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

Patakaragedera Kirineris
of 221, Makulugalla,
Pallepola, (Matale District)

C.A.No.972/99 (F)

D.C.Matale P/1654

Substituted-Plaintiff- Appellant

Vs,

1.Daulkaragedera Siriya (deceased)

2.Daulkaragedera Abiththa

3. Daulkaragedera Sirimalee

4. Daulkaragedera Carolis

All df Weragama, Kaikawala.

Defendants -Respondents

1A. Viyannala Hedera Thilak Karunaratne,
No. 471/1, Kaineka
Kaikawala

1B. Dikpitye Hedera Jayantha Sirisumana

No.4714/2/B, Kaineka,

Kaikawala

Substituted-Defendants-

Respondents.

Patakaragedera leelawathie

Patakaragedera Somadasa,

Patakaragedera Sarasema

Patakaragedera Karunawathie

Patakaragedera Gunadasa.

Respondents.

Before : M.M.A.Gaffoor,J.

Counsel : Daya Guruge with Rohitha Wimalaweera for the Plaintiff-Appellant

M.C.M.Muneer for the Defendant-Respondent

Written submissions filed on : SubstitutedPlaintiff-Appellant on 24/11/2017

Substituted Plaintiff-Respondent on 06/09/2016

Decided on : 06/03/2018

M.M.A,Gaffoor,J.

This appeal preferred to this Court from the impugned judgment of Matale District Court bearing Case No.1654/P. The above partition action has been filed by the plaintiff, in respect of land called Sellegewatta as described in the plaint.

The trial proceeded with 3 admissions namely:

a. Jurisdiction.

b Corpus as described in the plaint as described by the Licensed Surveyor M.Rajasekera in his survey plan No.3381 of 16.07.1995.

and

c. All contending parties admitted that the original owner as Kaluwa.

Plaintiff raised issues 1 & 2 and the Defendant raised issues 3-7 respectively:

The learned District Judge after trial delivered the said judgment on 28th May 1999, in favour of the substituted plaintiff-Appellant. Being aggrieved by the said judgment 1A and 1B defendant-respondents has preferred this appeal. It will be seen

that at the close of the case both plaintiff and defendants has passed away and they had been properly substituted.

The main contentions of the defendant-respondent are.

a. The plaintiff Davulkara Gethera Pinsiri was living in Ampare which she admitted in cross - examination and she never was in possession of the undivided share in the corpus. The evidence of plaintiff's son Kirineris admitted that the defendants was in possession but he used to visit the land intermittently.

b. The evidence of the License Surveyor did not reveal that he plaintiff was living in the co – owned property. (pages 71-72 appeal brief)

c. There has been no fence or clear demarcation of boundaries' as described by the License Surveyor.

d. The Defendant's contended that they too had title to the part of the land and had uninterrupted adverse possession since 1940.

e. The defendant called witness Tikiribanda who lives ¼ mile from the corpus (page 95-97 appeal brief) who corroborated the position of the defendant.

f. Witness Amarasekera gave evidence and said that he is living in the adjacent land in dispute. (Page 100 appeal brief) and the case was closed for the defendant.

g. The two witnesses who gave evidence in favour of the plaintiff admitted that they had no clear knowledge about the disputed land (page 112)

h. No evidence had been adduced that the plaintiff possessed the co-owned property or she enjoyed the fruits thereof.

i. Evidence revealed that the plaintiff has lest the village in which the disputed land is situated, forty years ago.(page 113)

j. Although the plaintiff has asserted that she had enjoyed the fruits of the land this fact had not been established by evidence.

k. The License Surveyor in his plans " X" and "Y" had clearly stated data there were no boundaries seen on the land in dispute.

l. When the preliminary survey being done, although the defendant was building new structure no objections were taken up by the plaintiff.

In his order the learned Trial Judge too had observed the undernoted important fact viz:

a. Although the plaintiff has stated that she has 2 brothers but in her amended plaint she has been silent on this issue (page.108)

b. The fact that the Plaintiff cannot find out the residences of the above two brothers their shares should be un-allotted. (page 119)

c. The plaintiff has failed to tender a pedigree along with the amended plaint (Page 110)

d. The defendant's contended that they too had title to the part of the land and had uninterrupted adverse possession since 1940.

e. The defendant called witness Tikiriband who lives ¼ mile from the corpus (pages 95-97 appeal brief) who corroborated the position of the defendant.

f. Witness Amarasekaera gave evidence and said that he is living in the adjacent land in dispute (page 100 appeal brief) and the case was closed for the defendant.

It is to be noted that a very brief written submission has been tendered on behalf of the substituted-plaintiff-appellant. The main

contention of the appellant was that the felling of a jack tree cannot be considered as an overt act of dispossession of the plaintiff. In this context, if the said act is considered alone without considering the cumulative effect of the other evidence tendered by the defendants and the counter evidence of the plaintiff, the cutting of the jack tree alone would not constitute an overt act. It is to be noted that the learned District Judge had observed the witnesses and their demeanor and had evaluated evidence.

Presumption of Ouster.

The case of ***Karunawathie & 2 other Vs.Gunadasa (1996) 2SLR 406*** has some relevance to the issues in the case in point. *Senanayake,J.,* in the above judgment observed thus:

"In considering whether or not a presumption of ouster should be drawn by reason of long continued possession alone, of the property owned in common, it is relevant to consider".

a. The income derived from the property

b. The value of the property and

c. The relationship of the co-owners and where they reside in relation to the situation of the property.(emphasis supplied)

(It has been proved that the Plaintiff reluctantly admitted that she lives in Ampare)

In the case of ***Rajapakse Vs. Hrndrick Sigho 61 NLR Page 35*** the court considered the judgments in ***Corea V. Lsseris Appuhamy 1911 15 NLR 65 and Cadija Umma Vs. Don Manis 1938 40 NLR 392 – Justice Basnayake, CJ*** observed thus:

" The law being as stated above the only question that arises for decision in this case is whether the evidence discloses an ouster of the plaintiff's by the defendants and whether that ouster continued for a period of over ten years. The expression " ouster" which is used in Corea's case and later in Cadija Umma's case is a concept of English Law and we must to that system of Law in order to ascertain its meaning" ***Doe Vs. Prosser, Cowp. 217 and 98 ER 1052 and Peacable Vs. Read 1 East 569.102 ER 220.***

The learned CJ continued and opined thus:-

The expression "actual ouster" needs explanation as it is an expression used by both Lord Mansfeild and Lord Kenyon in the cases referred to above I cannot do better than explain it in the very words of Lord Mansfeild.

"Some ambiguity seems to have arisen from the term "actual ouster" as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. "But that is not so (Emphasis added)".

In the instant case the evidence that the plaintiff was not in occupation of the land, but the defendants were in occupation of the whole land and also took its produce to the exclusion of the plaintiff and their predecessor to title, and gave them no share of the produce, did not act from which an acknowledgement of a right existing in the plaintiff fairly and naturally be inferred, is overwhelming.

Further, it is to be noted that there are plethora of judgments pronounced in Superior Courts, whether it had been observed that Appellate Courts are always slow to interfere with the decisions arrived at by the trial Judge as far as the facts of the case is concerned. This position has been applied and accepted in the undernoted decisions:

"Ranawaka Arachchuige Nriugette Alwis Vs. Allen Margret Wijetunga SC Appeal 343/14 decided on 13/12/2017, where justice Buvaneka Aluvihare observe thus:

" In the case of Mac Groddie Vs. Mac Graddie 3013 UK SC 58 (2013) 1 WLR 2477, commenting on the approach of the Appeal Courts to a finding of fact, the Supreme of the United Kingdom held. " it was long settle principle, stated in domestic and wider common law jurisdictions that an appellate court should not interfere with the trial judge's conclusions on the primary facts unless satisfied that he was plainly wrong".

This principle had been upheld in-

"***Alwis Vs. Priyasena Fernando1993 (1) SLR at page 119 ,*** where His Lordship G.P.S. held thus;

> "It is well established that findings of primary facts by a trial judge who hears and sees the witnesses are not lightly disturbed on appeal".

These views are supported by the undernoted decisions;

Fradd Vs. Brown & Co Ltd.20 NLR 282

De Silva and Others Vs. Senaviratne and Others 1981 (2) SLR 8.

D.S. Mahavithan Vs. Commissioner of Inlans Revenue 64 NLR217

S.D.M.Farook Vs. L.B.Finance (CA 44/98, CA Minues of 15.3.2013).

W.M.Gunathilake Vs. M.M.S. Pushpakumara (CA 151/98 CA Minutes of 09.05.2013.

In this stated of evidence we do not see how we can disturb the findings of the Leaned District Judge though undoubtedly there are statements in his judgment which invites criticism. Those question do arise but on the facts of this case there is no difficulty in resolving them in favour of the substituted defendants.

Having examined the evidence pertaining to the facts of this case it is impossible for this Court to come to a reasonable conclusion that the judgment is perverse.

Appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL.