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

C.A. Case No. 1395/2000 (F)

D.C. Kalmunai Case No. 1641/L

Athankany Seenathumma (Deceased)
Tamil Division,
Sammanthurai.
PLAINTIFF-APPELLANT

Abdul Maheej Ashraff Ali
Tamil Division,
Sammanthurai.
Substituted-PLAINTIFF-APPELLANT

-Vs-

1. **Sultan Lebbe Abdul Rahman**
2. **Sultan Lebbe Adam Lebbe**
3. **Adam Bawa Sulaima Lebbe**

DEFENDANT-RESPONDENTS

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

COUNSEL : N.M. Shaheid with Nuski Lathif for the Substituted-Plaintiff-Appellant.

Defendant-Respondents absent and unrepresented.

Decided on : 01.06.2018

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

The original Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action on 18.04.1983 in the District Court of *Kalmunai* praying for a declaration of title to the land described in Schedule "B" to the plaint, ejectment of the Defendants therefrom and for damages and costs.

The Plaintiff stated in her plaint that she became entitled to the said land by Deed No.3694 dated 09.04.1982 attested by N. Rasiah, Notary Public. She further stated that she bought this land from one Kathiramathmby Theivanaipillai, who had been in undisturbed and uninterrupted possession of the land along with her predecessors in title.

The Defendants totally denied the averments in the plaint and they stated in their joint answer that the 1st and 2nd Defendants were the sons of the 3rd Defendant and the 3rd Defendant was entitled to the land in dispute by virtue of a Deed bearing No.11861 dated 23.10.1956 attested by C. Gnanamuttu, Notary Public. But the answer gives a description of another land which was supposed to have been bought by the 3rd Defendant. The land described in the answer and the land described in the schedule 'B' to the plaint are not the same.

The Defendants further stated that they had been in possession and cultivating the said land since 1956 without any interruption from any one and they had prescriptive rights to the same in terms of Section 3 of the Prescription Ordinance and they prayed for the dismissal of the plaintiff's action.

When the trial commenced on 04.10.1989, issues were framed by the parties. The Plaintiff raised the following issues:-

1. Is the Plaintiff entitled to the land described in schedule 'B' to the plaint as stated in paragraphs 2, 3, 4, 5 and 6 of the plaint?
2. Are the land described in schedule 'B' to the plaint and the Lots depicted as 2, 3, 4 and 5 depicted in the Plan bearing No. S 64 made by K. Ratnarajah, the same?

3. Have the Defendants, since May, 1982, been in unlawful possession of Lot 3 as depicted in the Plan?

4. Have the Defendants suffered damages? If so how much?

5. If the issues 1 to 4 are answered in favour of the Plaintiff, is the Plaintiff entitled to the reliefs claimed in the plaint?

6. Prescriptive rights of the parties? (*sic*)

The 6th issue has been translated into English as above just as it is found in Tamil.

The Counsel who appeared for the Defendants objected to all the issues raised on behalf of the Plaintiff, and quite particularly he stated that the Plaintiff had not mentioned in the prayers that he asked relief for the land described in schedule 'B' to the plaint, and therefore in order to proceed with the case, the plaint must be amended. Having considered the arguments given by both Counsel the learned District Judge amended the Issue No. 5 as follows:-

5a. If issues Nos. 1, 2, 3 and 4 are answered in the affirmative, is the Plaintiff entitled to the land described in schedule 'B' to the plaint?

b. If so are the Defendants liable to be ejected therefrom?

c. Further, is the Plaintiff entitled to damages and other reliefs?

Thereafter the following issues were raised on behalf of the Defendants.

7. Have the Defendants been possessing the land depicted as Lot 3 in the said Plan and described in the schedule 'B' to the plaint as their own land for more than 5 years?

8. If the above issue is answered in the affirmative are the Defendants entitled to prescriptive rights?

Thereafter, Surveyor Ratnarajah gave evidence on behalf of the Plaintiff. His Plan No. S 64 dated 08.10.1985 was marked as **P1** and his report was produced as **P1A** in his evidence. According to this witness the plaintiff's husband had shown that Lots 2, 3, 4

and 5 were the parcels of land claimed by the Plaintiff. The land in dispute had been identified as Lot 3. This is a part of the land described in schedule "B" to the plaint-see page 14 of proceedings of 04.10.1989. This witness testified that Lots 2 and 3 were in the possession of the Defendants and they must have cleared jungle about 8 or 10 years ago and they appeared to have been cultivated with paddy for a long time.

According to the surveyor's report **P1A,** the total extent of Lots 2, 3, 4 and 5 is five acres and this corresponds to the land described in schedule 'B' to the plaint. The land in dispute is Lot 3 which the Defendants were in possession.

The identity of the land in dispute is well established. The Surveyor Ratnarajah's evidence in this respect is quite clear. He quite accurately differentiates the land claimed by the Plaintiff from the land claimed by the Defendants. This evidence undoubtedly settles the issue of identity of the land.

The Surveyor states in his evidence, "The land depicted as Lots 2, 3, 4 and 5 in my plan relate to T.P.239907. *The land in dispute and the land possessed by the defendants is the land shown as Lot 3 in my plan,* which is included in T.P.239907. This Lot is shown as Lot 92570 and 92571 in Primary Plan No. PP 3557. The land described in schedule 'B' is part of TP 92571.The defendants in their answer have claimed a land as shown as Lot 92582 in 3557 but that land does not fall within the land surveyed by me. It may be situated beyond the land surveyed by me".

From this evidence it is abundantly clear that the land in dispute is Lot 3 in Plan S 64 of Surveyor Ratnarajah which is part of TP 92571 in Plan No. PP 3557 and which is the land described in schedule 'B' to the plaint. It is, therefore, clear that the land in dispute is Lot 3 claimed by the Plaintiff in her plaint and that is the land now possessed by the Defendants.

The surveyor said that the Lots 2 ad 3 appeared to have been cultivated. According to the Plaintiff the Defendants had unlawfully entered the land in May, 1982. If that be so, the Defendants could have cultivated the land for about 5 or 6 years from 1982, and that is

reflected in their Issue No. 7 raised in this case stating that they had possession for 5 years.

This action was filed by the Plaintiff on 18.04.1983 and the surveyor gave evidence on 04.10.1989. That was after over 6 years of the date of the plaint. The Defendants stated in paragraph 4(d) of their answer dated 02.12.1983 that their predecessors and they had been in possession of the land for over 10 years by a title adverse to and independent of the Plaintiff. But when they raised Issue No. 7, they stated, *"have the defendants been possessing the land, depicted as Lot 3 in the said Plan and which is described in the schedule 'B' to the plaint, as their own land for more than 5 years?"*.

This issue prominently contradicts the Defendants' position that their predecessors and they had been in possession for over 10 years.

It is trite law that as a general rule, the claims of a litigant must be determined according to his rights and the law existing at the date of action brought-see the Full Bench decision of the Supreme Court comprising Sir Joseph T. Hutchinson, C.J, Mr. Justice Wendt, and Mr. Justice Middleton in ***Silva v. Nona Hamine*** 10 N.L.R 44. The institution of the action is the date on which the plaint was filed. In the instant case the plaint was filed on 18.04.1983, on which date the Plaintiff had the paper title but the Defendants were in possession of the land.

From the evidence of the surveyor it is very clear that the land claimed by the Defendants in their answer was not the land which they were in possession. *The land possessed by them was the land claimed by the Plaintiff* and I am of the view that the Defendants have been in unlawful possession of the land described in schedule 'B' to the plaint since 1982.

At this juncture I wish to take a look at Issue No. 7 raised by the Defendants. It states "Have the defendants been possessing the land depicted as Lot 3 in the said Plan and described in the schedule 'B' to the plaint as their own land for more than 5 years?"

Generally prescriptive rights claimed by a party is premised on uninterrupted and undisturbed possession for 10 years previous to the bringing of an action. Section 3 of the Prescription Ordinance No. 22 of 1871 is quite clear on this requirement. Five years'

possession cannot confer prescriptive rights on a party. This issue clearly exposes the hidden truth of the matter that when the trial commenced on 04.10.1989, i.e., after 6 years of the filing of the plaint, the Defendant had only 5 years' possession and not 10 years to make them eligible for prescriptive title.

The Issue No. 7 raised by the Defendants refers to the defendants' adverse possession. When an issue relating to adverse possession over 10 years (in the instant case 5 years) is raised by the Defendants as against the legal title of the Plaintiff, it is an important requirement in law that he must prove his 10 years' uninterrupted possession very cogently. Further, the claimant for prescription must also establish a starting point which signified the commencement of ten years. If this is not clearly proved, even the statement of the Defendants that they had 5 years' possession is liable to be rejected, since there is no starting point alleged of the commencement of 5 years.

In ***Dingiri Appu v. Mohottihamy***[1] Basnayake C.J held, *inter alia*, that where a land is owned in common, there must be clear evidence of ouster of all other co-owners, by the co-owner, who claims that he enjoyed the land exclusively without recognizing the rights of others. **He must also establish that he commenced to do so from a certain date and that ten years have elapsed from that date.** *(Emphasis added)*

This principle had already been formulated, albeit in somewhat different language by Bertram C.J., in ***Tillekeratne v. Bastian***- "Where any person's possession was originally not adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to prove adversely, but a manifestation of that intention to the true owner against whom he sets up his possession".[2]

The requirement of starting point of prescription has also been emphasized in subsequent cases. In ***Sirajudeen and two others v. Abbas***[3] (SC) G.P.S. de Silva, C.J (with Kulatunga, J. and Ramanathan, J. agreeing) stated that where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of

[1] 68 N. L.R. 40.
[2] (1918) 21 N.L.R.12 at p.19.
[3] (1994) 2 Sri.LR 365 at p. 370.

an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for him or her acquisition of prescriptive rights.

In this case the Defendants have failed to state from when their 5 years' possession commenced. Furthermore, if they had only 5 years' possession of the said land, that possession cannot be considered to give them prescriptive rights under Section 3 of the Prescription Ordinance.

The Plaintiff did not give evidence in this case but her husband testified on her behalf. His evidence establishes his wife's title to the land but he stated under cross-examination that before he bought this land for his wife, he did not know who was in possession of the land. Other than this witness, the son of the vendor to the Plaintiff Thangarasa Nadesan also gave evidence for the Plaintiff and in his evidence he stated that he knew the land in dispute which had been cultivated by his father from 1973 to 1976.

Giving evidence on behalf of the Defendants, the 3rd Defendant testified that, *"he cleared forest and has been cultivating this land for the last 35 to 40 years"*. And no one had posed any obstruction to his cultivation and no other person had cultivated this land. His evidence was supported by one Udumalebbe Abdul Careem who was the cultivator of an adjacent land. With regard to possession of the land in dispute by the 3rd Defendant it is also overwhelmingly established by the Vatta Vidane Ismalebbe and Grama Sevaka Mohamed Haniffa Thajim. They all corroborated the evidence of the 3rd Defendant and other witnesses who had given evidence for the Defendants.

Even if this evidence is true, it cannot be accepted in view of the fact that the Defendants themselves admitted that they had possession only for 5 years.

The Defendants had also raised the issue on this basis. I am of the view that even if the land was with shrub-jungle in 1982, the Defendants could have cleared and possessed adversely to the plaintiff's rights.

"It is the duty of the Court to record the issue on which the right decision of the case appears to the Court to depend. Once issues are framed, the case which the Court has to

hear and determine becomes crystallized in the issues and the pleadings recede to the background"-*Per* G.P.S. De Silva C.J. in ***Hanaffi v. Nallamma*** (1998) 1 Sri L.R. 73.

This is a *rei vindicatio* action, in which the trite principle followed by court is when the Plaintiff has paper title and the Defendant is in possession, the burden is on the Plaintiff to prove his title. Only when this burden is satisfactorily discharged, the onus of proving prescriptive possession devolves on the Defendant-see the PC decision of ***Siyaneris v. Jayasinghe Udenis De Silva*** 52 N.L.R. 289.

Upon an evaluation of the evidence led in this case it is abundantly clear that the Plaintiff, by documents marked **P2-P6** has satisfactorily established that she is entitled to the land in dispute. But the Defendants have failed to establish that their predecessors in title or they ever possessed and cultivated this land for more than 10 years. In this regard, the evidence of the independent's witnesses, the Surveyor Ratnaraja, the Vadda Vidana and the Grama Sevaka has to be considered.

It is settled law that scanty and vague evidence without details of the people who possessed a land is insufficient to satisfy a Court that there was possession within the meaning of Section 3 of the Prescription Ordinance-See ***Romanis & Others v. Siveth Appuand Another.***[4] T.S. Fernando, J. (with Sri Skanda Rajah, J. agreeing) stated in ***Romanis*** *(supra)* that vague evidence without details, that people "possessed" a land is insufficient to satisfy a Court that there was possession within the meaning of section 3 of the Prescription Ordinance.

In ***Hassan v. Romanishamy,***[5] Basnayake, C.J (with Sirimane, J. concurring) said: *"Mere statements of a witness, "I possessed the land", or "we possessed the land" and "I planted plantain bushes and also vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section".*

The land described in the answer of the Defendants is not the land in dispute. In terms of the evidence of the Surveyor Ratnarajah there is no doubt about this position. This

[4] 68 C.L.W 40
[5] 66 C.L.W. 112

matter is also corroborated by the Plan and Report of the second Surveyor Jalaldeen. Both these surveyors state that the land in dispute is Lot 3 depicted in Plan No. S 64. Hence, the identity of the land in dispute is well established.

The legal title of the Plaintiff to Lot 3 is not contradicted by the Defendants. As against this position, the only question that is placed before this Court is whether the Defendants had had undisturbed and uninterrupted possession for ten years as claimed by them against the title of the Plaintiffs from a certain date. As stated in this judgment earlier the Defendants have failed to establish a starting point from which they began to possess this land. In the absence of this evidence, I hold that the Defendants did not have prescriptive possession over 10 years to enable them to become entitled to this land. I therefore reject the claim of the Defendants on prescriptive rights.

The Defendants had encroached on the land belonging to the Plaintiff and since May, 1982 they have been in unlawful possession of the land and cultivating it to the loss and detriment of the Plaintiff. Therefore, the Defendants are liable to pay damages to the Plaintiff.

The learned District Judge, after considering all the evidence led in this case has entered judgment on 12.01.2000 in favour of the Defendants, holding that the Defendants had been possessing the land in dispute for a long time. This finding is totally against the evidence led in this case and contrary to the law of prescription.

I therefore hold that the judgment of the learned District Judge of *Kalmunai* dated 12.01.2000 is erroneous and must be set aside. For the reasons stated above, I allow the appeal and declare that the Plaintiff is entitled to the land described in schedule 'B' to the plaint, together with costs payable to the Plaintiff. The claim for ejectment of the Defendants is allowed. Since the Defendants have unlawfully possessed and cultivated the land in dispute, I also allow the plaintiff's claim for damages as prayed for in the plaint.

JUDGE OF THE COURT OF APPEAL