellant contends that the learned Trial Judge has completely failed to understand the nature of the case for the Appellant and that he has reached an erroneous conclusion that the Plaintiff was claiming prescriptive rights. However, upon a reading of the written submissions tendered on behalf of the Appellant in the District Court (paragraph one) is seems that the learned Counsel for the Appellant has claimed prescriptive rights over the corpus on behalf of the Appellant.

Be that as it may, this Court will now consider whether the elements for a successful possessory action have been proved by the Appellant and if so whether the Appellant ought to succeed in his claim.

Section 4 reads;

> "It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title:
>
> Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

In the case of Edirisooriya vs. Edirisooriya 78 NLR 388, relied by the learned Counsel for the Appellant, the ingredients necessary to succeed in a possessory action were discussed. That been;

a) That the Plaintiff was in possession of the corpus,
b) That the Defendant had dispossessed the Plaintiff unlawfully,
c) That Plaintiff instituted action within one year of the alleged dispossession

In the said case it was held that;

> "(1) The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force nor fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses.
>
> (2) To succeed in a possessory action the plaintiff must prove that he was in possession " ut dominus ". This does not mean, possession with the honest belief that the plaintiff was entitled to ownership. It is sufficient if the plaintiff possessed with the intention of holding and dealing with the property as his own."

In the case of Fernando Vs. Fernando 14 NLR 166, relied by the learned Counsel for the Respondent, it was held in a possessory action that the plaintiffs were not entitled to a decree, as the possession was not of *ut dominus* (as owner).

In the case of Edirisooriya vs. Edirisooriya 78 NLR 388 noted above Vythialingam, J states further;

> "It is correct to say that to succeed in a possessory action the plaintiff must prove that he was in possession "ut dominus". But all that this means is, in the words of Wood Renton, J. (later C. J.) "he must have possessed not alieno nomine, but with the intention of holding and dealing with the property as his own "

In document marked as P2 (vide page 109 of the Appeal brief) tendered as evidence by the Appellant, the Appellant has stated to the police on 23.01.1992 that the Appellant by virtue of an Agreement to Cultivate came to possess the corpus. Although he has stated therein that he can produce the said Agreement he has failed to do so in trial by specifically stating that he will not be admitting the same as evidence (vide page 54 of the Appeal brief) and it was the Respondent who tendered the same as evidence marked as V1 (vide page 110 of the Appeal brief). Upon considering V1 it is clear that the said agreement is only valid for 20 years. Further, in the said complaint the Appellant referrers to the owner of the corpus being one Weerasinghe. In evidence the Appellant also agrees that the corpus was acquired by the Land Reform Commission.

Considering the above it may be said that that Appellant was not in possession of the corpus to an extent regarded as adequate in law.

Notwithstanding the above, it is prudent to consider whether there has been an unlawful dispossession by the Respondent. As admitted by the Appellant, the corpus was acquired by the Land Reform Commission. As per the provisions of Section 3 of the Land Grants (Special Provisions) Act No. 43 of 1979 which reads;

> 'The President may, by an instrument of disposition substantially in the Form set out in the Schedule hereto, transfer, free of charge, any portion of any land vested in the State by virtue of an Order made under section 2, to any citizen of Sri Lanka over eighteen years of age.'

It can therefore be seen that the temporary grant (marked as V3) dated 23.01.1992 by which he came to possess the corpus is a legal instrument which contemplates a transfer. In such an instance it cannot be said that the dispossession was unlawful.

In any event the as pointed out by the Counsel for the Respondent the Appellant has categorically admitted that he is still in possession of the corpus and that he is plucking coconuts (vide page 55 of the Appeal brief). It is evident therefore that there has not been dispossession in the sense the term is used in Section 4 of the Prescription Ordinance.

In Edirisooriya vs. Edirisooriya 78 NLR 388, noted above Vythialingam, J referrers to the following in relation to dispossession;

> "... the case of Pathirigey Carlina Hamy vs. Mugegodagey Charles de Silva (1883) 5 S. C. C. 140 where Burnside, C. J. said "It is clear that the dispossession referred to in section 4 consists of a removal or deprivation of possession, or in another words well known to the law, 'an ouster'. Acts which merely amount to a trespass without ouster do not amount to dispossession." In that case the defendant, in the absence of the plaintiff, entered his land and erected a fence separating the portion on which he lived from the rest and plucked the nuts of the portion so separated. The plaintiff thereafter did not receive the fruits of the separated portion. On these facts it was held that the acts of the defendant did not amount to dispossession of the plaintiff."

Therefore it is evident that ingredients necessary for a possessory action to succeed have not been adequately proved by the Appellant as such his action must fail.

For the reasons morefully described above this Appeal is dismissed without costs.

Appeal dismissed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal