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

C. A. 789/97 (F)
D. C. Avissawella, 16551/P

1. Namalgamuwage Tillekeratne
2. Namalgamuwage Rosalinnona

Both of Gonagala North.

5th and 9th DEFENDANTS-APPELLANTS

VS

P. Babanona of Gonagala North

PLAINTIFF-RESPONDENT

Namalgamuwage Gunawardena
of Gonagala North and 14 others

DEFENDANT-RESPONDENTS

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : H. Withanachchi for the 5th & 9th Defendant-Appellants

Athula Perera with Nayomi Kularatne for the Plaintiff-Respondent

ARGUED ON : 16.07.2018

WRITTEN SUBMISSIONS TENDERED ON : 14.09.2018 (by both parties)

DECIDED ON : **31.01.2019**

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M. M. A. GAFFOOR, J.

The Plaintiff-Respondent above named (hereinafter referred to as the "Respondent") instituted this partition action (on 16.12.1981) bearing case No. 16551/P to partition the land called *"Nanawalagawa Owitta Watta"* more fully described in the schedule to the plaint in extent of 1A-1R-30P amongst the Plaintiff - 4/7 shares, 1st to 3rd Defendants - 1/7 shares each of the corpus.

The Respondent in her Plaint set out the pedigree and stated that the land was given to Namalgamuwage Lokuhamy by Namalgamuwage Brampi Singho for the purpose of plantation and 4th to 8th Defendants are in possession of a small portion of the land at the time of the institution of this case, however, they have only entitled to said plantation share. It was the further position of the Respondent that, the 9th Defendant without any rights over the corpus was forcibly trying to construct a building in the land.

The case thereafter fixed for trial on 14 issues raised by parties and at the trial on behalf of the Respondent, the husband of the Respondent, P. K. Sumanadasa, the Licensed Surveyor who prepared the Preliminary Plan were gave evidence and concluded the case of the Respondent. On behalf of the Defendants, the 5th, 9th, and 11th Defendants were gave evidence and concluded the case of the contesting Defendants.

At the conclusion of the trial the learned District Judge allocated shares in the following manner:

- Plaintiff : 4/7 shares
- 1st Defendant : 1/7 shares

- 2nd Defendant : 1/7 shares
- 3rd Defendant : 1/7 shares
- The 5th, 9th and 11th Defendants are entitled to only 25 perches by way of prescription.

Being aggrieved by the said judgment and the allotting shares, the present appeal preferred by the 5th and 11th Defendant-Appellants (hereinafter referred to as the "Appellants") on the following grounds:

1. The Respondent was not identified the land properly; and
2. The Appellants have prescribed the land.

In this appeal, contesting Appellants had taken a position that the land in dispute is not correctly depicted in Preliminary Plan; it was their contention that only a portion of the land is surveyed and shown in Preliminary Plan and the land sought to be partitioned is larger than the land shown in the Preliminary Plan. Therefore, in the District Court they have requested for a fresh commission. It is to be noted that the above request was allowed by the Court, even the Appellants failed to submit required documents for a fresh commission (*vide page 222 of the appeal brief*).

The above said Licensed Surveyor in his evidence stated that there had been no objections from the parties with regard to his survey of the land and he gave evidence that the depicted in the commission has been properly identified and surveyed.

The meats and bounds of the land to be partitioned have been correctly defined by Plan "X". The learned District Judge noted that the 3 boundaries of the land had been correctly identified as reasonably required in a partition

action. The Surveyor in his evidence has refused the position taken up by the Respondents that they objected to the extent of the land surveyed by him (*observation of the learned District Judge at page 2226 of the appeal brief*).

The Appellants another submission was that, they have prescribed the land. In contrast the Respondent's position is that (in the District Court of Avissawella, Case No. 8996) the Appellants have admitted the ownership of Brampi Singho – the predecessor in title of the Respondent and the 1st to 3rd Defendants. Therefore, the Respondent further submitted that the Appellants were only permissive possessors.

Thus the Counsel for the Respondent correctly submitted that to overcome the permissive nature of their possession, the Appellants should adduce cogent evidence before court and thereafter they should establish their uninterrupted, peaceful, and continuous possession for more than 10 years. But the Appellants failed to do so.

In **DE SILVA VS. COMMISSIONER GENERAL OF INLAND REVENUE***,* [80 NLR 292], Sharvananda, J. clearly and deeply observed that:

> *"The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no*

hostility to or denial of the title of the true owner there can be no adverse possession In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible. Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Such permissive possession is not in denial of the title of the mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession.

Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licencee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the perimeter's title. In order to discharge such onus, there must be clear and affirmative

> *evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. Where the parties were not at arm's length, strong evidence of a positive character is necessary to establish the change of character." (Pages 295 and 296)*

In **D.R. KIRIAMMA V. J.A. PODIBANDA AND 8 OTHERS** Udalagama J. adverted to some important points to be borne in mind in considering a claim of prescriptive title:

> *"Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by title adverse to an independent to that of a claimant or plaintiff."*

In this regard, the observation of the Hon. G. P. S. De Silva, C. J. in **ALWIS VS. PIYASENA FERNANDO** [(1993) 1 SLR 119] is noteworthy:

> *"..It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."*

In **ARIYADASA VS. ATTORNEY GENERAL[** (2012) 1 SLR 84] the Court observed as follows:

> *"Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanor and the deportment of a witness..."*

Therefore, in the light of the above backdrop, I see no reason to interfere with findings of the learned District Judge.

Accordingly, I dismiss the appeal with Costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL