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

C.A. Case No. 982/2000 (F)

D.C. Galle Case No. 7184/P

Lalitha Edirisinghe through her Power of Attorney holder **Sarukkali Mahawidanage Ranjith Ananda**

Welipitimodara, Gintota.

3A DEFENDANT-APPELLANT

-Vs-

Sarukkali Mahawidanage Sumitra Premawathie Weerasooriya

"Weerawila" Gonapeenuwala.

PLAINTIFF-RESPONDENT

Sarukkali Mahawidanage Chitra Padmini

No. 27, Welipitimodara, Gintota.

2nd DEFENDANT-RESPONDENT

(Substituted in place of 1st Defendant also)

BEFORE : **A.H.M.D. Nawaz, J.**

E.A.G.R. Amarasekara, J.

COUNSEL : Dasun Nagasena for the 3rd Defendant-Appellant

Malaka Herath with Lakshmi Diddeniya for the Plaintiff Respondent

Argued on : 09.08.2017

Decided on : 04.06.2018

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

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted this action to have the land known as lot 3 of **Ampitiyawatte** partitioned among her mother, sister and herself. The mother and sister were designated as the 1st and 2nd Defendants to the case in a plaint dated 28.09.1977, which morefully described the land to be partitioned in its schedule. The Plaintiff averred in her plaint dated 28.09.2017 that her father Sarukkeli Mahavidane Martin de Silva became entitled to this land in 1942 by virtue of a final partition decree entered in DC Galle Case No. 38408 on 05.05.1942 - vide page 300 of the appeal brief. The said Martin de Silva had died intestate leaving behind the Plaintiff (daughter), his widow (1st Defendant) and 3rd Defendant (another daughter).

Thus the Plaintiff had assigned the following shares in her plaint;

1. Plaintiff – ¼
2. 1st Defendant (mother) – ½
3. 2nd Defendant (sister) – ¼

Claim by the 3rd Defendant-Appellant

At the time the preliminary survey in this matter took place, the 3rd Defendant was the new claimant who asserted a claim to buildings on the land but not any soil rights. This shows that at the very 1st opportunity that the 3rd Defendant-Appellant got to assert a claim, it was only a claim to buildings, which would mean a claim for improvements. The survey was conducted on 03.06.1978 by licensed Surveyor T. Ramachandra who has depicted the subject-matter in Plan No. 844 of 13.06.1978. The buildings on the land have been designated as 2, 3, 4 and 5 in the said plan. It has to be noted that no soil rights were claimed by the 3rd Defendant before the surveyor. But the statement of claim of the 3rd Defendant was to the contrary.

Statement of claim of the 3rd Defendant dated 27.09.1978

The statement of claim filed by the 3rd Defendant denied the contents of the report of the surveyor. In other words though he disclaimed any soil rights below the buildings namely 2, 3, 4 and 5, the 3rd Defendant contradicted this position in his statement of claim and asserted prescriptive rights to lots 2, 3, 4 and 5. When one examines both the statement of claim of the 3rd Defendant and his points of contest, it is quite clear that barring lot 1 in the preliminary Plan No. 844 of 13.06.1978, the 3rd Defendant claimed prescriptive title to lots 2, 3, 4 and 5.

Thus there was before the learned District Judge of Galle the usual contest, as we more frequently find in partition cases, between the paper title of the Plaintiff, 1st and 2nd Defendants and prescriptive title asserted by the 3rd Defendant-Appellant. Bearing in mind the fact that the 3rd Defendant asserted prescriptive title to lots 2, 3, 4 and 5, quite contrary to his position on improvements before the surveyor, it would appear that the burden would be cast upon the 3rd Defendant in terms of section 3 of the Prescription Ordinance to prove that he or those under whom he claimed had been in undisturbed and uninterrupted possession of the land, by a title adverse to or independent of that of the claimant or Plaintiff for 10 years prior to the institution of the action. The institution of the action took place on 28.09.1977 and if there is compelling evidence that the 3rd Defendant was on the land with the manifest intention of acquiring title to it, after the lapse of 10 years prior to 28.09.1977, the Court will clothe his adverse possession with legal validity. In fact, Section 3 of the Prescription Ordinance postulates not only the need to prove an *animus* to hold the land against the claim of all others, but also an overt act or a series of overt acts representing equivocally a manifestation of that intention. It follows therefore that a secret intention entertained by a spoliator to steal the land will not suffice. Instead, the law requires a more cogent justification for permitting the usurpation of land.

The question then arises whether the 3rd Defendant has discharged the requisites of Section 3 of the Prescription Ordinance. One turns now to the trial which commenced on

07.02.1983 before the then Judge of the District Court of Galle Mr. H.W. Senanayake (as His Lordship then was).

Evidence at the Trial

a) Plaintiff's evidence

The fact that the predecessor in title of the Plaintiff, 1st Defendant and 2nd Defendant was Sarukkeli Mahavidanage Martin de Silva, who had obtained his title to the land by a final partition decree entered on 05.05.1942 in the same District Court was admitted without any demur. Sarukkeli Mahavidanage Sumithra Premwathie, a daughter of the said original owner Martin de Silva, who became the Plaintiff in this case testified first narrating as to how the title devoted on her father and she also produced in her evidence the preliminary survey Plan bearing No. 844 and the report.

This plan depicts 3 shops which are numbered 1, 2 and 3 where a saloon, jewellary shop and retail shop are located. It has to be recalled that shops numbered 2 and 3 were claimed by the 3rd Defendant-Appellant along with the soil rights therein but only in his statement of claim. The Plaintiff categorically denied that Richard de Silva (3rd Defendant) who was her father's brother ever built these shops.

Alluding to the shops depicted as 2 and 3 in the preliminary plan, the Plaintiff states that in place of the jewelry shop in lot 2, there existed a tea kiosk previously, but it was only run by her uncle Richard de Silva (3rd Defendant).

The witness further stated that since the father's death in 1975

The final decree was entered on 05.05.1942. The 3rd Defendant 'son testified that his father had built the two shops numbered 2 and 3 in 1943. Prescription is claimed from 1943. The question arises where this is probative at all. It is the plaintiff's father who became the absolute owner of the land in 1942 and if the shops were built in 1943 by his brother Richard de Silva (the 3rd Defendant), the question arises as to how this permission to build shops was given by the Plaintiff's father so soon after 1942. Did he forcibly take possession of the land so soon after the final partition decree had been

entered in favor of his brother? If at all, the evidence in the cases raises only the possibility of a permissive possession on the part of the 3rd Defendant.

The fixing of the starting point of prescription as far back as 1943 is not mentioned in the answer. The 3rd Defendant should have claimed lots 2 and 3 in his statement of claim. The fact that he built the shops in 1943 is not mentioned in the surveyor's report. When the Plaintiff claimed the lots 1, 2, 3, 4 and 5, the 3rd Defendant should have asserted his claim to these lots and soil rights, if he had in fact built them in 1943 and had been in possession of them since then. But nary a word had been spoken before the surveyor except the mere claim to improvements on lots 1, 2, 3, 4 and 5. If a claimant fails to mention before the surveyor a salient fact about his ownership to a particular lot but tries to contradict the non-disclosure later in his statement of claim it amounts to a challenge to the surveyor's report and this contradictory position must be put to the surveyor. In fact the proviso to Section 18 of the Partition Law, No. 21 of 1971 gives an opportunity to a Defendant *qua* the 3rd Defendant to summon the surveyor and challenge him as to why he failed to refer to the ownership of the 3rd Defendant to the buildings if at all the 3rd Defendant had asserted ownership to these buildings before the surveyor. In fact the proviso to Section 18 of the Partition Law goes as follows:-

> *"Provided that the Court shall, on the application of any party to the action and on such terms as may be determined by the Court, order that the surveyor shall be summoned and examined orally on any point or matter arising on, or in connection with, any such document or any statement of fact therein or any relevant fact which is alleged by any party to have been omitted therefrom."*

Thus the Partition Law offers an opportunity to an aggrieved party to summon the surveyor and pose questions to him as to why he omitted to mention relevant facts in his report if in fact the party had mentioned the relevant facts before the surveyor. A mere averment in the statement of claim that the party denies the contents of the surveyor's report would not suffice. This bare assertion, without more, would not advance the credibility of the party. In a partition suit, ownership is a relevant fact which should be brought to the fore at the earliest opportunity. Having not asserted ownership, the 3rd

Defendant challenged the contents of the report in his statement of claim but this challenge is not probative of his claim that he had prescribed to these lots. It has to be noted that as opposed to this evidence it was the plaintiff's testimony that lots 1, 2 and 3 had been in existence from the time of the final partition in 1942 and this is corroborated by the final Partition Plan bearing No. 755 marked as X. Neither the statement of claim of the 3rd Defendant nor the testimony of the 3rd Defendant's son ever reveals when if at all lots 2 and 3 were built by the 3rd Defendant. Nowhere does the 3rd Defendant state in his statement of claim that he built these lots in 1943 and had been in possession thereof since then.

Thus the failure on the part of the 3rd Defendant to mention the construction of these lots by himself in 1943 before the surveyor and the omission to assert it in the statement of claim throws doubt on the testimony of the 3rd Defendant's son that his father had constructed them in 1943 so soon after the final partition decree was entered in 1943. If at all, it would be a case of the son giving hearsay evidence on his own as to prescription and in the circumstances I would hold against the 3rd Defendant on his prescriptive claim and proceed to affirm the judgment dated 18.08.2000.

Accordingly I would dismiss the appeal of the Appellant.

JUDGE OF THE COURT OF APPEAL

I agree

E.A.G.R. Amarasekara, J.

JUDGE OF THE COURT OF APPEAL