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

Asoka De Mel Co. Ltd.,
No. 162, Polhengoda Road,
Colombo 05.

C.A. Case No. 671/1995 (F)

D.C. Galle No. 12013/L

PLAINTIFF

-Vs-

W. Gunadasa,
Ganahena, Unawatuna.

DEFENDANT

AND NOW

W. Gunadasa,
Ganahena, Unawatuna.

DEFENDANT-APPELLANT

-Vs-

Asoka De Mel Co. Ltd.,
No. 162, Polhengoda Road,
Colombo 05.

PLAINTIFF-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. and
H.C.J. Madawala, J.

COUNSEL	:	Rohan Sahabandu, PC for the Defendant-Appellant. Nilantha Kumarage for the Plaintiff-Respondent.
Argued on	:	02.02.2016
Decided on	:	19.04.2017

A.H.M.D. Nawaz, J.

The Plaintiff instituted this action claiming that he became entitled to the subject-matter of this case, namely, a lot marked as **"H"** of the land called "Niyadaga Watta" depicted in Plan No. 2377A dated 01.03.1931 made by A. Ganegoda, Licensed Surveyor which is described in 3rd paragraph to the plaint, that the Defendant on or about 24.09.1990, without any right whatsoever entered into the subject-matter and started to build a temporary building.

In his prayer the Plaintiff prayed:-

(1) that he be declared entitled to the land described in the schedule to the plaint;

(2) ejectment of the Defendant and those who claim under him to be ejected therefrom and to give vacant possession thereof;

(3) an injunction be issued preventing the Defendant from constructing the building.

The Defendant filed answer stating that the building mentioned in paragraph 3 of the plaint and bearing assessment No. 344 belonged to him by prescriptive possession acquired by himself and his predecessors. The Defendant further states that his parents were in occupation of the hut which was in existence earlier and that he was born in that hut and he has had 64 years of possession of the same.

At the trial the title of the Plaintiff has been established and the Defendant has not adduced any evidence against the proof of title of the Plaintiff.

The Defendant has also given evidence stating that there was a tea kiosk in the subject-matter which was erected by his grandfather and after him his father was in possession of the same.

As regards the possession of the building, the evidence of two witnesses called by the Plaintiff is important. These two witnesses testified that there was a hut but they said they did not know who was living in it. This evidence cannot be acted upon. The subject-matter is a place situated by the side of the Galle-Matara Road which is very conspicuous for its location. It is common ground that if a hut is in existence in some place, there must be somebody who must be in possession or occupation thereof. There is a clear difference between an occupied hut and an unoccupied hut. If there was no one in the hut, the question arises as to why the Plaintiff failed to take possession of the hut. The testimony given by the two witnesses of the Plaintiff is unworthy of credit.

P2 is a receipt for payment of compensation of Rs.10/= to the defendant's mother "Mai Nona". This is clear proof to strengthen the position taken by the Defendant that his mother was in possession of the subject-matter. If the Plaintiff says that the defendant's mother was paid compensation for the hut or for her occupation, he failed to establish that immediately thereafter, or at least from 1931, he took possession of the hut or the land. The defendant's position is that he has been in continuous and uninterrupted possession of the hut up to the time the dispute arose. This position of the Defendant has not been contradicted. The Defendant took up the position that they had been in possession since 1931. If payment of compensation to the defendant's mother interrupted possession, there is no evidence that was led by the Plaintiff that the uninterrupted and undisturbed possession alleged by the Defendant was aver disturbed by the Plaintiff.

Disregarding the evidence of the Defendant on his prescriptive possession to the subject-matter, the learned Additional District Judge delivered his judgment on 15.12.1995 in favour of the Plaintiff. If after 1931 the Defendant had been there, that would amount to adverse possession and the learned District Judge does not deal with this aspect at all in his judgment dated 15.12.1995.

It is settled law that in an action for declaration title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant that his possession is lawful -see ***Siyaneris vs. Jayasinghe Udenis de Silva 52 N.L.R. 289.*** In the present case, the Defendant has satisfactorily discharged his burden of long possession of the subject-matter. The Plaintiff has failed to disprove the defendant's long and prescriptive possession, though he has established paper title.

The other matter that this Court has to look into in this case is whether the Defendant could claim rights to a building, which was under construction in place of the hut having regard to the fact that there is no soil right. It is settled law that a building or a hut cannot be separated from the soil. I hold the view that the learned District Judge was in error in rejecting the defendant's position. The Defendant cannot claim right to the boutique only, without claiming right to the soil on which it stands. When he claims prescriptive right to the boutique, it goes without saying that he also claims right to the soil on which the boutique stands. The evidence of the Defendant is very clear that he and his predecessors in title had been possessing the boutique together the land on which it stood uninterruptedly for a long time.

It is clear beyond doubt that our law does not recognise the ownership of a building apart from the land on which it stands. If at the time the defendant's grandfather and father had built the hut or boutique where they ran a tea kiosk, it cannot be said that they had no interest in the land. Their position was that they claimed prescriptive right to the land on which they built the boutique. Hence they claimed prescriptive right to the land and the boutique. If that be so, the boutique goes with the land, which the Defendant claims on a long and uninterrupted prescriptive title.

It appears that the dispute has arisen for the first time on 24.09.1990 when the Defendant tried to erect a building with brick-walls instead of a thatched hut. It is evident by the unmarked photograph filed of record in the brief file. It is not challenged by the Plaintiff that he Defendant had got an assessment number (344) for this boutique. Moreover in the Plan bearing No. 2377A the boutique has been shown by the surveyor. All this supports the statement of the Defendant that he has been in possession of the subject-matter.

In considering all these matters, I have no hesitation but to come to the conclusion that the judgment of the learned Additional District Judge cannot be allowed to stand. I therefore allow the appeal, set aside the judgment and that the Defendant is entitled to costs here and the Court below.

JUDGE OF THE COURT OF APPEAL

H.C.J. Madawala, J.
I agree

JUDGE OF THE COURT OF APPEAL