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

Vidanage Piyadasa (Deceased)

Unawatuna, Ganahena.

Plaintiff

Vidanage Padmini Chandralatha

Substituted Plaintiff

Case No: CA 853/2000(F)

D.C. Galle Case No: 12766/L

Vs.

Vidanage Gunadasa

Unawatuna, Ganahena.

Defendant

AND NOW

Vidanage Gunadasa

Unawatuna, Ganahena.

Defendant-Appellant

Vs.

Vidanage Piyadasa (Deceased)

Unawatuna, Ganahena.

Plaintiff-Respondent

Vidanage Padmini Chandralatha

Substituted Plaintiff-Respondent

Before: Janak De Silva J.

Counsel:

Rohan Sahabandu P.C. with Hasitha Amarasinghe for Defendant-Appellant

Anura Gunaratne for Substituted Plaintiff-Respondent

Written Submissions tendered on:

Defendant-Appellant on 16.05.2019

Substituted Plaintiff-Respondent on 04.07.2018

Argued on: 01.02.2019

Decided on: 18.06.2019

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Galle dated 22.09.2000.

The Plaintiff-Respondent (Respondent) filed the above styled action seeking a declaration of title and eviction of the Defendant-Appellant (Appellant) from Lot 7A of subdivided Lot 7 of the land called Gurukanda Bodawatte alias Mawatha Bodawatte alias Mawatha Gederawatte morefully described in the schedule to the plaint.

The case pleaded by the Respondent is that Lot 7A is a portion of subdivided Lot 7 in plan no. 94 prepared by A. Weerasinghe, Licensed Surveyor and that the said Lot 7 was partitioned by the final partition decree in D.C. Galle 3175/P. It is further contended that the said Lot 7 was initially owned by the Appellant, Respondent and their two sisters and the rights of the Appellant and his siblings were transferred to the Respondent by deed no. 3629 dated 28.08.1970 (P3) (Appeal Brief pages 215-217) while the rest of the shares of the said Lot 7 were also transferred to the Respondent by deeds marked P4 and P5. The Respondent further states that Lot 7 was subdivided into Lot 7A to 7F and the Appellant occupied Lot 7A with the leave and licence of the Respondent.

The Appellant on the other hand contended that deed no. 3629 (P3) was not signed by the Appellant and is a fraudulent deed and that the Appellant is occupying the land in dispute as a co-owner as well as on prescriptive title.

The learned Additional District Judge held that the plaintiff had proved his title and gave judgment as prayed for in the plaint and hence this appeal.

This being a *rei vindicatio* action the burden was on the Respondent to prove his title [*De Silva v. Goonetilleke* (32 NLR 217), *Pathirana v. Jayasundara* (58 NLR 169), *Mansil v. Devaya* (1985) 2 Sri.L.R. 46, *Latheef v. Mansoor* (2010) 2 Sri.L.R. 333, *Dharmadasa v. Jayasena* (1997) 3 Sri.L.R. 327]. In this context deed no. 3629 (P3) assumes vital importance.

It was marked subject to proof and hence the Appellant submits that P3 must be proved in accordance with section 68 of the Evidence Ordinance. The Appellant submits that neither the notary who attested it or at least one of the attesting witnesses were called to testify as to its due execution. The evidence indicates that the notary and one of the witnesses were dead by the time the trial was taken. The Appellant contends that the Respondent should have then called the other witness and no explanation is available as to why he was not called. It is further submitted that even if no attesting witness was available the Respondent should have proved P3 according to section 69 of the Evidence Ordinance which was not done. Reliance is placed on the decisions in *Seneviratne v. Mendis* (6 C.W.R. 212), *Kiribanda v. Ukkuwa* (1 S.C.R. 216), *Somanather v. Sinnathamby* [(1899) 1 Tamb. 38], *Wijegunathilake v. Wijegunathilake* (60 N.L.R. 560), *Arnolis v. Muthu Menika* (2 N.L.R. 199) and *Joseph Fernando v. Perlyn Fernando* (61 N.L.R. 177).

It is true that P3 was marked subject to proof. However, when the Respondent closed his case P3 along with P1 to P9 was led in evidence without any objection from the Appellant [Appeal Brief page 114].

In *Latheef and Another v. Mansoor and Another* [(2010) 2 Sri.L.R. 333 at 371] Marsoof J. held:

> "There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts."

In *Sri Lanka Ports Authority and Another v. Jugolinija* [(1981) 1 Sri.L.R. 18 at 24] Samarakoon C.J. held:

> "If no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the cursus curiae of the original Civil Courts."

This was quoted with approval and followed by the Supreme Court in *Balapitiya Gunananda Thero v. Talalle Methananda Thero* [(1997) 2 Sri.L.R. 101] where it was held that where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case and that this is cursus curiae. There is a long line of cases where this principle has been recognized [*Silva v. Kindersle* (18 N.L.R. 65), *Adaicappa Chettiar v. Thomas Cook and Son* (31 N.L.R. 385), *Perera v. Syed Mohamed* (58 N.L.R. 246), *Cinemas Limited v. Sounderarajan* (1988) 2 Sri.L.R. 16, *Stassen Exports Ltd v. Brooke Bond Group Ltd and two others* (2010) BLR 249].

That remained the legal position when the argument in this matter was concluded. When the judgment was been prepared the Supreme Court delivered judgment in *Dadallage Anil Shantha Samarasinghe v. Dadallage Mervin Silva and Another* [S.C. Appeal 45/2010; S.C.M. 11.06.2019] where Sisira De Abrew J. held (at page 8):

> "...I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that the failure on the part of a party to object to a document during trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved..."

The deed P3 then cannot be used as evidence in view of this decision merely because it was not objected to at the close of the case of the party which produced it although marked subject to proof.

However, section 70 of the Evidence Ordinance reads:

> "The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

Section 70 is an exception to section 68 of the Evidence Ordinance [Coomaraswamy, *The Law of Evidence*, Vol. II Book 1, page 112]. In *Dadallage Anil Shantha Samarasinghe v. Dadallage Mervin Silva and Another* (supra) there was no such admission and hence that decision is distinguishable from the facts in this case.

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned [Section 17(1) of the Evidence Ordinance]. Statements made by a party to the proceeding are admissions [Section 18(1) of the Evidence Ordinance].

The letter dated 28.07.70 (P10) signed by the Appellant and his two siblings Premawathie and Asilin Nona clearly states that they had sold their rights to the Respondent. This document was put to the Appellant during cross- examination and admitted by him [Appeal Brief pages 149-150]. That is sufficient proof of the execution of P3 and can be proved against all three of them [*Sreenivasaraghava Iyengar v. Jainambeebee Ammal and Others* (48 N.L.R. 49)].

Furthermore, the Appellant admitted under cross-examination that he became aware of P3 in 1985 and that he did not make any complaint about it until this case was filed in 1993 [Appeal Brief pages 143-145]. These facts raise a serious doubt about the creditworthiness of the Appellants contention that P3 is a fraudulent deed.

There was also a section 66 matter in terms of the Primary Courts Procedure Act between the parties bearing case no. 57155 where the Respondent in his affidavit (Appeal Brief page 238)took up the position that he bought lot 7 from the Appellant, Premawathie and Asilin Nona by deed no. 3639(P3) and that he gave permission to the Appellant to live in the house he got from case no. 3175/P. The Appellant in his counter affidavit [Appeal brief pages 239-240] does not deny those averments. That also amounts to an admission.

This then also negates the prescriptive title that the Appellant sought to establish. 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 [*Chelliah v. Wijenathan* (54 N.L.R. 337 at 342)].

In any event once it is accepted that P3 is part of the evidence before court, the Appellant then has to establish the required ingredients for prescriptive title after 1970. As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court [*Sirajudeen and two Others v. Abbas* (1994) 2 Sri.L.R. 365]. The Appellant has marked in evidence three receipts as V1 to V3 indicating that he had paid assessment rates. V1 is dated 1965 while V2 and V3 are dated 1990 and 1991. The evidence in this case falls far short of establishing any prescriptive title on the Appellant.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned Additional District Judge of Galle dated 22.09.2000.

Appeal is dismissed with costs.

Judge of the Court of Appeal