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

Rajapaksha pathirranalage Sunil Dankelewatte of pahala Diyadora, Wewagama.

Substituted 1st Defendant Appellant

Ranhoti pedige Durayalage Ananda Wijekoone of Eluwapola, Wewagama

C.A. No.580/99 (F)
D.C.Kuliyapitiya No.8011 P.

Substituted-Plaintiff-Respondent

2a. Rajapasksha Pedige Lankatillake of Pahala Diyadora, Wewagama

3a . Rajapaksha Weerasinghe of Pahala Diyadora, Wewagama.

Substituted - Defendant-Respondents.

BEFORE : M.M.A.Gaffor,J.

COUNSEL : S.A.D.S.Suraweera for the Substituted 1st Defendant-Appellant

Harsha Soza P.C. with Ranjith Perera and Z.Hassim for the Substituted 2nd Defendant-Appellant.

S.A.D.S.Suraweera for the Substituted 2nd Defendant-Appellant

ARGUED ON : 28.06.2017

WRITEEN SUBMISSIONS FILED ON : 1st Defendant-Appellant filed on 11.10.2017

Plaintiff-Respondent filed on 16.10.2017

DECIDED ON : 12.01.2018

M.M.A. Gaffoor J.

In this case the Plaintiff-Respondent originally filed a partition action seeking to partition the land called "Kumbukepotha". The original plaint was subsequently amended by plaint dated 30.11.1987. The preliminary plan No.975 marked as X prepared by R.B.Nawarathna License Surveyor had depicted the corpus as Lots 1 and 2 having extent of 2 Acres 1Rood and 31 Perches.

It is to be noted that the corpus is a paddy field. The Defendant-Appellant in this appeal had mainly contested the issue that he is claiming prescription over the said land by virtue of Section 3 of the Prescription Ordinance. The Defendant-Appellant had relied on documents 1V1 and 1V2. It is also to be noted that the Additional District Judge had taken into consideration documents 1V3 and 1V4 submitted by the Defendant-Appellant.

The first enactment elating to prescription was the proclamation of 22.01.1801 later regulation of 13 of 1822 repealed the earlier proclamations and regulations. The present Prescription Ordinance No.22 of 1871 was passed amending the earlier legal provision.

Betram C.J. in ***Thilekerathna Vs. Bastian*** observed that "our Prescription Ordinance of 1871 constitutes a complete code and though not doubt we have to consider any satisfactory enactments in the light of the principles of the common law, it will be seen that the terms of our own Ordinance are so positive that the principles of Common Law do not require to be taken in to account.

This decision bears testimony in the case of ***Therunnanse Vs. Menike (1 NLR 200)*** where it had been held that Roman Dutch law relating to prescription has been swept away by legislation.

Section 3 of the Prescription Ordinance No.22 of 1871 reads as follows:-

> Proof of undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such

land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with cost:

Provided that the said period of ten years shall only being to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

There were 2 admissions vide page 75 of the appeal brief. The Plaintiff -Respondent has raised 4 issues and the Defendant –Appellant had raised 3 issues and the 4th Defendant had not raised any issues in this respect. The main issue that had been raised by the Defendant-Appellant is issue No.5 on which he claims prescriptive title. The trial proceeded on these issues and the learned District Judge delivered the judgment on 13/07/1999. Page 4 of the judgment in the appeal brief gives the breakdown of the shares allocated to the Plaintiff – Respondent and 1st to 4th Defendants in which the 1st Defendant-Appellant had been allocated 4/18th of the shares. Being

aggrieved by the said order of the learned District Judge this appeal is preferred mainly by the 1st Defendant-Appellant.

It is observed by the learned trial Judge that if the 1st and the 2nd Defendants in order to establish prescriptive title the burden is on them to prove the ingredients of prescription as stated in Section 3 of the Prescription Ordinance vide page 5 second para of the judgment. Further the learned District Judge had observed that the Plaintiff has asserted that during the period of 1950 to 1982 the Plaintiff and the 1st to 3rd defendants had cultivated this paddy field. And further he has asserted that the preliminary work on the paddy field had been done by them jointly and the yield or the harvest had been shared by them.

In order to prove their long period of possession the 1st and 2nd Defendant has called 4 witnesses. 1st witness in his evidence he had said that the 1st and 2nd Defendants had cultivated this land and possessed it and that the Plaintiff had no claim to the said paddy field. The 1st Defendant had called Ukkuwa and a retired Cultivation Officer Albert Marasignhe. In their evidence they have asserted that they are unaware of the facts regarding possession either of the Plaintiff or the Defendants. The learned trial judge has analyzed this evidence and had come to the conclusion that the witnesses called by the 1st and 2nd Defendants has failed to testify in favor of the 1st and 2nd Defendants.

In the light of the above evidence it is amply clear that the Defendant-Appellant had not discharged the burden of proof as required by law, especially in an assertion of prescriptive title.

In the case of ***Maria Perera Vs Albert Perera*** (***1983 (20 SLR 399)*** G.P.S. de Silva J. as he then was held that the possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster.

As regards the burden of proof under the Prescription Ordinance, in the case of ***Gunasekera vs. Tissera (1994 (3) SLR 245)*** M.D.H. Fernando J after considering a series of judgments including the decisions of ***Corea Vs Isreris Appuhamy (15 NLR 65)*** and ***Brito Vs Muthunayagam (20 NLR 327)*** held that if any person wants to succeed he must meet the requirement of the high order of proof to establish adverse possession and the burden of proof vests entirely upon the co-owner who seeks to claim prescriptive title against the other co-owners.

The learned trial judge in evaluating the evidential value of 1V1 and 1V2 had observed that the corpus in dispute **Kumbukepoththa Kumbura** is a different paddy field owned by the 1st and the 2nd Defendants. This had been revealed by the evidence of the 1st Defendant. This had been revealed by the evidence of the 1st Defendant. Page 7 appeal brief. In the light of the above evidence the trial judge has doubted the veracity of 1V1 and 1V2. Furthermore the extracts of the register of the agrarian lands that had been produced pertains only to 1987. In the light of this piece of the above evidence the Judge had doubted the veracity of 1V1 and 1V2.further more the extracts of the Registrar of the Agrarian Lands that had been produced pertains only to 1987. In the light of this piece of evidence the Judge has very clear stated that the 1st and 2nd Defendants did not have possession before 1987.

It is also to be observed that the Appellate Courts will not interfere with the finding of facts arrived at by the trial judge unless perverse of not supported by evidence:

18 NLR 382 , 20 NLR 282 (PC) 54 NLR 102 (PC) 1SLR (1993) (SC) /SC (CHC)No.43/2010 decided on 5th August 1913.

In the light of the above circumstances, we see no reason to interfere with the findings of the learned District Judge. Appeal stand dismissed and parties will have their shares allocated as described in the judgment of the learned District Judge.

JUDGE OF THE COURT OF APPEAL