

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

Ahamed Ismail Mohomed Smaid alias Ahamed Ismail
Mohomed Savahir

238, Bandarawattha, Eheliyagoda

DCF - CA Appeal No. 711/97(F)
Awissawella D.C. Case No. 570/L

Plaintiff

Vs.

1. Mohomed Sali Husain Bari
33, New Road,
Darga Town

2. K. V. Premadasa
Chief Clerk, Government Hospital, Eheliyagoda

Defendants

NOW BETWEEN

K.V. Premadasa
Retired Chief Clerk
Nadurana Road Eheliyagoda

2nd Defendant- Appellant (deceased)

AND

K.V.A. Nalika Sandamali
No. 21/1, Nadurana Road Eheliyagoda

Substituted 2nd Defendant-Appellant

Vs.

Ahamed Ismail Mohomed Smaid alias Ahamed Ismail
Mohomed Savahir
No. 238 Bandarawatta
Eheliyagoda

Plaintiff - Respondent

Mohomed Sali Husain Bari No. 44, New Road Darga Town

1st Defendant - Respondent

Before: N. Bandula Karunarathna J.

&

R. Gurusinghe J.

Counsel: S.A.D.S. Suraweera with P.K.C. Dilhan for the substituted 2nd defendant-appellant.

Naveen Marapana PC with Thenuja Meegahawatta for plaintiff-respondent.

Written Submissions: By the substituted 2nd defendant-appellant Not filed

By the plaintiff-respondent 05.12.2012 & 24.09.2020

Argued on: 07.02.2020 & 27.04.2021

Judgment on: 13-10-2021

N. Bandula Karunarathna J.

The 2nd defendant-appellant (hereinafter called and referred to as the "2nd defendant") preferred this appeal against the judgment dated 04.06.1997 of the learned Additional District Judge of Awissawella in case No. 570/L.

The plaintiff-respondent (hereinafter referred to as the "plaintiff") instituted this action in the District Court of Awissawella on the 17.07.1989 seeking *inter-alia* a declaration of title to the land more fully described in the schedule of the plaint and sought further an ejection of the 2nd defendant-appellant. The 2nd defendant filed two amended answers on the 12.09.1990 and 22.02.1993 respectively. The 2nd defendant sought that the action of the plaintiff be dismissed. He further prayed a declaration of title in his favour.

The plaintiff filed an amended plaint on the 24.03.1995. The 2nd defendant did not file an amended answer in reply to the said amended plaint. The case proceeded for trial on the said amended plaint dated 24.03.1995 and the amended answer dated 22.02.1993.

The plaintiff by his amended plaint stated that;

- (a) Wickreme Gama Athi Ralalage Sudu Ethena Hamine was the owner of an undivided 1/4th share of the land called "Pussalle Hene Deniya" which is more fully described in the schedule "අ" of the amended plaint.
- (b) Said Sudu Ethena Hamine gifted her undivided 1 /4th share to her son Asgangula Pathirannahalage Wanigasekera on the 02.03.1934.
- (c) Walipitiyage Dona Emi Wanigasekera (wife of said Wanigasekera) and Sumithra Peris, Devapriya Senerath Wanigasekera and Shriyakanthi Palipana (children of said Wanigasekera) succeeded to share of Wanigasekera upon his death.

- (d) Said Emi Wanigasekera was a declarant under the Land Reform Law and the Land Reform Commission by statutory determination published in the Extra Ordinary Gazette dated 21.06.1991 bearing number 667/14 allowed her to retain the land more fully described in schedule "a" of the amended plaint.
- (e) Said Emi Wanigasekera and her children gifted the land to Rangallalage Charlis Singho by deed of gift bearing number 42 dated 25.05.1984 and he was placed in possession of the land.
- (f) Said Charlis Singho transferred the above land to the plaintiff and the 1st defendant by deed bearing number 1433 dated 23.04.1986 and they were placed in possession of the land accordingly.
- (g) The plaintiff and his predecessors in title have had acquired the prescriptive title to the corpus.
- (h) The 2nd defendant without any title to the corpus entered into the possession of the land on or about 13.07.1989 and disturbed the possession of the Plaintiff by erecting a building.

The plaintiff respondent sought *inter-alia* a declaration that he and the 1st defendant be declared as the owners of the subject matter of this action and sought further that the 2nd defendant be ejected there from together with everyone under him.

The 2nd defendant by his amended answer dated 22.02.1993 stated that;

- (a) the corpus of this action is a portion of the land called "Pussallawa Hene Deniya" in extent of one acre one rood and thirty-nine point five perches (A:1 R:1 P:39.5) which was described as lot number 82 in final village plan of the village of Kandangamuwa.
- (b) Asgangula Pathirannahalage Thegis Appuhamy was the original owner of said land (which was in extent of A:1 R:1 P:39.5).
- (c) Asgangula Pathirannahalage Gunawardhana succeeded to said land as the only heir of said Thegis Appuhami.
- (d) Said Gunawardhana caused the above land partitioned by plan number 1514/66 dated 15/05/1966 prepared by Allen Smith Licensed Surveyor.
- (e) Said Gunawardhana transferred an undivided 30 perches out of lot 4 and the whole of lot 5 in extent of 20 perches to Kutti Widana Archchige Jemis Singho by deed number 2705 dated 10.10.1966.
- (f) Said Jemis Singho and his brother Bais Appuhami were married to one lady ("eka geikema") and 2nd defendant, his brothers and sister succeeded to Jemis Singho's rights accordingly.
- (g) 2nd defendant and his predecessors were in possession of the corpus.

The 2nd defendant prayed *inter-alia* to dismiss the action of the plaintiff.

Parties raised issues of the case on the 12.07.1996. Issue number 1 -5 were raised on behalf of the plaintiff-respondent and Issue number 6-17 by the 2nd defendant-appellant. The plaintiff gave evidence and tendered documents marked පැ1 to පැ6, X and X1 in evidence. Documents පැ 7 to පැ 13 were marked by the plaintiff during the case of the 2nd defendant. The 2nd defendant gave evidence and called Madduma Ralalage Gunesekera (Chairman of the Farmers Committee), Amarasekera Disanayakage Chithra Shelton (Chairman, Provincial Council) and Hitihamilage Gamini Amarasiri Bandara (cultivation officer) to testify on his behalf. The 2nd defendant tendered documents marked 2 ඩ 1 to 2 ඩ 23 in evidence.

The trial Judge delivered his judgment on the 04.06.1997 granting relief as prayed for in the amended plaint. The 2nd defendant-appellant invoked the appellate jurisdiction of this Court on the grounds set out in paragraph 15 of the petition of appeal dated 28.07.1997.

During the course of the 2nd defendant's evidence, the plaintiff produced;

- (a) The petition filed by Thegis Appuhamy (the original owner of the 2nd defendant) in the testamentary case of his own father in the District Court of Rathnapura, 779. This Case was later transferred to District Court Awissawella and re-numbered as 5/T of 1923.
- (b) The affidavit of the said Thegis Appuhamy which was filed in the same case.
- (c) The inventory file in the same case.

It is evident that when these documents were shown to the 2nd defendant, he admitted that Thegis Appuhamy had got this land from his father Asgangula Pathirannahalage Appuhamy who had died leaving a widow named Wickreme Gama Athi Ratalage Sudu Ethena and 6 children. Thegis Appuhamy was one child and the donee in පැ 3 namely Asgangula Pathirannahalage Wanigasekera was another child. The 2nd defendant also admitted the land in suit was the land no. 7 in the inventory marked as පැ9.

He also admitted that on the basis of these documents, his original owner also, had several step sisters. He admitted that these documents show that his predecessor in title had admitted that Thegis Appuhamy's step mother Suduetana and his step brother Wanigasekera and four step sisters, all had rights in the land in dispute. Suduetana would therefore have got ½ of what Thegis Appuhamy's father had. As per the inventory පැ 9 the deceased had a 1/2 share of Pussellehene deniya. Therefore, Suduetana would, on inheritance, have got a 1/4 share.

Both parties concede the larger land called Pussellehene deniya was about one acre in extent. On this basis, Sudaetana's share would be around 1/4 of an acre in extent. This tallies with what is shown in plan පැ 5. The plaintiff also produced two other deeds from the step sisters of Wanigasekera to him marked පැ 10 & පැ 11, although the plaintiff does not claim title on those deeds.

Therefore, on the admission of the 2nd defendant's own predecessor in title Suduetana the plaintiff's predecessor in title had a 1/4th share in the land in suit. The 2nd defendant did not challenge the devolution of title from Suduetana to the plaintiff.

The documents clearly show that the Land Reform Commission (LRC) had by its statutory determination as published in the Gazette පැ4 had in lieu of Wanigasekera's undivided 1/4th share vested a divided extent of A0, R1. P 05 in his widow who was the declarant, under the LRC law. The recitals in deed no: 42 dated 25.5.1984 marked as පැ2 clearly spell out the relationship

between Wanigasekera and the donors on that deed. Therefore, it is clear that the title that was with Suduetana has now devolved on the plaintiff and the 1st defendant.

The decision of the five-judge-bench in the Supreme Court in Jinawathie and Others Vs Emalin Perera 1986 (2) SLR 121 decided that, Upon coming into operation of the Land Reform Law No. 1 of 1972 on 26.08.1972, all agricultural land in excess of 50 acres became vested in the Land Reform Commission in absolute title free from all encumbrances and the former owner became a statutory lessee who had to make a statutory declaration within the specified period on the prescribed form of the total extent of the agricultural land held by him as such statutory lessee. In the declaration the required particulars had to be furnished along with a plan or sketch plan. The portion which the statutory lessee would prefer to retain could also be indicated.

Thereafter, the Land Reform Commission makes a statutory determination specifying the portion or portions of the land which the statutory lessee is allowed to retain. On the publication of the statutory determination in the Gazette the Commission disentitles itself to any right or interest in the agricultural land specified in the statutory determination from the date of such publication.

Where any agricultural land is co-owned, each co-owner was deemed by a statutory fiction to own his share in the co-owned land as a distinct and separate entity for the purposes of the Land Reform Law. Where a person or thing is deemed to be something it only means that whereas such person or thing is not in reality that something the law requires him or it to be treated as if he or it were with all the attendant consequences and incidents. The rule of *eiusdem generis* does not operate to impose any limitation on the notional situation arising from the application of the deeming provision as the enumerated classes are exhaustive of the genus.

Once the statutory determination is made the person in whose favour it was made becomes owner of the land specified in the determination with all the incidents of ownership. The land does not then cease to be a distinct and separate entity and it does not become once again an undivided portion of the larger land from which such specified portion was carved out. By virtue of the Amending Act No. 39 of 1981 any encumbrance which subsisted over and in respect of the undivided shares, the recipient of the statutory determination held in the larger land would however be revived. Subject to this such recipient is absolute owner of the portion of land specified in the statutory determination vested with the *jus utendi*, the *jus fruendi* and (so far as the law does not prohibit) the *jus abutendi*, the right of alienation and the right to vindicate his title in an action at law.

On the basis of this decision even though Thegis Appuhamy and Suduetana were at one time co-owners of Pussellehene Deniya, by the statutory determination which was later published in the Gazette 4 Dona Emmie Wanigasekera of Kuruppu Road (the 2nd defendant had admitted that Thegis Appuhamy's brother Wanigasekera lived at Kuruppu Road - vide page 8 of the proceedings of 18.10.1996) became the absolute owner of that portion of it as is now depicted in plan 5. That title has passed to the plaintiff and the 1st defendant.

The plan no. 1514/66 of Allen Smith Licensed Surveyor dated 15.05.1966 marked as 2 2 shows that the land in suit is at the extreme eastern end of that plan; but, witness Madduma Ralalage Gunesekera (former Chairman of the Farmers Committee), was emphatic that the 2nd defendant possessed that portion of the land right in the middle. (Vide his evidence in re-examination on 11.12.1996) This evidence puts an end to any claim he may have had to a prescriptive title, as it clearly shows that all his documents relate to another portion of Pussellehene Deniya which is

right in the middle of the larger land depicted in Allen Smith's plan marked 2 2 and not to the land in suit.

Further, the paddy field register 12 and the inquiry notes relating to the amendment contained therein marked 12 A clearly show that Dona Emmie Wanigasekera had in fact possessed the land in suit and it is on the basis of the fact that the cultivation committee had accepted the fact that Charles Singho had worked the same as her "Anda Cultivator" that the amendment sought for in 1983 was allowed. In fact, a witness called by the 2nd defendant on the 07.01.1997 had been the cultivation officer who presided at that inquiry on the 21.12.1983. (Vide 12 A).

The 2nd defendant did not oppose to this Inquiry relating to the application made by Dona Emmie Wanigasekera. When perusing document marked 13 & 13 A, it does not contain any statement by the 2nd defendant along the lines of what he gave as evidence in this present case. The 2nd defendant has not proved that he ever objected to the inclusion of the name of Dona Emmie Wanigasekera or her "Anda Cultivator" namely Charles Singho, who incidentally is the donee on 2 although he admitted that the books are kept open for that purpose each year.

The 2nd defendant has failed to prove that the documents marked by him applied to the divided portion of Pussellehene Deniya as depicted in the LRC plan 5 nor, has he succeeded in proving that he possessed the land depicted in that plan. The evidence of his own witness has shown that he never possessed that land.

It is crystal clear that Thegis Appuhamy the predecessor in title of the 2nd defendant -appellant did not have absolute ownership of the disputed corpus and he was only a co-owner. According to the available evidence, Suduethana and Asangula Pathirennalage Wanigasekera, the predecessors of the plaintiff were also co-owners of the said disputed land.

Section 7 of the Land Reform Law No.1 of 1972 reads as follows;

"For the purposes of this Law, where any agricultural land is co-owned, each co- Owner shall be deemed to own his share in such land as a distinct and separate entity."

The five-judge-bench decision of the Supreme Court in Jinawathie and others vs. Emalin Perera (supra) held that where the Land Reform Commission by a statutory determination allots to one co-owner a defined portion of a co-owned and undivided land, that co-owner becomes the absolute owner of the defined portion so allotted to him.

It was held at page 128 of the same judgement;

"It is, however, necessary in this case to consider the operation of the provisions detailed above in regard to a person, whose extent of agricultural land over and above the said ceiling of 50 acres does not constitute a distinct and separate entity but comprises only undivided interests in a larger land, which he is entitled to only in common with several other persons, all or several of whom, however, do not own interests over and above the said ceiling. Sec. 7 of this Law is the provision which has to be resorted to in such a situation. The provision of this section requires, by the use of a statutory fiction, the interests of a co-owner, which would, at the time this Law comes into operation be only an undivided share of a larger land owned in common, to be treated as a distinct and separate entity. "(Emphasis added)

It was further held at page 129 of the same judgement;

"...The moment this Law comes into operation the undivided share of a co-owner, whether he be one whose interests are over fifty acres or not, becomes, in the eye of the law, a distinct and separate entity, equal to the undivided extent he was earlier entitled to in the common land. Such entity is, at that time, still not identified or located on the ground, as distinct from the larger land. It is, at that stage, as learned Counsel submitted, only notional, and only confined to paper. By the use of this fiction undivided interests are treated as divided, and a co-owner is treated as the sole owner of a distinct entity, in order to set the provisions of this Law in motion. The effect of the operation of the provisions of sec. 7 is to bring about a separation or partition of the undivided share of a person, who, at the time this Law comes into operation, owns such interests in common with several others, and transform such undivided share into a distinct and separate portion. Even though still only notional and only existing on paper, yet, the law requires the extent of land such person is entitled to, to be treated as a distinct and separate entity" (emphasis added)

In a vindicatory action the plaintiff must himself have title to the property in dispute. The burden is on the plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the defendant in occupation. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence. In consideration of the foregoing principle relating to the legal concept of ownership, and to an action rei vindication, it seems to me that the plaintiff-respondent did, at the time of the institution of these proceedings, have, "sufficient" title which he could have vindicated against the 2nd defendant-appellant in proceedings such as these.

It was decided in Subramaniam v. Sivarajah 46 NLR 540 that, the Court presumed an ouster from the fact that one co-owner was in possession of the entire land and took the profits exclusively and continuously for a period of over 60 years without accounting to the other co-owners who lived in close proximity under circumstances which indicated a denial of a right to the other co-owners to take or receive them.

In the present case, however, the facts are different. The co-owners are in possession of different allotments of the co-owned land.

Section 11 of the Act No 14 of 1986, Land Reform (Special Provisions) Act is as follows;

Insertion of new section 59A in the principal enactment.

11. The following new section is inserted immediately after section 59, and shall have effect as section 59A of the principal enactment;

Prescription Ordinance not to apply to lands vested in the Commission.

59A. No person shall, by possession or user of any agricultural land or estate land vested in the Commission, acquire any prescriptive title to any such land and neither the Prescription Ordinance nor any other law relating to the acquisition of rights by virtue of possession or user shall apply to any such land unless undisturbed and uninterrupted adverse possession for a **period of over one third of a century** is proved by such person.

The learned counsel for the 2nd defendant filed his written submission on the 10.02.1997, after the trial was concluded. In that written submission the learned counsel has indicated on behalf of his client, as follows;

“ඉහත විස්තර කල කරුණු අනුවද විත්තිකරු සහ ඔහු වෙනුවෙන් සාක්ෂි දුන් සාක්ෂිකරුවන්ගේ සාක්ෂිද සමස්ථයක් වශයෙන් ගත් කල මෙකී බිම් කොටස දෙවන විත්තිකරු සහ ඔහුගේ පූර්වගාමීන් 1966 සිටම අවුරුදු 30 කට ආසන්න කාලයක් නිරවුල්ව අධිකාරිව අන් අයවලුන්ගේ අයිතිවාසිකම් පිළි නොගෙන හුක්ති විද ඇති බවද, පැහැදිලිවම පෙනී යයි. ඒ අනුව කාලසීමා ආඥා පනතේ ප්‍රතිපාදන පරිදි 2 වන විත්තිකරුට මෙම බිම් කොටස හිමිව ඇත්තේය.”

When considering the above section 59A of the amended Land Reform Commission Act, to claim prescriptive rights the 2nd defendant-appellant in the present case should have proved that he was having at least 34 years of undisturbed, uninterrupted and adverse possession against the plaintiff. According to the above-mentioned paragraph of the written submission filed in the District Court by the learned counsel for the 2nd defendant, he had only 30 years of prescriptive rights.

Learned Counsel for the 02nd Defendant Appellant argued that the Statutory Determination by the LRC had been gazetted on 21.06.1991 and the Plaintiff had purchased the land as claimed by him, in the year 1986 from Charlis Sinngho. The date of the institution of the instant action was on 17.07.1989. It was further argued for the 02nd Defendant Appellant that as the Plaintiff did not have any title at the time of instituting the action, the plaint was liable to be dismissed.

It is my view that this case proceeded for trial on the amended plaint dated 24.03.1995. Thus, there is no merit of the said argument on behalf of the 2nd Defendant Appellant.

The Land Reform Commission by its order published in the Extra Ordinary Gazette notice bearing number 667/14 dated 21.06.1991 made statutory declaration under S.19 of the Land Reform Law (vide පැ4) allowing Emmie Wanigasekera to retain a specific portion of land called Pussellahene Deniya. Therefore, to succeed in his claim, the 2nd defendant should have proved that he was having, prescriptive rights for 34 years; undisturbed, uninterrupted and adverse possession against the plaintiff, prior to 21.06.1991.

For the foregoing reasons, I am of the opinion that the plaintiff-respondent's action is entitled to succeed.

The appeal of the 2nd defendant-appellant is, accordingly, dismissed with costs.

The judgment of the learned Additional District Judge of Awissawella dated 04.06.1997 is affirmed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal