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

1. Gunawathie Dissanayake
   No.62/2, Viharamulla,
   Monaragala.
2. Siriyawathie Dissanayake
   Police Quarters. Ragama.

   PLAINTIFFS

C.A. Case No.731/1996 (F)

D.C. Badulla Case No.94/36/L

-Vs-

1. Buddhima Lalitha Dias
2. D.K.B. Dissanayake
3. C.N.B. Dissanayake
   All of No.50, Higurugamuwa,
   Badulla.

   DEFENDANTS

AND NOW

1. Buddhima Lalitha Dias
2. D.K.B. Dissanayake
3. C.N.B. Dissanayake
   All of No.50, Higurugamuwa,
   Badulla.

   DEFENDANT-APPELLANTS

-Vs-

1. **Gunawathie Dissanayake**
   No.62/2, Viharamulla,
   Monaragala.
2. **Siriyawathie Dissanayake**
   Police Quarters, Ragama.
   PLAINTIFF-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Harsha Zosa, PC with A. Premalingam for Defendant-Appellants

Rohan Sahabandu, PC with Hasitha Amarasinghe for Plaintiff-Respondents

Decided on : 27.08.2018

A.H.M.D. Nawaz, J.

The Plaintiff-Respondents instituted this action on 02.01.1986 seeking a declaration of title to land described in the 2nd schedule to the plaint, ejectment of the Defendant-Appellants and those holding under them and damages in a sum of Rs.25 from November 1984 till they are placed in possession. The 2nd schedule described a land and its contents in an extent of 1 rood and 35 perches. Though this cause of action was one based on a licensor-licensee relationship, the 1st and 2nd Plaintiffs (two sisters) set out a devolution of title and narrated as to how they permitted their brother (a Grama Sevaka) to occupy the land. They averred that their mother Sisilyahamy who became the owner of the land described in the schedule transferred for consideration two divided portions to them. The 1st Plaintiff was conveyed by a Deed bearing No.12040 **(P3)** a divided extent of 40 perches, whilst the 2nd Plaintiff was given a divided extent of 35 perches by a Deed bearing No.12041 **(P4)**. Both deeds of sale were executed on 24.09.1962.

Somewhere in 1965 their brother-the 1st Defendant's husband came to *Badulla* as a Grama Sevaka and as he did not have a house of his own, the Plaintiffs averred that they let him into possession of the land described in the schedule to the plaint.

With the passing away of the brother on 16.08.1984, the Plaintiffs alleged that their sister in law (the 1st Defendant) along with her children (2nd and 3rd Defendants) disputed the title of the Plaintiffs and it was in those circumstances that the Plaintiffs sought a declaration of title to the land described in the schedule to the plaint and the ejectment of the Defendants among other things.

The answer filed by the Defendants dated 19.12.1986 denied any leave and licence and stated that R.B. Dissanayake-the husband of the 1st Defendant and the father of the 2nd and 3rd Defendants entered the land in 1965 and possessed the land and house therein without acknowledgement of any right in anyone and thus had prescribed to the land. As the said R.B. Dissanayake passed away in 1984, his prescription would inure to them as they were the legal heirs of Dissanayake.

The answer also had an alternative claim in that the Defendants claimed a sum of Rs.100,000 as compensation for the construction of a house and improvements on the land. This was claimed in the answer as an alternative to title by prescription in the event title is decided in favour of the Plaintiffs. Thus the answer prayed for a dismissal of the plaintiff's action and compensation in a sum of Rs.100,000/-.

Leave and licence on the part of the Plaintiffs and prescription by their brother Dissanayake from 1965 to 1984 were raised principally as issues and the trial took off on 26.09.1988 with Sisiliyahamy-the mother of the Plaintiffs and the mother in law of the 1st Defendant beginning to give evidence for the Plaintiffs.

The question before this Court was whether the 1st Defendant's husband was a licensee of the Plaintiffs as the Plaintiffs alleged or he had prescribed to the land in his own right as the Defendants alleged. The evidence that unfolded in the case unmistakably drives one to conclude that R.B. Dissanayake was a licensee in 1965 and not someone who independently entered the land as the answer averred. It had to be remembered that the

Plaintiffs became the owners of the land on 24.09.1962 and the mother of the Plaintiffs and R.B. Dissanayake (the husband of the 1st Defendant and the father of the 2nd and 3rd Defendants) testified that it was with the leave and licence of the Plaintiffs he was let into possession of the land and the house thereon. This leave and licence were given until he constructed a house on his own land which was adjacent to the land in question. Even the 1st Defendant in her testimony testified that not only her mother in law (Sisiliyahamy) but also the sisters in law (the Plaintiffs) gave them possession to occupy the house which stood on the land, because they did not have a house when her husband came on transfer to *Badulla*. This evidence confirming the fact that the Plaintiffs gave her husband to live in the house establishes the fact that the plaintiffs" issue was proved- namely the husband of the 1st Defendant was a licensee of the Plaintiffs. In other words the husband of the 1st Defendant was given a *habitatio* of the house by the Plaintiffs.

The 1st Defendant contradicts her own issue about the year of their entry into the land. Whilst her issue asserted that it was 1965, she testified that it was in 1968. The plaintiffs' version was that the permissive entry was in 1965. In view of the inconsistency *per se* in the 1st defendant's case, it has to be taken that it was in 1965 that leave and licence and *habitatio* were granted.

It is trite law that when possession commences on a dependent title, it continues in the same breath until the Defendant shows a change in *causa*. If the possession of a Defendant is contractual, the percipient judgment of U. de Z. Gunawardana, J. in ***Ruberu and Another v. Wijesooriya*** (1998) 1 Sri LR 58 becomes pertinent. The learned judge opined that a licensee obtaining possession is deemed to obtain it upon terms that he will not dispute the title of the Plaintiff without whose permission he would not have got it. The effect of Section 116 of the Evidence Ordinance is that if a licensee decides to challenge the title under which he is in occupation, he must first quit the land. The fact that the licensee obtained possession from the Plaintiff is perforce an admission of the fact that the title resides in the Plaintiff.

But here were the Defendants who sought a dismissal of the plaint by pleading a superior title of prescription of their privy-R.B. Dissanayake. In other words their case was that R.B. Dissanayake's permissive possession turned adverse. In my view though U. de Z. Gunawardana, J. stated that a defendant is estopped from pleading his own title vis a vis his licensor, he was indeed referring to an acquisition of a paper title on the part of a licensee. If the licensee acquired a paper title, it is only then that he has to surrender possession and litigate to vindicate his title. As the 1st Defendant pleaded prescription on the part of her husband in this case, it is open to the 1st Defendant to plead and establish it in the same case, as Section 3 of the Prescription Ordnance would permit a defendant to take that defence.

Be that as it may, there must be an overt act on the part of the 1st Defendant's husband that manifests an intention to oust the Plaintiffs and the question arises whether the Defendants have established adverse possession on the part of their privy. It was contended that the adversity began in 1970 when plans for a construction of a new house were submitted. The 1st Defendant no doubt stated that her husband R.B. Dissanayake spent his money and constructed the house. It must be remembered that there stood on the land an old house in which an uncle of the Plaintiffs and R.B. Dissanayake had been staying, This was the house that R.B.Senanayake-the husband of the house was given the leave and licence to occupy. In other words his sisters (the Plaintiffs) gave him *habitatio* of the house.

Initially, it was the evidence of the 1st Defendant that her husband effected repairs to the old house as it was inhabitable. Later on she testified that her husband constructed a new house.

In terms of **V1**-the permission that was granted for a construction of a new house, the house must be built of bricks and the roof must be covered with zinc. But on a totality of evidence it is apparent that the roof contained old tiles which were not the prevalent commodity of tiles available at the time of the trial. This shows that there never came up on the land a new house. The learned District Judge of *Badulla* has observed the deportment and demeanor of the 1st Defendant and concludes that the 1st Defendant's

testimony does not pass the test of credibility. If one looks at the report of the surveyor **(X1)**, one sees a reference to a floor of a house which had been paved with cow-dung clay and not cement. The surveyor had observed this in 1987 and this evidence goes contrary to the assertion of the 1st Defendant that her husband had built a new house. These items of evidence of only show the existence of an old house, and I take the view that the learned District Judge of *Kandaho* was quite right when he concluded that only repairs had been effected to the old house and no new house had come up at all.

It has to be remembered that the repairs had in fact been effected with the permission from the Plaintiffs and their mother. No doubt water supply as evidenced by a document marked as **V5**, had been taken after the institution of the action in the District Court. All other documents marked as **V4, V6** and **V7** have been considered by the learned District Judge and these documents evidencing receipts do not specify the exact amount spent for the purpose of supply of electricity.

The evidence of the mason-Piyadasa was that the construction charges would be around Rs.65,000/-. But Issue No.13 specified a sum of Rs.100,000/- and I cannot fault the learned District Judge for taking the view that the alternative claim of Rs.100,000/- as compensation has not been established.

Upon a careful perusal of the totality of the evidence, I find that there was no new house that had come up on the land but rather the old house that stood on the land had been renovated. There was thus no adverse possession that had supervened and the husband of the 1st Defendant had continued to possess the land on a dependent title of the Plaintiffs from 1965 till he died in 1984. If at all, a change in *causa* (manifest intention to possess the land *ut dominus or ouster*) must be shown to have begun from an identifiable event which excluded the Plaintiffs and there is no proof of the identifiable event, which has been credibly established-*see* ***Chelliah v Wijenathan*** 54 N.L.R 337 at 342; ***Sirajudeen and others v. Abbas*** (1994) 2 Sri LR 365 for insistence on the starting point for prescription. There is then no proof of a starting point which signals an uninterrupted and undisturbed possession for 10 years prior to the bringing of the action.

What is put forward as the beginning of adverse possession is a purported construction of a house in 1970 which does not bear scrutiny having regard to the evidence placed at the trial. The creditworthiness of the witnesses has been assessed by the learned District Judge who had the advantage of seeing and listening to the witnesses and this Court will be slow to disturb the findings to facts of primary decision maker in the circumstances- see ***Fradd v Brown*** 20 N.L.R 282; ***Powell v Streathem Manor Nursing House*** 1935 AC 243; ***Munasinghe v Vidanage*** 69 N.L.R 97: ***Natt v Thomas*** 1947 1 All ER 582; ***Jinarathne Thero v Piyaratne Thero*** (1982) 1 Sri L.R 273; (1993) 1 Sri.LR 332

In the circumstances, the permissive possession of R.B. Dissanayake had continued till 1984 when he crossed the great divide and that permissive permission will not give rise to the claim of prescriptive possession made by the Defendants. The action was filed in 1986. Though prescription claimed by the Defendant-Appellants did not originate from their privy R.B.Senanayake because his possession has always been permissive at the instance of the Plaintiffs, there is another principle that was intrinsically interwoven with the leave and licence granted to R.B.Dissanayake namely *habitatio*

Habitatio

Thus, the case of prescriptive title put forward by the Defendant-Appellants fails on a consideration of the facts and the case of the Defendant is unsustainable. Let me observe that the leave and licence given to R.B.Dissanayake would be tantamount to *habitatio.* I do have to allude to this Roman Law concept as it was contended that there was no evidence of due termination of the licence given to the Defendants , and hence this action could not be maintained-see ***Ahriff v Razik*** (1985) 1 Sri.LR 162; ***Attanayake v Ramyawathie*** (2003) 1 Sri.LR 401 at 409. The necessity to terminate any licence does not arise at all, in view of the fact that the licence given to R.B.Dissanayake the privy of the Defendants terminated upon his death. His death *ipso facto* terminated the licence as it was personal to him and this licence was not transmissible to the defendants upon the death of R.B.Dissanayake.

Maintainability of the Action-Plea of Misjoinder

Both in the oral argument and written submissions, it was the contention on behalf of the Defendant-Appellants that this action jointly by the two sisters should fail for misjoinder of parties and causes of action. It was averred in the plaint that out of the land described in the second schedule the first Plaintiff was entitled to a divided extent of forty perches and the second Plaintiff was entitled to a divided extent of thirty five perches. In other words the first Plaintiff has no rights in the divided thirty five perches belonging to the second Plaintiff and the second Plaintiff has no rights in the forty perches belonging to the first Plaintiff. In other words both Plaintiffs do not have undivided rights in the total extent of 1 Rood and 35 Perches (75 perches) and cannot therefore be together declared entitled to the entirety of the seventy five perches. It therefore follows that the two Plaintiffs are not entitled to the property in equal shares. There is no common ownership to the land and therefore they cannot join in one plaint the principal relief prayed for-namely that the first and second Defendants be declared entitled to the land in the second schedule-cannot be granted and therefore the action will have to be dismissed. The two Plaintiffs specifically have their divided rights in separate entities. In the circumstances there is no proof of title pleaded by them-see ***Loku Menika and Others v Gunasekare*** (1997) 2 Sri.LR 281; **Dharmadasa v Jayasena** (1997) 3 Sri.LR 327. This plea is tantamount to misjoinder of Plaintiffs and causes of action.

I have to interpose at this stage and recall that this objection to misjoinder of parties and causes of action was taken only in the course of the trial on 15.05.1989 when the learned Counsel for the Defendants upon the aforesaid basis raised issues No 15 and 16 stating that the action could not be maintained as there was a misjoinder of parties and causes of action. These issues were indeed raised as preliminary issues of law, but the learned District Judge by his order dated 29.05.1992 overruled the said preliminary issues and held that the action could be maintained.

The tenor of the learned District Judge's reasoning was that the Defendants had claimed prescriptive title to the whole land described in the schedule to the answer, which of

course mentioned a slightly different extent. In other words when the defendants claimed both lands as one unit in the answer and raised prescriptive title to that one unit, they disregarded the infirmity in the plaint namely there is a misjoinder of the plaintiffs and causes of action. By their plea of prescriptive title to the entire land, they had disregarded misjoinder-so inferred the learned District Judge. Accordingly the learned District Judge held that the action could continue. The wisdom of the learned District Judge is not to be disregarded so slightly. Sometimes wisdom cries out in the wilderness. Though the learned District Judge held that the action could continue, I read the conclusion as equivalent to a statement that one plea of the defendants (misjoinder taken half way through the trial) is defeated by another plea of the theirs -i.e they had prescribed to the entire land as one unit though they were divided portions.

I would not pronounce on the validity of the inferences that flow from the conclusion of the learned District Judge as his answer is quite moot but I take the view that the plea of misjoinder that was raised far too belatedly. It is axiomatic that misjoinder should not be taken either in the answer or at a posterior stage of the trial as it was taken in this trial. Section 17 of the CPC is quite categorical that no action shall be defeated by reason of the misjoinder or nonjoinder of parties and there is no provision in the Code to dismiss an action on the ground of misjoinder of causes of action-See ***Ranasinghe v Fernando*** 69 N.L.R 115. The very objection that the learned President's Counsel for the Defendant Appellants took before this court as to the maintainability of the action was dealt with in the case of ***Madar Saibo vs. Sirajudeen*** 17 N.L.R 19 wherein it was held that joinder by two persons in one action of claims in respect of separate lands to which each is separately entitled is obnoxious to section 17 of the Civil Procedure Code, but the irregularity may be waived by the defendant-see Pereira J.

So the Defendants must be taken to have waived misjoinder when they went to trial without having raised it at an anterior point of time before the answer.

"In order to properly understand the rule we must look at the whole of it. It begins by saying "No cause or matter shall be defeated by reasons of the misjoinder or non-joinder

of parties." – that is the key to the whole question. If the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the Court". *Per* Lindley L.J. in ***Moser vs. Marsden*** (1958) 2 W.L.R 725.

So the objection as to the maintainability of the action fails before this Court and for the foregoing reasons I have set out on the facts and law engulfed in this case, I would proceed to affirm the judgement dated 04.10.1996 and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL