

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

A.G. Upali Hemachandra,
No. 306/2,
Wakwella Road,
Galle.
Plaintiff-Appellant

CA CASE NO: CA/1171/1998/F
DC GALLE CASE NO: 11705/L

Vs.

Wilkin Dias Abeygunawardena,
(Deceased)
Defendant-Respondent

1. Ajith Naleendra Dias
Abeygunawardane,
No. 41/4,
Jawatte Road,
Colombo 4.
2. Anusha Aloka Gunasekara,
No. 46/28,
Thennekumbura,
Kandy.
Substituted Defendant-
Respondents

Before: Mahinda Samayawardhena, J.
Counsel: M.D.J. Bandara for the Plaintiff-Appellant.
H. Withanachchi for the Substituted Defendant-
Respondents.

Decided on: 18.01.2019

Samayawardhena, J.

The plaintiff filed this action seeking declaration of title to the land described in paragraph 2 of the plaint, ejectment of the defendant therefrom and damages. The defendant filed the answer seeking dismissal of the action. After trial, the learned District Judge of Galle dismissed the plaintiff's action. Hence this appeal by the plaintiff.

The land described in paragraph 2 of the plaint is a land known as Lot A of *Mahagedarawatta* in extent 33 perches. Boundaries to the said Lot have been given in the plaint, but the plaintiff never produced a Plan to identify the said Lot.

According to the plaint, Arnolis Perera was the original owner of the land, and upon his death, his rights devolved on his children, namely Cyril and Violet, and then, Cyril and Violet gifted it to the plaintiff by Deed P1 dated 20.10.1988. The plaint is dated 23.03.1990.

In the answer the defendant whilst seeking dismissal of the action stated that his father was the owner of the said Lot in extent 33.06 perches by virtue of the Final Partition Decree in

Galle District Court partition action No. 17105/P marked V3, and upon his death, his rights devolved on his children including the defendant, and thereafter all of them gifted their rights by Deed V12 dated 14.11.1989 to Godvin Dias Abeygunawardena, one of the aforementioned children, and therefore the said Godvin Dias Abeygunawardena is a necessary party to this action.

Despite this revelation, the plaintiff did not think it fit to make Godvin Dias Abeygunawardena a party defendant, which, in my view, goes to the root of the plaintiff's case. At least, by that time, the plaintiff would have realized that he has filed the action against a wrong party, or, to say the least, without making Godvin Dias Abeygunawardena his action is futile.

The learned counsel for the plaintiff-appellant during the course of argument stated that the defendant could have made Godvin Dias Abeygunawardena a party to the action. There is no such burden or necessity on the part of the defendant. The plaintiff shall prove his case.

Although the plaintiff during the course of cross examination admitted his knowledge about the said partition action and the fact that the defendant's father was allotted Lot A by the Final Partition Decree¹, he never presented his case either in the plaint or in his evidence in chief in that manner. Further, although he did not identify the land in suit by way of a Plan, during the course of cross examination he admitted that the Final Partition Plan was with him, which was marked by the

¹ Vide page 122 of the Appeal Brief.

defendant through the plaintiff as V2.² The Final Partition Decree has been marked as V3. This itself shows the *mala fides* of the plaintiff and the untrustworthiness of the plaintiff as a witness.

The plaintiff's position was, as I stated earlier, that Arnolis Perera, his grandfather, was the original owner of Lot A, and upon his death, rights devolved on the two children, and then they gifted it to him by Deed P1. In Deed P1 the donors state that they acquired title to the land by prescription. As I also said earlier, the plaintiff filed this action less than 1 ½ years after the execution of that Deed. Therefore, if he is to succeed in this action, he should have proved prescriptive title of the donors. But the plaintiff did not call either of the donors to give evidence.

A person who claims prescriptive title against the rightful owner who has the paper title has a very heavy burden to prove all the requirements prescribed in section 3 of the Prescription Ordinance. Mere possession over ten years is not prescriptive possession. The possession shall be by title adverse to or independent of that of the rightful owner. The plaintiff knew the rightful owner.

The plaintiff does not say from when his predecessors started prescriptive possession against the defendant's father who was admittedly the owner of the disputed Lot A by a Partition Decree. This is crucial if the defendant is to succeed on prescription. *"Where a party invokes the provisions of section 3 of the*

² Vide pages 100 and 101 of the Appeal Brief.

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.”³ “He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster.”⁴

In addition to Deed P1, the plaintiff has marked Assessment Rate Payment Receipts as P2-P14. Some of them are not relevant to Lot A, the assessment number of which, according to paragraph 2 of the plaint, is 306/2. In any event, they are not conclusive evidence to prove possession.⁵

The Judgment of the District Court is affirmed and the appeal is dismissed but without costs.

Judge of the Court of Appeal

³ *Sirajudeen v. Abbas* [1994] 2 Sri LR 365 per G.P.S. de Silva C.J. Vide also *Reginald Fernando v. Pabilinahamy* [2005] 1 Sri LR 31 at 37 per *Bandaranayake J. (later CJ)*, *Chelliah Vs. Wijenathan* 54 NLR 337 at 342 per *Gratiaen J.*, *Mitrapala v. Tikonis Singho* [2005] 1 Sri LR 206 at 211-212 per *Dissanayake J.*

⁴ *Seeman v. David* [2000] 3 Sri LR 23 at 26 per *Weerasuriya J.*

⁵ *Sirajudeen v. Abbas (supra)* at 369-370 per G.P.S. de Silva C.J., *De Silva v. Commissioner of Inland Revenue (1978)* 80 NLR 292 at 296 per *Sharvananda J. (later CJ)*