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

CA/671/95 (F)
D.C. Galle, Case No. 12013/L

Asoka De Mel Co. Ltd
No 162, Polhengoda Road,
Colombo-05

PLAINTIFF

Vs.

1. W. Gunadasa
   Ganahena Unawattuna

DEFENDANTS

AND NOW BETWEEN

W. Gunadasa
Ganahena Unawatuna

Vs.

Asoka De Mel Co. Ltd
No. 162, Polhengoda Road
Colombo-05

PLAINTIFF DEFENDANT COMPANY

Before: **M. T. MOHAMMED LAFFAR, J. &**
K. K. A. V. SWARNADHIPATHI, J.

Counsel:

Defendant Appellant
Rohan Sahabandu(P.C) with S. Senanayaka

Plaintiff Respondent
Ranjan Suwaderathna (P.C) with Ranjih.D.Perera

Argument By written submission.

Decided on: 01. 04. 2021

The appeal lies from a case heard in the District Court of Galle. The plaintiff filed the case in 1991 against the defendant. According to the plaintiff, he had brought a portion of land from one Asoka de Silva in 1990.
The plaintiff further states that the portion of land marked as H in Plan No: 2377A made by A. Ganegoda Licensed Surveyor on 1.3.1931 in respect of land called Niyandagalawatta, which was the subject matter of the partition case in 25481/P at the District Court of Galle. The plaintiff company had bought the potion of the land, from the owner whose pedigree runs back to the partition case, which is the subject matter of the present case.

In the said partition action, by a fiscal conveyance lot H of the aforementioned plan had devolved on the 31st and 37th defendants. At an auction, one Piyadasa de Silva had bought the portion of land, including the section, which is the subject matter of this case. In the year 1947, this land was sold to Thevara Hannadige Sugathdasa de Silva. He in turn transferred to Asoka Ananda Piyadasa in 1958. The plaintiff had bought the land from the said Asoka Ananda Piyadasa in 1990. All these deeds was produced at the trial.
The defendant had not disputed the pedigree. However, his contention was that as he was born and bread in the premisses for nearly 65 years, he has a prescriptive right. He, too, had brought evidence to prove his possession. After the evidence, the learned District Judge had held with the plaintiff.

Aggrieved by the judgment pronounced on the 15th of December 1995, the defendant moved the appellate jurisdiction of this court. This case was initially argued before justice A.H.M.D. Nawaz and Justice H.C.J. Madawala.
However, the judgement was not signed by justice Madawala due to her sudden passing away, the Supreme court decided to fix the case for arguments again at the Court of Appeal. When the case was taken for argument, both parties agreed to dispose the case through written submissions.

The defendant Appellant argued that even though the plaintiff-respondent had stated that he had entered the land on or about 24.9.1990 and started building a temporary building, in reality, that is not so. In his answer, he had claimed ownership of the building bearing Assessment No: 344 situated in the land described by the plaintiff. He admits that he is not claiming the whole land but only the portion of land covered by the building. Further, he had sought for a declaration of the title and legal ownership only to the land in which the building stands. His

contention is that he and his predecessors have enjoyed the subject matter claimed by him for over hundred years. Therefore, by virtue of uninterrupted independent and adverse possession, he is entitled to claim under Section 3 of the Prescription Ordinance.

At the District Court, the plaintiff had filed this case seeking for,

Declaration of title

Ejectment of the defendant and all those were holding under him.

An injunction stopping the construction by the defendant.

The defendant, in his answer, had specifically stated that from the land described by the plaint, the portion of the land covering Assessment No:344 should be excluded. He prayed,

To reject the plaint

To declare the defendant's ownership to the building bearing assessment No:344

At the trial, only the jurisdiction was admitted by both parties. The plaintiff raised six issues, and the defendant raised four issues.

Evidence was recorded, and the judgement was pronounced in favour of the plaintiff. Aggrieved by the said judgement dated 15th of December 1995, the defendant lodged this appeal. According to the defendant Appellant, the learned trial judge had failed to answer issue numbers 2,3,4,5 and 9 without considering the evidence correctly. His contention is that plaintiff had failed to establish the fact that there was no proof of handing over the possession by the fiscal to plaintiffs' predecessors. Therefore, the defendant's uninterrupted possession was never broken.

He further argues that the plaintiff had failed to prove his possession by proving the Assessment register or any bills which would normally have been paid if the plaintiff was in possession. Quoting case *Warnakula Vs Ranmini Jayawardhena (1990) 1 SLLR 206* stressing the importance of a judge giving reasons in answering issues. The Appellant has laid importance to the fact that the learned District Judge had failed to appreciate the law of prescription When writing the judgement. According to the plaintiff-respondent the defendant had tried to build and renovate the falling down boutique in September 1990, at which point the plaintiff made a complaint to the police, and a case was filed at the district court. He had further reiterated that

considering the answer, the Appellant has not claimed the entire land. In that event, he should show the boundaries of the portion of the land claimed by him through a plan drawn for the purpose of showing the boundaries of the potion claimed. It was his duty to request for a commission for the purpose of demarcation of the portion of land claimed by him.,

When perusing the judgement, it is evident that the defendant had not produced the documents. Therefore, the learned judge had stated that he is not in a position to consider documents that had not been handed over to the court by the defendant.

I pursued the original court case record, proceedings, petition of appeal and written submission of both parties. When considering the partition law, judgement in a partition action is a judgement in the ream. Anyone to whom a share had not been given is considered as a non-receiver from the land. He, therefore, cannot claim on prescription as far as the partition action is considered.

The defendant claims that he and his predecessors had lived for more than 100 years, but they have not claimed at the partition case. When considering the judgement of *Silva Vs Siyadories (year) 14 NLR 268,* it is evident Laselles C.J had said, "The ownership of a building vest, by the rule of accession in the owners of the soil. It is true that in some cases, a person who builds on the land of another obtains the essential rights of an owner by virtue of the right of superficies, but the right is acquired by means of an agreement between the owner and the superficiary and in view of the provisions of Ordinance No: 7 of 1840, it is at least doubtful whether such an agreement would be valid unless evidenced by notarial deed is provided. Co-owner who puts up a building on the common property is in a totally different position from a person who under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owner. The co-owner could prevent him from building on the common property without the consent of the other co-owners, but the building, once erected, accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action".

Considering this judgment, it is very clear that just because there was a building, the defendant-appellant cannot claim rights. It is very clear that the Appellant or his predecessors had not participated in the partition action. Therefore, the Appellant is estopped from claiming

prescription to the subject matter of the partition action. The judgement in case No: 25481/P of the District Court of Galle becomes a judgement in rem binding even the Appellant's predecessors.

It was the duty of the Appellant to establish his entrance to the subject matter of this case after the partition judgement. He should prove how the prescription started and uninterrupted enjoyment of the land against the others. Today in discussing prescription, we have to depend on the Prescription Ordinance of No:22 of 1871 amended by Act No:2 of 1889 Section. 3 of the said Ordinance stipulates the ingredients of prescription.
Therefore, whenever a case comes before the Court on Prescription it is the duty of the judge to satisfy himself that all ingredients of prescription had been proved by the person claiming the prescription. In the present case before this court, I see no proof of adverse possession by the Appellant. He nearly states that he and his predecessors had been in possession. That statement does not prove adverse possession. In *De Silva-Commissioner General of Inland Revenue (year) 80 NLR 292,* Sharvananda J. held that where 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 *Gunasekara Vs Tissera (1994) 3 SLLR 245,* M.D.H. Fernando J stated that if any person wants to succeed, he must meet the requirement of the high order of proof to establish adverse possession and the burden of proof vests entirely upon the co-owners who seeks to claim the prescriptive title against the other co-owners.

Even though this case is not a partition action, the aforesaid judgement proves that it is the duty of the person claiming prescription must prove his adverse possession.

The learned District Judge had analysed the evidence even though the defendant-appellant had failed to produce marked documents for pursual and evaluate at the judgement the learned District Judge had considered V3 with the official witness who had given evidence. The witness had stated even though by pursuing document V3, the witness could only say that it is an assessment tax to a place called No:344 Galle Road Matara.

However, the witness is not in a position to disclose the land to which the receipt of the number 344 belongs. Even the documents V5 through not produced by the defendant-appellant, the

learned District Judge had noted that the Grama Niladari who came to give evidence had not accepted this letter. Grama Niladari's evidence was that the letter was not written by him. Therefore by his evidence document V5 was not proved. It is the same with V2. Again, the defendant-appellant had not produced the document to Court. However, the learned District Judge has evaluated evidence of the official witness of the National Housing Development Authority. This witness too, had given evidence by pursuing V2 and stating that he is not in a position to specifically state to what land the letter was issued nor can he say whether it's regarding a house or a toilet. Therefor document V2 was not proved according to the learned District Judge.

Considering all the above, it is my view that the learned District Judge had very clearly discussed and evaluated the evidence in delivering his judgement. There is no reason to disturb the judgement pronounced by the Additional District Judge of Galle on the 15th of December 1995.

In view of this, I dismiss the appeal with cost and direct the Registrar of the Court of Appeal to remit the case record with this judgement to the original court.

Judge of the Court of Appeal

M. T. MOHAMMED LAFFAR, J.

I agree.

Judge of the Court of Appeal