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

Don Harold Stassen Jayawardena,
No. 82, Main Street, Ja ela.
PLAINTIFF

C.A. Case No. 36/2000 (F)

D.C. Kegalle Case No. 4511/L

-Vs-

1. K.P. Melis Singho (deceased),
1a. R.R. Somawathie
Both of Paranawatte, Mangedara,
Thulhiriya.
DEFENDANTS

AND NOW

R.R. Somawathie,
Paranawatte, Mangedara,
Thulhiriya.
1A SUBSTITUTED - DEFENDANT - APPELLANT

-VS-

Don Harold Stassen Jayawardena,
No. 82, Main Street, Ja ela.
PLAINTIFF - RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J,
COUNSEL	:	M. Saadi Wadood with Palitha Subasinghe and Tharanga Edirisinghe for the 1A Substituted Defendant-Appellant. H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondent.
Decided on	:	30.11.2016

A.H.M.D. NAWAZ, J.

This appeal is preferred by the Defendant-Appellant (hereinafter referred to as "the Defendant") against the judgment of the District Court of Kegalle dated 26.01.2000 entered in Case No. 4511/L in favour of the Plaintiff-Respondent (hereinafter referred to as "the Plaintiff").

This action had been instituted by the Plaintiff against the original Defendant (who is now deceased) on 10.10.1990 seeking a declaration of title to the land morefully described in the schedule to the plaint and for ejectment of the Defendant and all others holding under him and for damages etc.

There is no dispute between the parties as to the identity of the land. The Plaintiff states in his plaint that by a final decree entered in the Partition Case No.1643/P his father D.J.H. Jayawardena became entitled to the said land who by Deed No. 7254 dated 22.01.1966 and attested by V.B.R. Wijewardene, Notary Public sold and transferred the said land and thereby he became entitled to the said land.

The Plaintiff further states that since 1970, with his leave and licence and in a house built by the Plaintiff, the Defendant was kept therein to look after the lands of the Plaintiff and other properties belonging to the plaintiff's family.

According to the Plaintiff, the dispute as to the possession of the land arose on 02.09.1990 when the plaintiff's brother Ranjith Jayawardena tried to pluck coconuts from the trees standing on the land, the Defendant obstructed him in that exercise. The Plaintiff made a complaint to the Police subsequently.

The Defendant on the other hand states in his answer dated 20.04.1992 that he came into occupation of the said land in 1948 on the promise made by plaintiff's predecessor D.J.H. Jayawardena (plaintiff's father) to the effect that he would give the Defendant ½ share of the said land if he looked after his land including paddy lands and improved this land with plantations, and upon this promise he put up a house and grew plantations on the entire land and according to the promise of the father of the Plaintiff, he partitioned the land into two halves and since 1955 he has been in possession of his share which is described in the 2nd schedule to the answer and thus he has prescribed to the said half a share.

The Defendant prays for a declaration in respect of the half share of the land described in the 2nd schedule to the answer and if the Plaintiff is declared entitled to the whole land he claims as compensation a sum of Rs.40,000 for the house and Rs.100,000 for the improvements and until these damages are paid, the Defendant pleads that he be allowed to retain possession. The Plaintiff has vehemently objected to these claims.

While the case was pending trial in the District Court, the original defendant died and the present Defendant has been substituted in his place.

When the case was taken up for trial, the parties admitted the title of the said D.J.H. Jayawardena as the original owner of the land in dispute. The Defendant does not claim any title to the land except prescriptive possession. The learned District Judge has analyzed the evidence given by the Plaintiff and the Defendant and their witnesses in respect of the house claimed by the Defendant and the plantations and other improvements alleged to have been made by the Defendant. The learned District Judge has held that the Defendant has failed to prove that the entire land

was possessed by the Defendant as stated by him, and the plantations were planted by the Plaintiff and the house was not proved to be worth Rs.40,000 and accordingly judgment was entered in favour of the Plaintiff with costs.

This is a *rei vindicatio* action filed by the Plaintiff against the Defendant. Whilst the Plaintiff has paper title, which is not disputed by the Defendant, the Defendant claims prescriptive title to one half of the land on which he is admittedly in possession. But how he came into possession of this land and its consequences are matters that must be looked into.

When the Plaintiff has proved his title, the burden is on the Defendant to show that he has a superior title, for example, title by prescription. In ***Siyaneris vs. Jayasinghe Udenis De Silva*** 52 N.L.R. 289,[1] the Privy Council held as a first proposition that in an action for declaration of title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant.

It was also held in that precedent that if a person goes into possession of land as an agent of another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal.[2] Has the Defendant proved that his possession is lawful when there is no dispute about the title of the Plaintiff? Has the Defendant established a superior title?

The important legal questions that have arisen in this appeal for consideration by this Court are:-

(a) The alleged promise made by plaintiff's predecessor in title D.J.H. Jayawardena to the Defendant and upon which he entered into occupation.

(b) The character in which the Defendant came on to the land for occupation. The Defendant was allowed to be on the land as a caretaker for the

[1] Reported as *Kuda Madanage Siyaneris* (Appeal No 15 of 1950) *v Jayasinghe Arachchige Udenis De Silva* (Ceylon) (1951) UKPC 4 (8 February 1951).
[2] For this second proposition laid down in the case *see fn* 3.

plantations of the Plaintiff and other members of his family, and with the leave and licence of the Plaintiff.

(c) Whether the Defendant who was placed as a caretaker can unilaterally partition the whole land and take ½ share on his own without the consent of the owner?

(d) Whether the disputed house was built by the Plaintiff or Defendant and even if it was built by the Defendant whether he has any legal right to it and claim damages?

I would now go into the above issues.

(a) The alleged promise to transfer half a share of the land

The defendant's position is that the original owner, D.J.H. Jayawardena had promised him that he would be given ½ share of the land in dispute if he looked after the land in dispute and other properties belonging to him and other members of his family. If that be the position, the said promise must be in writing and notarially attested in terms of Section 2 of the Prevention of Frauds Ordinance, which states:

> *"No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract or agreement for effecting any such object or for establishing any security, interest, or in cumbrance affecting land or other immovable property.....shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses".*

Since the alleged promise by the father of the Plaintiff, is in respect of an immovable property, the alleged promise must be in writing and notarially attested. In this case, the Defendant has failed to prove such promise as is required by the provisions of

Section 2 of the Prevention of Frauds Ordinance. In the absence of such a writing, the defendant's assertion that he was promised a portion or half of the land in dispute in consideration for his being the caretaker of the land cannot be accepted and enforced.

(b) Leave and Licence

It is admitted by the Defendant that he was allowed to occupy the land in dispute as a caretaker by the original owner Jayawardena. In other words, the Defendant was placed on the land with the leave and licence of the owner. If a person accepts the ownership of a land of another person or his privy and gets into occupation of such land, he cannot deny during the continuance of such licence the title of the other person-*See* Section 116 of the Evidence Ordinance. In the present case, the Defendant got into the land with the concurrence of the said Jayawardena and he has been there as his caretaker with the leave and licence of the person who placed him in possession. If the Defendant claims ownership to ½ share of the land by prescription, his possession has allegedly become adverse against the person from whom the Defendant got permission to occupy the land.

Since the Defendant accepted the ownership of the person who placed him in occupation of the land in dispute, he cannot divide the land and claim ownership to half of the land in terms of the law. His claim for a half portion of the land is tantamount to a denial of the ownership to such portion by the original owner or his privy-the Plaintiff. The Defendant who entered with the leave and licence of the owner of the land cannot claim adverse possession or ownership to a particular portion without the consent of the owner.

In the case of ***Chelliah vs. Wijenathan*** 54 N.L.R. 337 at 342 Gratiaen J. (with Alan Rose C.J concurring) held:

> *"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".

The Defendant who claims prescriptive title to the land in dispute by adverse possession has failed to establish how and when his adverse possession commenced and he became entitled to the land. In ***Tillekaratne vs. Bastian*** 21 N.L.R 12 the full bench of the Supreme Court (Bertram CJ, Shaw and De Sampayo JJ) formulated three propositions of law applicable to what is meant by the word "adverse" in terms of Section 3 of the Prescription Ordinance (especially at page 18).

The proposition that is apposite to the instant case is as follows:

"A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity"

The Supreme Court observed in the case that; *"the effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession....."* (at page 19)

The Defendant who was the caretaker of the owner is deemed to be an agent of the owner and therefore he cannot change his permissive possession into an adverse possession and claim the land as his own unless and until he has effectively ousted the true owner. If entry into possession is on a dependent title, the acknowledged principle in our law is that possession is presumed to continue in that capacity. In other words, prescriptive possession will not commence to run in this situation until and unless the possessor clearly manifests a change in *causa* to possess on an independent and adverse title. In this connection the courts have postulated the principle that the mere *animus* to possess *ut dominus* is insufficient and there must be a verifiable manifestation of that intention as a precondition to the acquisition of a prescriptive title. A corollary to this principle is that the change of character must

be shown to have begun at a particular point of time and continued undisturbed and uninterrupted for ten years prior to the institution of the action. The permissive possession as is found in this case must have turned adverse at one point. This is what Gratiaen J. pointed out as the starting point of prescription in ***Chelliah vs. Wijenathan*** 54 N.L.R. 337 (*supra*)-*see* also the dicta of G.P.S. De Silva C.J (with Kulatunga J. and Ramanathan J. concurring) in ***Sirajudeen and two others vs. Abbas*** (1994) 2 Sri.LR 365 at p 370 (SC) alluding to the words of Gratiaen J. in ***Chelliah vs. Wijenathan***. G.P.S. De Silva C.J pointed out in ***Sirajudeen*** that the necessity to look for a starting point is a relevant aspect of the plea of prescription which must be borne in mind by trial judges.

As I pinpointed above, the Defendant attempted to prevent the brother of the Plaintiff from plucking coconuts on 02.09.1990. Even if one were to take the incident on 02.09.1990 as a manifestation of the defendant's possession becoming adverse, it has to be pinpointed that the Plaintiff made a police complaint immediately asserting his title to the property and thus objecting to the adversity. Soon thereafter, the Plaintiff filed this action on 10.10.1990. Thus there is no proof of adverse possession for a period of ten years prior to the institution of the action. In a situation of this nature the owner is protected from the loss of rights because the licensee's permissive possession inures solely to the benefit of the licensor and to that extent the licensee can derive no advantage from a possession that is dependent on and subordinate to that of the licensor. The essential point, then, is that a licensee does not occupy the property *possessio civilis* and hence the possession in this case lacks the quality of adversity necessary to establish prescriptive possession. In fact the defendant's possession has remained unlawful since 02.09.1990 and the Defendant has failed to discharge his burden of proving lawful possession.

(c) Unilateral partitioning of the land

A land can be partitioned only by the owners of the land, either by an amicable partition or by a decree of a competent Court. Section 2(1) of the Partition Law No. 21 of 1977 states as follows:

> *"Where any land belongs in common to two or more owners, any one or more of them, whether or not, his or their ownership is subject to any life interest in any other person, may institute an action for the partition or sale of the land in accordance with the provisions of this Law".*

The Defendant claims that in 1955 he had partitioned the land in dispute on his own and erected a fence enclosing the divided portion and has been possessing that portion to the detriment and damage of the Plaintiff since then. He also claims the other portion since 1972, on prescriptive possession. Can the Defendant, who entered into occupation of the said land as a caretaker engage in such a unilateral partitioning without the consent of the owner? The answer is explicitly in the negative. According to the partition law only the owners can effect such partition either on mutual agreement or by a Court of competent jurisdiction. A caretaker remains a caretaker and his status or character will never change into adverse possessor even if he had possessed the land over 10 years. If a person goes into possession of a land as an agent of another, prescription does not begin to run until he had made it manifest that he is holding adversely to his principal-*see* the 1951 PC decision of ***Siyaneris vs. Jayasinghe Udenis De Silva*** 52 N.L.R. 289-*supra.*[3]

In this case the Defendant states that he came into occupation of the land in dispute in 1948, and since he was promised ½ of this land by the original owner Jayawardena, he got the land partitioned in 1955 and has been in possession thereof since 1955. Assuming that the Defendant came to possess the land in 1948, he has no legal right to claim a portion of the land, after the unlawful partition in 1955,

[3] *Kuda Madanage Siyaneris (Appeal No. 15 of 1950) v Jayasinge Arachchige Udenis De Silva (Ceylon)* [1951] UKPC 4 (8 February 1951)

because he was placed in possession by the owner and therefore his possession should be considered as that of a caretaker and not as if on an independent title.

As stated above, the Defendant has got into possession of the land in dispute with the leave and licence of the owner or he was placed thereon as a caretaker or agent of the owner. Then the Defendant is estopped from claiming ownership to the entire land or a portion thereof. As such, the Defendant had not acquired a prescriptive title to the land in dispute and the Defendant has not established a case for compensation as could be demonstrated presently and I therefore hold that the judgment of the learned District Judge should be fully affirmed.

(d) Whether Defendant has any legal rights to claim damages/compensation

The question as to whether the Defendant put up the house in which he was living has not been satisfactorily established. While the Plaintiff states that it was built by his father, the Defendant states that it was built by him. Considering the evidence given in the case, the learned District Judge has come to the conclusion that the Defendant has failed to prove that the house was built by him. Furthermore, the Defendant has failed to prove that the improvements and plantations were effected by him. The evidence shows that all the necessary fertilizer and materials were supplied by the owner of the land and not by the Defendant.

Since it was established that the house was put up by the owner of the land and the fertilizer, materials and other expenses were borne by the Plaintiff and his predecessor, the Defendant cannot claim any compensation for the improvements made on the land. The Defendant appropriated 600 coconuts plucked by him for his own use. When the Defendant tried to build a new house, problems began between the parties and an interim injunction was issued by Court to prevent him from constructing a new house. That preventive redress also put paid to an attempted act of adversity.

'Omne quod inaedificatur solo, solo cedit'

Since the old house is proved to have been put up by the owner and the plantations were already there when the Defendant came into occupation, these things are attached to the soil and since the Defendant has no soil rights, he is not entitled to any compensation for improvements. Any building erected on the soil is seen as a mere attachment to the ground, even if the building is worth more than the bare land. The reason is that in contrast to buildings land is almost indestructible and is therefore considered permanent. I need hardly emphasize that the maxim ***'omne quod inaedificatur solo, solo cedit'*** is now trite law. Everything that is built on land-or on to another immovable-accedes to that land or immovable and becomes the property of the owner of the land or immovable.[4]

Thus in the South African case of ***Van Wezel vs. Van Wezel's Trustee*** Wessels JA said:

> *"In fact as soon as a structure is built into the soil it accedes to the soil, for by the civil law as by the Roman-Dutch law the accessory has the same character as the thing to which it acceded. In character such a house would be an immovable both because it is built into the soil and because it is placed there presumably for a permanent purpose."*[5]

This type of accession of a structure to an immovable is commonly referred to as *inaedificatio.*

In land law the foundation of the modem law of accession is the famous Roman rule ***superficies solo cedit*** (the building accrues to the land).[6] This principle applies in legal systems based on Roman Law and Roman Dutch Law-*see* the Sri Lankan cases in which this principle has been applied-***De Silva vs. Harmanis*** 3 N.L.R. 160, ***Katherina vs. Jandris*** 7 N.L.R. 133, ***Samaranayake vs. Mendoris*** 30 N.L.R. 203, ***Sopihamy vs. Dias*** 50 N.L.R. 284, ***Paulis Singho vs. William Singho*** 64 N.L.R. 405

[4]Gaius *Inst*II 73, Grotius 2.1.13 (trans R.W. Lee (1926)-"Things attached to the earth or fixed to houses are considered to go with immovable property."
[5]1924 AD 409 at 417
[6]Justinian *Inst* 2.1.29: also Gai Digest 41.1.7.10

and for a recent pronouncement on the principle see ***Neina Marikkar Umma Suleyha vs. Rathubadalge Ensohamy et al*** CA Appeal 02/2000 decided on 31.08.2016. Applying the above principles, I hold that the Defendant would not be entitled to any compensation.

So the appeal of the Defendant-Appellant fails on the issues as enumerated above. Accordingly I affirm the judgment of the learned District Judge of Kegalle and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL