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

C.A. Appeal No. 98/2000(F)

Kuliyapitiya DC Case No. 10962/L/94

Rajapakse Pedidurayalage Wimalasena,
Wewagama,
Iddamalpitiya

Plaintiff/Appellant

V.

Rajapakse Pedidurayalage Menika,
Wewagama,
Iddamalpitiya.

Defendant/Respondent

BEFORE : **JANAK DE SILVA, J**

K.PRIYANTHA FERNANDO, J

COUNSEL : Sanjeewa Ranaweera for Plaintiff /Appellant

Rasika Dissanayake for the Defendant/ Respondent.

ARGUED ON : 26.03.2019

WRITTEN SUBMISSIONS

FILED ON : 22.02.2019 by the Defendant/Respondent

JUDGMENT ON : 03.07.2019

K. PRIYANTHA FERNANDO, J.

01. Plaintiff Appellant (Appellant) instituted the above numbered action in the District Court of Kuliyapitiya against the Defendant Respondent (Respondent) on 7th June 1994, seeking a declaration of title to the land more fully described in the 2nd schedule to the plaint, to eject the Respondent there from and for damages.

02. Respondent filing answer claimed for prescriptive title over the land. After trial, the learned District Judge delivered her judgment in the Respondents favour stating that the Respondent has prescriptive title to the land in suit over the Appellant.

03. Being aggrieved by the said judgment, Appellant lodged the instant appeal. Although, the petition of appeal has urged 17 grounds of appeal, grounds can be summarized into three.

    1. The judgment of the learned District Judge is perverse and not in accordance with the evidence adduced at the trial.
    2. The learned District Judge has failed to consider that there was no overt act evident, for the court to find that the Respondent has gained prescriptive title over the land in suit.

3. The learned District Judge erred when she found that the Respondent has gained prescriptive title to the land in suit.

04. Parties at the trial admitted that in terms of the final decree in the partition case No. 5082 in District Court Kurunegala, the Appellant was allotted lot C and that the Respondent was allotted lot B of the plan No. 4078 of the licensed surveyor D.D. Gunasekera.

05. It was evident that the above lot No. C in plan No 4078 is depicted in plan No 2414 of the licensed surveyor R. B. Navaratne and that the portion of the land in dispute which is described in the 2nd schedule to the plaint is lot No. 01 of the said plan No.2414 which was marked as P3.

06. Counsel for the Appellant submitted that the Appellant and the Respondent are siblings. Defendant in his evidence had said that he had no intention to have possession adverse to the Appellant with regard to lot C of plan No. 4078. Counsel contended that Defendant has failed to show any overt act adverse to the Appellant to gain prescriptive title over the land in suit.

07. Counsel for the Respondent submitted that the dispute between the parties is a boundary dispute and that the legal remedy would have been an action for demarcation of boundaries. He further submitted that according to the Appellant, the encroachment had been in 1988 and that the Appellant had slept over his rights for 6 years. It is the contention of the counsel that as it is a boundary dispute, prescription would not apply and that the Plaintiff would only be entitled to compensation and not ejection.

08. It is an admitted fact that the Appellant became the owner of Lot C of plan No. 4078 and that the Respondent became the owner of lot B of the same. It

is clear that lot No. 01 of plan P3 which is the portion of land in dispute is a part of the said Lot C of plan No 4078.

09. Evidence of the Respondent was that about two years after the survey was done in the partition case, he erected the fence according to the survey of plan No. 4078 and he continued to possess the land as it is (including the portion of land in suit). However, in his evidence he had clearly admitted that he never had any intention to encroach into the land belonged to his brother, the Appellant. He further said that he never possessed the land belonged to Appellant illegally or by force as mentioned in his answer. (Page 83 of the Court record).

10. On the evidence of the Respondent himself it is clear that he had no intention to encroach into or adversely possess the lot C of plan No 4078 that belongs to the Appellant.

11. However, there had been a dispute over a jack tree and parties have settled it by sharing the value equally. According to the Appellant, that had been in 1988.

12. When the parties are close relatives, the party who claims prescriptive title over the other, will have to show that his possession was hostile to the real owner and that it was adverse to the owner after a definite time of an overt act.

13. In case of ***I. de Silva V. Commissioner General of Inland Revenue S.C.1/76 B.R.A 364 80 N.L R page 292,*** His Lordship Justice Sharvananda (as he then was) said:

> *"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. 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 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 licensee to show when and how the possession became adverse. ..."

14. His Lordship went on to say:

> *"... Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession to adverse possession, unless such conduct unequivocally manifests denial of the perimeter's title. In order to discharge the onus, there must be clear and affirmative evidence of the change in the character of possession. Evidence must point to the time of commencement of adverse possession. Where parties were not at arm's length, strong evidence of a positive character is necessary to establish the change of character."*

15. In case of ***Podihamy V. Elaris [1988] 2 Sri L.R. 129*** Court said:

> *"... In viewing the claim of the 1st Defendant based upon prescriptive possession one must not lose sight of the very important fact that the parties are close relatives who had been living in amity during earlier times which therefore rendered it necessary for the 1st Defendant to show some positive act suggesting ouster as a starting point for prescriptive possession to commence. ..."*

16. As observed in paragraph 09 of this judgment, the clear evidence of the Respondent was that he never had any intention to encroach into the land belonged to the Appellant. The dispute that was settled over a jack tree was also in about year 1988 according to the Appellant. Therefore, the Respondent has failed to prove that he possessed the land in suit adversely to the Appellant after an overt act 10 years prior to the institution of this action in the District Court. Hence, the Respondent has failed to prove that he has

gained prescriptive title to the land in suit over the Appellant. The learned District Judge has therefore erred when she answered the issues in favour of the Respondent on the prescription.

17. The contention of the counsel for the Respondent that this is a boundary dispute and that prescription is not relevant, is untenable. The position taken by the Respondent by his answer was that he had gained prescriptive title to the land and issues were also raised on that basis. He is not entitled to change the character of the action at this stage.

18. In the above premise, I find that the grounds of appeal urged by the Appellant have merit and accordingly the judgment of the learned District Judge dated 14.03.2000 is set aside.

Appeal allowed with costs.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL