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

CA 562/98 (F)

D.C. Matale Case No. L 4101

1. Naranpanawa Gedera Karunadasa
2. Naranpanawe Gedera Gunawathie

Both of: 42 Mile Post, Moragollewa, Dambulu Oya, Dambulla.

Defendant-Appellants.

vs.

Helle Liyanaarachichige Don Lambert Seneviratne, 'Ruwan' Stores, Moragollewa, Dambulu Oya, Dambulla.

Plaintiff-Respondent.

Before : A.W.A. Salam, J.

Counsel : W.D. Weeraratne for the Defendant-Appellant and Priyantha Alagiyawanna for the Plaintiff-Respondent.

Argued on : 22.11.2012

Written Submissions tendered on: 31.05.2011.

Decided on : 30.04.2013

A W A Salam, J

The defendant-appellants have preferred this appeal to have the judgment dated 29 May 1998 of the learned district judge set aside. The appeal came to be filed upon the conclusion of a suit filed by the plaintiff-respondent against the defendant-appellant praying inter alia for a declaration of title to the property described in schedule B to the plaint together with similar declaration that the property described in schedule C to the plaint is part and parcel of the land which is described in schedule B to the plaint. The plaintiff-respondent further sought an order of ejectment of the defendant-appellants from the subject matter of the action and damages.

The plaintiff-respondent in his plaint categorically pleaded that the defendant-appellants was the owner of the subject matter of the action at one point of time and it was sold to him by deed No 1125 dated 14 December 1981 attested by B.S Perera, Notary Public. The land that was thus sold to the plaintiff-respondent is in in extent of 3 acres and identified as being situated towards the northern side of the land described in schedule A to the plaint. For this reason the plaintiff-respondent stated that he came to possess the said land described in schedule B. There was no dispute that the defendant-appellants owned the balance portion of the said land towards the south of the larger land. Since the common

boundary between the land of the plaintiff- respondent and that of the defendant -appellants was uncertain, the plaintiff-respondent took steps to fix the common boundary but without success. The several attempts by the plaintiff-respondent to fix common boundary amicably with the defendant-appellants were also turned out to be futile as the defendant-appellants while claiming a land in extent of 1 acre along the southern boundary of the land had obstructed to fix the boundary. The portion of the plaintiff-respondent's land said to be encroached by the defendant-appellants is described in schedule C to the plaint.

The defendant-appellant filed answer admitting that they had by the said deed No 1125 transferred 3 acres of the said land to the plaintiff-respondent. However, they took up the position that although the said deed referred to an extent of 3 acres, the land sold to the plaintiff-respondent is restricted to the land which is located within the boundaries described in the said deed 1125 and therefore the defendant-appellants have not sold any property beyond the said boundaries.

Quite importantly, when the matter came up for trial in the lower court, two admissions were recorded at the instance of both parties and thereafter evidence was led in relation to issue the 8 issues of which 1 to 5 were raised on behalf of the plaintiff-respondent and the rest (6 to 8) on defendant-appellants' behalf.

At the trial the plaintiff gave evidence and called M. Rajahsekaram, licensed surveyor to testify on his behalf. At the conclusion of the plaintiff-respondent's case documents marked P1, X and Y were produced and the case of the plaintiff-respondent was closed. The appellant however chose not to give evidence or to produce any documents. The learned district judge thereafter delivered his judgment granting relief to the plaintiff-respondent as prayed for in the plaint.

As far as the admissions recoded at the trial are concerned it is important to note that there had been no dispute that the defendant-appellants were the owners of the property described in schedule A to the plaint in extent of 6 acres. The other admission was that by deed No 1125 the defendant-appellants sold a portion of land from and out of the said 6 acres to the plaintiff-respondent to constitute an extent of 3 acres which is more fully described in schedule B to the plaint.

The defendant-appellants had inter alia taken up the position that the plaintiff-respondent has purchased the subject matter without a plan and if there be any deficiency in the extent, the plaintiff-respondent should bear consequences and in any event the action of the plaintiff-respondent is prescribed in terms of section 10 of the Prescription Ordinance.

As regards the question of deficiency the plaintiff-respondent contended that by P1 the defendant-appellants have in unambiguous language transferred in the name of the plaintiff-respondent a portion of land in extent of 3 acres. It is further submitted that in the schedule to deed No 1125 the eastern, northern and western boundaries of the said land are clearly fixed except the southern boundary which has been described as rest of the said land. He further submits that deed marked as P1 deals with an extent of exactly 3 acres. In the circumstances learned counsel for the plaintiff-respondent submitted that his client had purchased from the defendant-appellants a land which is in extent of 3 acres with specific boundaries and the mere absence of a plan should not be a ground to deprive the plaintiff-respondent to obtain a declaration of title to 3 acres from and out of a larger land admitted to have belonged to the defendant-appellants at one point of time.

As a matter of fact the absence of plan at the time of the plaintiff-respondent having purchased a definite area of 3 acres from the northern portion from and out of the larger land, owned by the defendant appellants should not stand in the way of plaintiff-respondent's right to obtain a declaration of title to the land in extent of 3 acres.

As was urged on behalf of the plaintiff-respondent, if he is denied the relief on the ground that there was no plan and the

maxims *in pari delicto potior est conditio defendentis* (the defendants position is superior if the culpability is equal) is applicable, it would end up in a great injustice. In the first place to purchase a property without a plan is no offence. Equally the plaintiff-respondent is not guilty of negligence to apply the maxim in favour of the defendant-appellants. Therefore the maxim *in pari delicto potior est conditio defendentis* has no application to the present case.

Taking into consideration the fact that the defendant-appellants had sold the plaint-respondent a portion of land from the larger land which he owned at one point of time giving the extent specifically as 3 acres describing 3 boundaries, I am of the view that the learned trial judge was correct in declaring the plaintiff-respondent as the owner of the corpus. Even assuming that the maxim cited above is applicable, yet this is a fit case where the maxim could be relaxed for the plaintiff-respondent was not at fault in purchasing rights without a plan.

The plaintiff-respondent has purchased the property in question on 14 December 1981. He has filed the action on 11 January 1990. Since the action had been instituted after 9 years from the date of the said deed, the action cannot be said to have prescribed in terms of section 10 of the Prescription Ordinance.

Even otherwise as the defendant-appellants had not admittedly possessed the land in question for 10 years, as is evident from the deed on which he has sold his rights to the plaintiff-respondent, it cannot be said that the plaintiff-respondent had lost the right to the property in question for non-user for 9 years.

Quite surprisingly, the defendant-appellants in the answer had failed to take up the position that the action of the plaintiff-respondent is prescribed in law. They neither raised an issue as to the question of prescription. The issue with regard to plea of prescription has been raised for the first time by the defendant-appellants in their written submissions.

In the case of Brampy Appuhamy Vs Gunasekara 50 NLR 253 Basnayaka J (as his Lordship was then) held that where the effect of prescription Ordinance is merely to limit the time within which an action may be brought, the court will not take the statute into account unless it is expressly pleaded by way of defence. This principle was later followed in the case of Gnananathan Vs Premewardena 1999 (3) Sri Lanka Law Report 301 where it was held that for salutary reasons lest all the basic rules of law particularly that of the rule of Audi Alteram Partem that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings.

In the circumstances, it is my considered view that the judgement of the learned district judge is faultless and calls for no intervention of this court by the exercise of appellate jurisdiction. As such this appeal stands dismissed subject to costs.

Judge of the Court of Appeal

NR/-