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

C. A. No. 626/93 (F)

D. C. Kaluthara Case No. 5697/P

Sekkuarachchige Ranjith Nandasena of Mahawaskaduwa, Waskaduwa

PLAINTIFF

-VS-

1. Walgampolage Rosalin Perera
2. Walgampolage Norbert Perera
3. Walgampolage Babynona Perera

All of Tissa Central College Road, Kaluthara North.

4. Darakankanange Wilson Dias
5. Walgampolage Oilin Perera
6. Darkankanange Seneviratne Dias
7. Darkankanange Somatunga Dias

All of 5th Cross Lane, Kaluthara North.

DEFENDANTS

AND NOW BETWEEN

6. Darkankanange Seneviratne Dias

7. Darkankanange Somatunga Dias

All of 5th Cross Lane, Kaluthara North.

DEFENDANTS-APPELLANTS

-VS-

Sekkuarachchige Ranjith Nandasena of Mahawaskaduwa, Waskaduwa

PLAINTIFF-RESPONDENT

1. Walgampolage Rosalin Perera (Deceased)

1A. Walgampolage Norbert Perera

2. Walgampolage Norbert Perera (since deceased)

2A. Kusumalatha Pathirana

3. Walgampolage Babynona Perera (since deceased)

3A. Linton Fernando

All of Tissa Central College Road, Kaluthara North.

4. Darakankanange Wilson Dias
5. Walgampolage Oilin Perera, both of 5th Cross Lane, Kaluthara North.

DEFENDANT-RESPONDENTS

BEFORE	:	**M. M. A. GAFFOOR, J.**
COUNSEL	:	J. A. J. Udawatta with Thamali de Alwis for the 6th & 7th Defendant-Appellants Rohan Shabandhu, P.C. for the Plaintiff-Respondent
WRITTEN SUBMISSIONS TENDERED ON	:	14.09.2018, 08.11.2012 (by the 6th & 7th Defendant-Appellants) 05.04.2012 (by the Plaintiff-Respondent)
DECIDED ON	:	**30.11.2018**

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M. M. A. GAFFOOR, J.

The Plaintiff-Respondent (hereinafter referred to as the "Respondent") initially instituted this partition action against the 1st to 5th Defendants to partition the land called Lot No. 3 of Uswatta alias Girimbewatta Plan No. 4460 dated 20.12.1922 prepared by H. C. Scharenguivel, Licensed Surveyor in extend 39 1/4 Perches (A0-R0-P39 1/4).

According to the Respondent's Plaint, he stated that, originally the land in question was owned by Madalena Suwaris, Madalena Perera, Manis, Seridias Perera, Joslina Perera, Alice Perera, Aron Moras, Seemon Perera and Babyhamy (according to the final decree entered in case No. 5872/P in the District Court of Kaluthara) each being entitled to 1/9 share. And showing his pedigree the Respondent stated that he is entitled to 29/30 share of the property and 1 to 3rd Defendants 1/30 shares jointly. It was the position of the Respondent that the 4th and 5th Defendants have entered the land in question and were constructing buildings unlawfully.

The 4th and 5th Defendant (husband and wife) filed their objections on 26.09.1989 and stated that they now (at that time) do not have any rights and by Deed No. 490 dated 19.12.1987 gifted their rights to their two sons 6th and 7th Defendants (*vide, page 86 to 90 of the appeal brief*). Therefore, the 6th and 7th defendants were later added as parties in this case.

On 03.07.1991, the 7th Defendant Somatunge Dias (Son of the 4th Defendant, Wilson Dias) filed his statement of claim and averred inter alia that the 4th Defendant was in possession of the land and house in question for more than 20 years and the Respondent never possessed the said land and premises. He further stated that he had prescribed to said property by Deed No. 490 dated 29.12.1987 4th Defendant gifted 1/2 to 7th Defendant Somatunga Dias and balance 1/2 to Senaviratne Dias, the 6th Defendant and the house too gifted 1/2 each and they have prescribed to the property in question (also Seneviratne Dias, 6th Defendant admitted the same)-(*Vide, page 116 to 123 of the appeal brief*).

The trial commenced on 28.07.1992 with one admission (corpus is Lot 3A) and 8 issues. Issues 1 to 5 were raised on behalf of the Respondent and 6th to 8th raised on behalf of the 4th to 6th Defendants.

The Respondent gave evidence and led the evidence of one Jinasena Silva, an official from the Land Reform Commission, one Salgadoe Punchi Singho and closed his case leading in evidence documents P1 to P43.

The 4th Defendant Darakankanamage Wilson Dias, the predecessor in title of 6th and 7th Defendants gave evidence on 03.11.1992.

The learned District Judge on 13.08.1993 ordered the partition of the land as per the pedigree of the Respondent and rejected the plea of prescription of the 4th Defendant.

Being aggrieved by the said order, the 6th and 7th Defendant-Appellants (hereinafter referred to as the "Appellants") filed this appeal and urged that the issue of prescription should not have been against them.

After hearing both parties' submission and perusal of the documents, it is clear that the Appellants refer their issue of prescription for the property in question.

In the judgment the learned District Judge also specifically referred to the only issue between the two parties – the issue of prescription and examined the evidence to see whether, in fact the defendant has prescribed to the land.

In the trial, the Respondent giving evidence stated in his evidence inter alia that Oilin (mother of the Appellants) transferred her rights (referred to the pedigree of the respondent) in the corpus by Deed No. 2143 dated 05.10.1963 (marked as P7) to Ekmon Ranaweera. The Respondent further stated that he became a co-owner of the corpus by Deed No 2886 dated 01.04.1981 (marked as P17) from the said Ekmon Ranaweera and Lavaneris Ranaweera who also got rights from Somawathie (sister of Oilin) and heirs of Seemon Perera.

It is seen from the District Court proceedings that, the 4th Defendant, the predecessor-in-tile of the Appellants in his evidence has accepted that said Oilin has sold her rights under P7 in 1963. He stated that, though Oilin transferred by P7 in 1963 that they were in occupation of the land and premises and that no one disturbed his possession *(vide page 2 of the District Court-proceedings dated 03.11.1992).* Also the learned District Judge in his judgment observed that the 4th Defendant had signed P7 as a witness; but in the cross examination the 4th Defendant has stated that he became aware of the sale by P7 only after the institution of the instant action- when Oilin told him about 10 months previously *(vide proceedings dated 03.11.1992 - page*

196 of the appeal brief). The learned District Judge was well attentive of this evidence and he had specifically stated in his judgment that the 4th Defendant's evidence cannot be believed.

The learned District Judge had considered the evidence of Nobert Perera who was called by the 4th Defendant and observed that, according to his evidence the 1st to 3rd Defendants are the co-owners of the property and they also owned the house standing on the premises and that Oilin and the 4th Defendant were living in the house with the consent of the 1st to 3rd Defendants (*vide page 217-222 of the appeal brief*). According to this evidence the learned District judge observed that the 4th Defendant's own witness had given a contrary story as to prescription.

Further, the learned District Judge had observed that, the 4th Defendant stated that he planted some coconut trees in the land in question in 1957 but according to the report of the Surveyor X1 prepared in 1990 the coconut trees are not 30-40 years old – the learned District Judge accepts X1 and stated that he cannot accept that the trees were planted in 1957.

Therefore, it is crystal clear that the 4th Defendant was not aware of land and not satisfied the trial judge for prescription claim.

It is settled law that, in order to initiate a prescriptive title, it is necessary to show a change in the nature of the possession and the party claiming prescriptive right should show an ouster.

According to the provisions of Section 3 of the Prescription Ordinance Act, No 2 of 1889 the claimant must prove the following elements:-

1. Undisturbed and uninterrupted possession
2. Such possession to independent or adverse to the claimant and
3. Then (10) years previous to the bringing of such action.

The Section reads as follows:

> *"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs."*

In SIRAJUDEEN AND TWO OTHERS vs. ABBAS [(1994) 2 SLR 365], G. P. S. De Silva, C. J. held that.

> *"As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription.* ***It is necessary that the witnesses should speak to specific facts***

and the question of possession has to be decided thereupon by Court."

"One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner."

In CHELLIAH vs. WIJENATHAN [54 NLR 337], at page 342, Gratiaen, J. held that:

''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 fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognized by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years.''

In DE SILVA vs. COMMISSIONER GENERAL OF INLAND REVENUE, [80 NLR 292], Sharvananda, J. clearly and deeply observed that:

"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. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession..." (Pages 295 and 296)

The learned District Judge before dismissing the averment of the 4th Defendant carefully considered the credibility of the evidence led by him namely Robert Perera. Accordingly, he specifically looked at the credibility of the 4th Defendant and observed that he cannot be believed and not creditworthy-his evidence as to prescription does not tally with the evidence of his own witness.

It this segment I wish to call the findings of Ranasinghe, J in DE SILVA AND OTHERS vs. SENEVIRATNE AND ANOTHER, [(1981) 2 SLR 07]

"Where the findings on questions of fact are based upon the credibility of witnesses on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest considerations that it would be justified in doing so."

After applying these principles to the present case, I take the view that the 4th Defendant who claimed prescriptive rights had not proved the specific facts

regarding his possession; and enjoyment of the property for ten years before the action was instituted. Hence, the Appellants are not able to show their inherited-prescriptive rights from their predecessor in this case.

In the above mentioned circumstances, I am of the apparent view that the learned District Judge had correctly analyzed the entire facts and evidence placed before him. I see no reason to interfere with his judgment.

Therefore, I affirm the Judgment of the District Court dated 13th August 1993; and dismiss this appeal with cost.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL