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

1. B. Farina Faumi
   of 211/52,1/2, No. 1 Block,
   Colombo Municipal Council Flats,
   Jumma Masjid Road,
   Maligawatta.

Appeal No. C.A. 46/2000 (F)
D.C. Colombo Case No. 17866/L

2. Mohamed Hussain Kanzul Ayne of
   No. 45/1, Mosque Lane,
   Muthuwella Mawatha,
   Colombo 15.

3. Fathima Jesliya Hakim of

   No. 614, ½, Aluthmawatha Road,
   Colombo 15.

Plaintiffs.

Vs.

Y.L.M. Nazim of
No. 119/2,
Vuystwyke Road,
Colombo 15.

Defendant.

1. B. Farina Faumi
   Of 211/52,1/2, No. 1 Block,
   Colombo Municipal Council Flats,
   Jumma Masjid Road,
   Maligawatta.

2. Mohamed Hussain Kanzul Ayne of
   No. 45/1, Mosque Lane,
   Mutuwella Mawatha,
   Colombo 15.

3. Fathima Jesliya Hakim of
No. 614, ½, Aluthmawatha Road,
Colombo 15.

Plaintiffs – Appellants.

Vs.

Y.L.M. Nazin of (Deceased).
No. 119/2,
Vuystwyke Road,
Colombo 15.
Defendant Respondent

1a. Ayesha Rasmi Nazim alias Mohmed
Nazim Ayesha Ramsi.,
No.123, Vuystwyke Road,
Colombo 15.

1b. Rasnam Nazim alias Mohmed Nazim
Rasnav,
No. 123, Vuystwyke Road,
Colombo 15.

1c. Himaya Nazim alias Mohmed Nazim
Ainul Himaya,
No. 123, Vuystwyke Road,
Colombo 15.

1d. Sarina Nazim alias Mohmed Nazim
Sarifa Fizal,
No. 119/2, Vuystwyke Road,
Colombo 15.

1e. Nafeil Nazim alias Mohmed Nazim
Naizal Aizun,
No. 119/2, Vuystwyke Road,
Colombo 15.

1f. Naizer Nazim alias Mohmed Nazim
Naizal Nihair,
No. 119/2, Vuystwyke Road,
Colombo 15.

1g. Rehana Nazim alias Mohmed Nazim
Fathima Misli Rehana Ramzin,
No. 119/2, Vuystwyke Road,
Colombo 15.

Substituted Defendant-Respondent.

Before : E.A.G.R. Amarasekara. J

Counsel : B.O.P. Jayawardena AAL with Oshada Rodrigo AAL for the Plaintiff-Appellant.
Parakrama Agalawatta for the Substituted Defendant- Respondent.

Decided on: 07.09.2018.

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

This is an appeal filed by Plaintiff-Appellants (hereinafter referred to as the Plaintiffs) against the Judgement dated 08.02.2000 of the Colombo District Court in Case No. 17866/L. The Plaintiffs instituted the above numbered action in the aforesaid District Court against the Defendant Respondent (hereinafter referred to as the Defendant) seeking a declaration of title to the land and premises more fully described in the second schedule to the Plaint and for ejectment of the Defendant and all those holding under him from the said premises. The Plaintiffs pleaded that the Defendant was in wrongful and unlawful occupation of the said premises from 01.10.1996 and further claimed damages at the rate of Rs. 5000/- per mensum from that date until delivery of vacant possession of the same to the Plaintiffs.

The Defendant filed his answer denying the claims of the Plaintiffs and claimed prescriptive title to the land in dispute. The Plaintiffs filed replication praying for the dismissal of the Defendant's claim in reconvention. At the commencement of the hearing parties admitted the jurisdiction of the court and issues numbered 1 to 3 were framed by the Plaintiff while the Defendant framed issues numbered 4 to 6. The 2nd and 3rd Plaintiffs testified in support of their case and document P1 to P9 were marked and produced through them. The Defendant gave evidence on behalf of himself.

