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

5A. Nimal Ranjith Weerathunga,
Karandana,
Dhammulla.
5A Defendant-Respondent

CASE NO: CA/625/2000/F
DC RATNAPURA CASE NO: 2027/P

Vs.

1. Ratu Nakathige Sedoris,
(Deceased)
1A. Rathu Nakathige Yasaneris,
2. Rathu Nakathige Nandoris,
3. Kedhachari Nakathige Burlina,
4. Kedhachari Nakathige Pabalina,
All in Karandana,
Dhammulla.
Plaintiff-Respondents
& Several Other
Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Anuruddha Dharmaratne for the 5A Defendant-Appellant.

Geoffery Alagaratnam, P.C., with Harindi Seneviratne for the 1A and 3A Plaintiff-Respondents.

S.W. Premaratne for the 2nd Plaintiff-Respondent.

Rohan Sahabandu, P.C., for the 3rd Defendant-Respondent.

Argued on: 02.11.2018

Decided on: 26.11.2018

Samayawardhena, J.

This is a partition action. Pending trial, the 5th defendant has died and his son has been substituted as the 5A defendant. The 5A defendant filed this appeal against the Judgment of the District Court of Ratnapura dated 26.07.2000.

There is no corpus dispute. There was no pedigree dispute either. The only contesting defendant was the 5th defendant who claimed prescriptive title to the Lots C2 and D in Plan No. 245 marked V1.

According to the plaint, the 5th defendant does not come under the pedigree of the plaintiffs. Nor did the 5th defendant claim that he was a co-owner of the land. His claim was purely on prescription. The learned District Judge has rejected the 5th defendant's claim.

At the argument before this Court, the learned counsel for the 5A defendant indirectly raised a pedigree dispute for different purpose. That is to say that the learned District Judge has failed to investigate title to the land and therefore retrial shall be ordered.

According to the plaint and the evidence of the 1A plaintiff, there were three original owners to the land. They were Nakathige Punchi Baba (4/8 share), Angappuli Radage Angappuliya (1/8 share) and Wanasinghe Mudalige Don Piloris Appuhamy (3/8 share). According to the evidence of the 1A plaintiff, Piloris has had only one child, namely, Asilin Nona alias Nonahamy.[1] But the learned counsel for the appellant drawing attention to the plaintiffs' own Deed marked P6 dated 14.06.1942 points out that Piloris has had three children, namely, Wanasinghe Mudalige Asilin Nona, Wanasinghe Mudalige Magi Nona alias Nonohamy and Wanasinghe Mudalige Podi Appuhamy. Therefore, the learned counsel says that at least the share of Wanasinghe Mudalige Magi Nona alias Nonohamy and Wanasinghe Mudalige Podi Appuhamy shall be left unallotted (so that the appellant can have the benefit of it). By Deed P6, it is clear that Piloris had not one, but three children.

The next question is whether the share of the other two children of Piloris, which has not been disclosed by the plaintiffs shall be left unallotted. The answer to that question can be found in the Deed P6 itself. According to that Deed, all three children of Piloris have transferred their rights by that Deed to Almon Weerakoon, whose rights have later devolved on the 1st plaintiff.

[1] Page 120 of the Brief.

Therefore, there is no room for the share of those two to be left unallotted.

Learned counsel for the appellant further submits that issue No.13 which was earlier rejected, has later been answered by the learned District Judge against the 5A defendant. That is not a decisive factor.

I must stress at this juncture that there is a misconception that Judgment shall be understood by reading issues and answers only. It is not so. When answering a spate of issues in a case at a stretch, momentary lapses on the part of the Judge might occur. That is human as Judges are not robots, but mortals with flesh and blood. However, it should not vitiate the Judgment unless they go to the root of the case. As Justice Edussuriya on behalf of the Supreme Court held in *Udugamkorale v. Mary Nona [2003] 2 Sri LR 7 at page 9*: "*the answers to issues in a judgment are almost always monosyllabic and are a follow up on the matters in issues discussed, dealt with and decided in the body of the judgment. Hence the decision of the case must be arrived at by a careful reading of the body of the judgment and not on a superficial reading of the answers to the issues.*"

The proviso to Article 138(1) of the Constitution states that "*no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*"

In *Vernon Boteju v. Public Trustee [2001] 2 Sri LR 124 at 128-129*, Justice Weerasekera stated: "*Proviso to Article 138(1) of the Constitution provides that no judgment, decree or order of any Court shall be reversed or varied on an error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. The learned District Judge has arrived at findings on the points for determination upon an evaluation of the evidence led in this case. Therefore, despite the error that has occurred in answering issue No. 13 and his failure to answer some issues it is not open to the defendant-appellant to assert that prejudice has been caused to his substantial rights or has occasioned a failure of justice." (Vide also Sunil Jayaratne v. Attorney-General [2011] 2 Sri LR 91 at 101)*

The aforesaid two matters the learned counsel for the appellant raised before this Court (lack of proper investigation of title and answering an issue which has already been struck off), have neither prejudiced the substantive rights of the 5A defendant nor occasioned a failure of justice. Hence the Judgment cannot be disturbed on those two grounds.

There is no dispute that Wanasinghe Mudalige Magi Nona was the mother of Weeratunga Arachchilage Akmon Singho, and Weeratunga Arachchilage Akmon Singho was the father of the 5A defendant. In other words, the grandmother of the 5A defendant was Wanasinghe Mudalige Magi Nona.

Notwithstanding the fact that neither the plaintiffs nor the 5A defendant has taken up such a position at the trial or before this Court, it appears to me that the said Wanasinghe Mudalige Magi

Nona was one of the three children of Wanasinghe Mudalige Don Piloris Appuhamy—one of the original owners of the land referred to above.

This is also fortified by P9—a certified copy of the proceedings in a Village Tribunal case had between Baba Guraa (the transferee of the Deed P5) as the plaintiff, and the 5A defendant's grandmother—Wanasinghe Mudalige Magi Nona as the defendant, regarding a dispute in respect of ownership and possession of Wanasinghe Mudalige Don Piloris Appu's share.

In P9, it is, *inter alia*, recorded as follows: "*This defendant denies that she caused any damage to plaintiff by reason of not allowing plaintiff to possess the said land or pay any house rent as this defendant's father Wanasinghe Mudalige Don Piloris Appu was the sole owner of the said land and house sold the same to Wanasinghe Mudalige Don Podi Sinno Appuhamy and that this defendant is living with the leave and licence of the said Podi Sinno Appuhamy and this defendant therefore denies liability*."

P9 has been marked through the evidence of the 5A defendant.[2] It is the submission of the learned counsel for the appellant before this Court that the Court should not have allowed that document to be marked through the 5A defendant because he has stated in evidence that he was not aware of that case. However, it is noteworthy that, although the 5A defendant was represented by a senior counsel at that time, the said senior counsel has not objected to it. If the counsel for the 5A defendant wanted to object to that document, it should have

[2] Page 170 of the Brief.

been done when it was being marked, but not at the stage of appeal.

"In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal—vide explanation to section 154 of the Civil Procedure Code" (Cinemas Ltd v. Sounderarajan [1998] 2 Sri LR 16. Vide also: Siyadoris v. Danoris (1841) 42 NLR 311, Silva v. Kindersly (1914) 18 NLR 85)

It appears to me that the learned counsel for the 5A defendant did not object to it, because he was aware of that case—vide cross examination of the 1A plaintiff by counsel for the 5A defendant at page 135 of the Brief, where the learned counsel has suggested to the 1A plaintiff that, the said case was withdrawn, which is correct.

According to P9, Magi Nona—the grandmother of the 5A defendant was living on the land—at that time in 1945, with the leave and licence of Wanasinghe Mudalige Don Podi Sinno Appuhamy. According to the Deed P6, the said Wanasinghe Mudalige Don Podi Sinno Appuhamy is the brother of Magi Nona.

For the aforesaid reasons, it is clear that Magi Nona, and her son—the deceased 5th defendant, and his (the 5th defendant's) son—the 5A defendant are not total strangers to the co-owners of the land, who are parties to the action.

Magi Nona had earlier been a co-owner, but later alienated her rights by the Deed P6. Nevertheless, she continued to live on the land followed by her successors-in-title, the 5th and 5A defendants, for a very long time—may be more than 45 years. The 1A plaintiff who was 50 years of age in his evidence admits that Magi Nona and her son-Akmon had been in possession from the time he can remember.[3]

However, long possession alone cannot be regarded as prescriptive possession. In terms of section 3 of the Prescription Ordinance, No. 22 of 1871, as amended, such possession to be treated as prescriptive shall *inter alia* be adverse to or independent of that of the real owner. Permissive possession to become adverse possession, the claimant must establish a starting point for his acquisition of prescriptive rights. This cannot be done by forming a secret intention unaccompanied by an act of ouster.

"*It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.*" *(Seeman v. David [2000] 3 Sri LR 23. Vide also: Reginald Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37, Chelliah Vs. Wijenathan (1951) 54 NLR 337 at 342, Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212)*

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[3] Page 127 of the Brief.

When the relationship between the parties is close such as in the instant action, the overt act manifesting the commencement of adverse possession and strong affirmative evidence for continuation of such adverse possession are all the more important. *(De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292, Podihamy v. Elaris [1988] 2 Sri LR 129)*

The 5A defendant in this case far from establishing adverse possession, at least, never took up the position that he and his predecessors maintained adverse possession against the other parties of the case.

What the 5A defendant stated in evidence was that he does not know how and when his grandmother—Magi Nona came into possession. As Chief Justice G.P.S. de Silva held in *Sirajudeen v. Abbas [1994] 2 Sri LR 365*: *"Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights. A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title."*

The prescriptive claim of the 5A defendant fails.

Appeal is dismissed but without costs.

Judge of the Court of Appeal