P4 was tendered and marked subject to proof of a certified copy ("එහි සහතික පිටපතක් ඔප්පු කිරිමට යටත්ව ඉදිරිපත් කිරිමට අවසර පතයි") - vide page 30 of the proceedings dated 98.10.12. As per the aforesaid proceedings dated 98.10.12 it appears P4 was so marked at the request of the Plaintiffs who wanted to mark that document, but the proceedings do not reveal whether there was any objection to the document by the Defendant. P6 and P7 too were marked subject to proof- (vide pages 3 and 4 of the proceedings dated 09.03.1999). The Plaintiffs have marked and tendered a certified copy of P4 as P4a without any objection. (vide page 6 of the Proceedings dated 09.03.1999). However, as per the proceedings dated 09.03.1999, at the end of the Plaintiffs' case, the Defendant has reiterated his objection only for the documents marked P4 and P7. No objection seems to have been reiterated for other documents, including P4a and P6 tendered by the Plaintiff. Hence, as per the proceedings, the document marked P1, P2, P3, P4a, P5, P6, P8 and P9 have to be considered as evidence for all the purposes of the case. (See Sri Lanka Ports Authority Vs Jugolinija Bold East (1981) 1 SLR 18)

The Defendant in his written submissions filed in the District Court had attempted to submit that the proceedings at the closure of the Plaintiffs' case had to be corrected, but, if the proceedings were wrongly typed he should have taken steps to correct it with notice to the opposite party prior to the judgment. As both parties have filed their written submissions before the learned District Judge on the same date, the opposite party could not have any opportunity to reply to the allegation that there were errors in the proceedings with regard to the reiteration of objections at the end of the Plaintiffs' case. In such a situation this court sitting in appeal cannot consider that there are uncorrected errors in the proceedings with regard to the reiteration of objections at the closure of Plaintiffs' case. The learned District Judge seems to have considered the correction suggested by the written submissions of the defendant without giving an opportunity for the other side to comment on that. Such an approach cannot be approved by this court. In such a backdrop, this court has to consider that the Defendant reiterated his objections only to documents marked P4 and P7 at the end of Plaintiffs' case as evidenced by the proceedings. Since a certified copy of P4 has been marked as P4a without any objection it becomes evidence for all purposes of this case. Thus, objections raised against P4 becomes obsolete. On the other hand, as observed before in this judgment there is no clear indication in the proceedings that even P4 was objected to by the Defendant at the time it was marked and produced. Since objection to P6 was not reiterated at the end of the Plaintiffs' case as evidenced by the proceedings, this court has to consider that the objections to P6 was waived at the closure of the Plaintiffs' case. It is clear from the proceedings that the objection to P7 was reiterated, but as per the written submissions filed in this court by the Defendant, his objections was not for the P7. On the other hand, since the Defendant had admitted in evidence that the schedule to the Plaint describes the land in dispute (vide proceedings dated 13.07.1999), proof of P7 is not necessary for the success of the Plaintiffs' case if they can prove title to the land described in the 2nd schedule to the Plaint.

It is clear that the land in the 2nd schedule to the Plaint is part of the bigger land described in the 1st schedule to the Plaint. As mentioned before, the Defendant had admitted the boundaries described there in the schedule to the Plaint. It is also admitted by the defendant that he came on to the said land as a tenant of Buhari who is the Donor of Deed No. 88 dated 12.05.1967 marked as P6 by the Plaintiffs. To prove their paper title the Plaintiffs have tendered deeds marked P1, P3, P4a and P6 but the stance taken by the Defendant was that he has prescriptive title to the land in dispute. Since it is not in dispute that he came to the land in dispute as a tenant, he cannot deny the title of the landlord or his successors in title unless he proves an overt act and prescriptive possession from there onwards for a period of ten years. The learned District Judge has held that the Defendant failed in proving prescriptive title. It is true that the Defendant did not file an appeal against this decision. It may be for the reason that he is in possession and the Plaintiffs' case too was dismissed causing no harm to his rights. However, it is the duty of this court to see, in considering this Appeal filed by the Plaintiffs to see whether the learned District Judge properly assessed the evidence led in this case to come to the said decision of rejecting Defendant's claim.

The evidence led at the trial clearly shows that the Defendant was able to extract sufficient material from the witnesses of the Plaintiffs through cross examination to prove an overt act and prescriptive possession over 10 years.

The 2nd Plaintiff in his evidence at pages 5 and 6 of the Proceedings dated 12.10.1998 has stated as follows;

"ප්ර. මේ ඔප්පුවෙන් 1983 දි තමන්ට දේපල ලැබුණම ගෙදර ඉන්න අයට දැනුම් දුන්නා ද
තමන් තමයි අයිතිකරු කියා?

උ. පොලිසියට ගිහින් කිව්වා.

ප්‍ර. ඒ ගැන කියා ගෙයත් ඉල්ලා සිටියාද?

උ. කීප වතාවක් ගේ ඉල්ලා සිටියා, ඒ අනුව දුන්නා.

ප්‍ර. එසේ කලේ ඊට අවුරුදු දෙකකට කලින්?

උ. ඊට කලින් දි තිබුනා.
අද සිට අවුරුදු 2කට කලින්, එනම් 95, 96 දි ඊට කලින් ඒක වතාවක් ඉල්ලා සිටියා.

ප්‍ර. ඒ කොයි කාලයේද?

උ. ලිව්වට පසුව.

ප්‍ර. ලියා කොපමණ කාලයකට පසුවද?

උ. මාස 6 කට පසුව.

ප්‍ර. දෙදෙනෙකුට ලිව්වා නම්, අබ්දුල් අයිඩ්ට කිව්වා මෙයින් අයින් වෙන්න කියා?

උ. ඔව්.

ප්‍ර. තමන්ට කුලිය දුන්නේ නැහැ ගෙයින් යන්න කිව්වම මටයි ගේ අයිති කියා විත්තිකරු

කිව්වා.?

උ. ඔව්."

The above answers show that after about 6 months from the date the 2nd Plaintiff got the deed in her name, she asked the Defendant to leave the premises, but he stayed there stating that he is the owner without paying any rent to her. It seems the Plaintiff also had to complain to the Police. This action was filed in the District court only in 1997. The aforesaid incident of refusing the ownership of the 2nd Plaintiff and the predecessors of the other Plaintiffs who got the title in 1983 from the same deed should have taken place somewhere in 1984.

Even the 3rd Plaintiff has corroborated the above position in answering the questions posed to her during cross examination in the following manner;

ප්‍ර. 1983 වරෂය තමන්ට අයිතිවාසිකම් ලැබුණ ගමන් තමන් මේ විත්තිකරුගෙන් මුදල් ඉල්ලුවාද?

උ. ඉල්ලුවා දුන්නේ නැහැ.
කුලිය දුන්නේත් නැහැ තාමත් පදිංචිව ඉන්නවා.

(Vide page 10 of the proceedings dated 09.03.199)

Even the Defendant has answered in the following manner;

"ප්‍ර. ඒගොල්ල කවදා හරි තමන් පදිංචි ගෙය හා ඉඩම ඒ අයට අයිතිය කියා ඇවිත් කථා කලාද?

උ. කාලෙකට පෙර කොහේන්ද කෙනෙක් ආවා. මම කිව්ව මේක මගේ ගෙය කියා.

ප්‍ර. ඒ ආවේ කවුද කියා මතකද?

උ. මට හරියට කිව්වේ නැහැ.

ප්‍ර. 71 න් පස්සේ කුලිය දුන්නේ කාටද?

උ. අයිතිකරුවෙක් අවෙත් නැහැ. ආපු කෙනා බුක්තිය ගත්තේත් නැහැ.

එදා සිට අද වන තුරු මගේ නිවසක් හැටියට මම පදිංචිව බුක්ති විදිනවා."

(Vide page 2 and 3 of the Proceedings dated 13.07.1999)

ප්‍ර. මේ පැමිණිල්ලේ උප ලේඛණයේ සඳහන් මායිම් තමන් පිලිගන්නවාද?

උ. ඔව්.

ප්‍ර. තමන් පදිංචි ඒ ස්ථානයේ?

උ. ඔව්.

(Vide Page 4 of the Proceedings dated 13.07.1999)

ප්‍ර. එක්කෙනෙක් අයිති කියා ගෙන ආවා කිව්වා නේද?

උ. ඔව්.

ප්‍ර. ඒ මොන අවුරුද්දේද?

උ. අවුරුදු අටකට දහයකට පමණ පෙර ගැනු කෙනෙක් ආවේ.

Even though the evidence of the Defendant standing alone is not strong enough to prove adverse possession for more than 10 years from an overt act, the Defendant as aforesaid has extracted evidence from the Plaintiffs' witnesses to prove adverse possession for more than 10 years from an overt act. Thus, it is my considered view that the learned District Judge erred in evaluating the facts revealed by the Plaintiffs' witnesses in coming to the conclusion that the Defendant failed in proving his case. When there is evidence from the plaintiffs' witnesses that the defendant denied their title on a date which is 10 years before the date of filing the plaint and continued to stay in the property in dispute without paying any rent or accepting plaintiffs' title from that date onwards, the learned District judge cannot come to any other conclusion except for holding in favour of the defendant. What the Plaintiffs' witnesses admit need not be proved again by the Defendant.

For the foregoing reasons, I hold that the learned District Judge erred in holding that the Defendant failed in proving his prescriptive title. Therefore, it is my view that at the time of filing the Plaint, the Defendant had acquired Prescriptive title.

Hence this appeal is dismissed with costs.

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E.A.G.R. Amarasekara

Judge of the Court of appeal.