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

In the matter of an appeal from the District Court of Galle.

C.A. Case No.1254/2000 (F)

D.C. Galle Case No.12416/L

Richard Samarasinghe
of Kotakadeniya Watte, Katukurunda,
Haberaduwa.
PLAINTIFF

-Vs-

Rohini Jayasinghe
of Godewatta, Katukurunda,
Haberaduwa.
DEFENDANT

NOW BETWEEN

Rohini Jayasinghe
of Godewatta, Katukurunda,
Haberaduwa.
DEFENDANT-APPELLANT

-Vs-

Richard Samarasinghe
of Kotakadeniya Watte, Katukurunda,

Haberaduwa.

PLAINTIFF-RESPONDENT

1. **Dickman Samarasinghe**
   of Pelawatte, Katukurunda,
   Haberaduwa.
2. **Donald Samarasinghe**
   of Pelawatte, Katukurunda,
   Haberaduwa.
3. **Chandrawathie Samarasinghe**
   of Thuduwewatta, Katukurunda,
   Haberaduwa.
4. **Ridgeway Samarasinghe**
   of Thuduwewatta, Katukurunda,
   Haberaduwa.
5. **Nandasiri Samarasinghe**
   Kathluwagewatte, Katukurunda,
   Haberaduwa.
6. **Kandthi Samarasinghe**
   of Thuduwewatta, Katukurunda,
   Haberaduwa.
7. **Dayarathne Samarasinghe**
   of Thuduwewatta, Katukurunda,
   Haberaduwa.
8. **Cyril Samarasinghe**
   No. 84/2C, Solomon Mawatha,
   Walapala.

8A. **Anange Dayawathie Perera**
   No. 84/2C, Solomon Mawatha,

Walapala.

9. Aththatage Karalaine None
   Kotakadeniya Watte, Katukurunda,
   Haberaduwa.

RESPONDENTS

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

COUNSEL : Priyantha Rajapaksha with Yasas de Silva for the Defendant-Appellant

Sanjeewa Jayawardena, PC with Sandamali Chandrasekara for the Respondents

Decided on : 06.08.2019

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

The original Plaintiff-Richard Samarasighe filed this action No.12416/L against the Defendant-Appellant, (hereinafter called and referred to as "the Defendant") in the District Court of *Galle* on 05.01.1992 for a declaration of title to the land morefully described in the 2nd paragraph of the plaint and for ejectment of the Defendant and all those claiming under her from the said land and to place him in peaceful possession thereof and for damages.

The Defendant filed her answer on 24.11.1993 praying for dismissal of the Plaintiff's action and to declare that the Defendant is entitled to the land described in the 2nd paragraph of the plaint.

On 23.06.1995 when the case was taken up for trial, both parties agreed that the land described in the 2nd paragraph of the plaint is the subject-matter of the action and also admitted the averments contained in paragraphs 7 to 10 of the Plaint. At the end of the trial on 27.11.2000 the learned District Judge delivered his judgment in favour of the

Plaintiff, declaring him entitled to the land in dispute. The Defendant has preferred this appeal from that judgment.

In the written submission of the Defendant's Counsel dated 11.07.2016, a legal objection has been taken to the effect that this action could not be instituted by the Plaintiff in the District Court without first referring it to the Mediation Board. This objection is belated and cannot be taken up for the first time in appeal. Objection to jurisdiction of the Court should be taken at the earliest possible opportunity.

Section 39 of the Judicature Act states that whenever any Defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of first instance neither party shall afterwards be entitled to object to the jurisdiction of such Court, but such Court shall be taken and held to have jurisdiction over such action, proceeding or matter. In this case, the Defendant has taken this objection after filing the answer.

Any objection to jurisdiction of the Court should have been taken in the answer under Section 76 of the Civil Procedure Code. If not so taken, the Defendant has been deemed to have waived the objection and has acquicised it. In this case the answer filed by the Defendant does not have any averment objecting to the jurisdiction of the Court, and therefore the Defendant is deemed to have waived it is not entitled to take the objection now before this Court. Therefore, this objection is untenable and is rejected *in limine*.

Whilst the appeal was pending the original Plaintiff had died in August 2006, and the present Plaintiffs-Respondents are substituted in his place. Their position is that the original Plaintiff Richard Samarasighe and his predecessors in title had been in possession of the land bearing Lot 9 which is adjoining the land in dispute, bearing Lots 4, 5, 6, 7 and 8, depicted in Plan No.2469A made by F.A. Gunasekera, Licensed Surveyor, which are described in 2nd paragraph of the plaint, for about 70 years without any interruption from any one.

It is the liability of the vendor to hand over possession-*traditio*, and put the vendee in vacant possession of the property sold soon after the sale to the vendee. The vendee has

the right to demand for the delivery of possession from the vendor, and if the vendor is unable to give such possession the vendee can bring an action against the vendor for rescission of the contract and for damages. Under the Roman-Dutch law the vendor is bound to give possession of the property sold, free from all encumbrances to the *bona fide* purchaser.[1] The Roman-Dutch law holds the purchaser is entitled to vacant possession on his purchase. A vendor is understood to deliver vacant possession when he makes such delivery of the thing sold that it cannot be reclaimed by another person, and where therefore the purchaser would be successful in a suit of possession.[2] A purchaser of land has the right to call upon a vendor to warrant and defend when sued in ejectment that the other actions are not available to him-*Vide* ***Fernando v. Jayawardene.***[3]

In the case of ***Ratwatte v. Dullewa,***[4] a Full Bench of the Supreme Court considered the questions of failure to deliver possession, cancellation of sale and refund of purchase money. The defendant, in this case, had refused to deliver quiet possession to the plaintiff of the land sold to him, when that was occupied by a third party.

It was contended on behalf of the defendant that, "having executed a conveyance the title to the land was thereby vested in the plaintiff, who had thus acquired all he had bargained for, i.e., the d*ominium*, which would enable him to obtain the actual possession by ouster of the claiming occupant. The plaintiff's only remedy was to sue the claiming occupant for declaration of title, making the vendor a defendant in the action to warrant and defend his title". The Full Bench, having considered all the previous authorities and the legal implications on the matter held as follows:

Apart from any express agreement, a vendor of immovable property is bound to deliver vacant possession (i.e., possession unmolested by the claim of any other person in possession) of the property sold to the vendee; on his failure to do so, the vendee is entitled to a rescission of the sale and a refund of the purchase money.

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[1] Van Leeuwen 4, Chapter 19, section 10

[2] Voet, bk.19, tit.1, ss. 10 and 11

[3] (1896) 2 N.L.R. 308

[4] (1907) 10 N.L.R. 304

The vendee is not obliged, in such circumstances, to sue the party in possession before proceeding against his vendor. A vendee of immovable property is not bound to accept delivery of the deed of transfer as sufficient delivery of possession of the property; he is entitled to ask his vendor to place him in actual possession.

It is evidence in this case that the Defendant had bought the land in dispute in 1989 by Deed No.1031 dated 08.11.1989. There is no evidence that the Defendant soon after buying the land from her vendor asked him to give her vacant possession of the said land. It is the responsibility of the vendor to deliver vacant possession of the land sold. Instead, on 22.11.1989 the Defendant herself had gone with a Surveyor to the land to demarcate the boundaries of the said land. The dispute had arisen on this act of the Defendant. Until this date, though the Defendant had a paper title she had never gone to the land.

It is the usual practice in this country that when a person intends buying a land, he must go through the title deed and plans, if any, and go with the seller to show him the land. If the buyer knows about the metes and bounds of the land previously, and does not want to go through the hassle of going through the title deed, the plan etc. he may agree to the execution of the deed. Otherwise, it is the duty of the buyer to ask the seller to show him the boundaries and give vacant possession thereof. In this case the Defendant without going through the procedure stated above had tried to demarcate the boundary on her own without the assistance of the seller. Thereafter, when faced opposition from the Plaintiff, she had filed a Case No.11665/L to have the boundaries of the land demarcated. Surprisingly, she had stated in her plaint in this case that the land contained no boundaries. Even in this case, she did not make the vendor a party to warrant and defend title to the said land.

Under the Roman-Dutch law there is in every sale an implied covenant to warrant and defend the title, and the nature of the remedies available to the purchaser is in accordance with the peculiar obligations of the vendor, even after the sale is completed by conveyance. The first obligation of the vendor is to afford vacant possession to the purchaser, and in default the purchaser has an immediate right of action *ex empto* against the vendor for the rescission of the sale. The second obligation is to warrant and defend

the title against any trespasser, and if the purchaser is legally evicted in the *rei vindicatio* action, he can sue his vendor for compensation in the action *de evictione*, provided he has given him timely notice. Subject to these obligations of the vendor, and the remedies of the purchaser, a person may sell what does not belong to him.

Voet says: "It matters little whether what is sole is the property of the vendor or not, inasmuch as he is bound to purchase the same thing elsewhere and fulfil his contract, unless he prefers to be condemned in damages is he knowingly sold another's property. For if he acted in good faith he is no farther bound than for the delivery of vacant possession, and is only liable in damages for the *id quod* interest in the case of the judicial eviction".[5]

The Plaintiff's position was that since he was in possession of Lot 9 which adjoins the Lots 4,5,6,7 and 8, in Plan No.2469A, he annexed all these lots with his Lot No.9 in the said Plan No.2469A as one land and had been cultivating and enjoying the fruits of the same for about 70 years. In this situation if the Defendant goes to the land to identify it with the Surveyor will definitely create a dispute though she had a deed in possession.

Subsequently, the Defendant had made a complaint to the Police and that complaint resulted in a proceeding under Section 66 of the Primary Court Procedure Act in the Magistrate's Court. On the basis of a receipt issued by the Coconut Development Board, the Magistrate placed her in possession of Lots 7 and 8 leaving Lots 4, 5 and 6, and directed to settle the dispute by the District Court. On this direction the Plaintiff has instituted the present action.

Since the Defendant herself admitted that neither she nor her predecessor in title had possessed the land in dispute, the long possession claimed by the Plaintiff must be considered in his favour under Section 3 of the Prescription Ordinance. In the South African case of ***Scholtz v. Faifer***,[6] Innes C.J. said: "A person who applies for such relief must satisfy the Court upon two points: *(i)* that he was on possession of the (property)

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[5] Voet: 18, 1, 14- Berwick's Translation 19
[6] 1910 T.S. 243

at the date of the alleged deprivation; and *(ii)* that he was illicitly ousted from such possession". Applying this principle, the Defendant has not proved that she was deprived of her possession of the property by the Plaintiff.

The receipt issued by the Coconut Development Board is not proof of ant possession in favour of the Defendant. It can be issued any one who produced a deed to obtain relief from the Board. There is no evidence that this receipt was issued after inspecting the land and cultivation of the Defendant. There is no evidence that this receipt was issued on the basis of physical possession. In ***Hassen v. Romanishamy***[7], Basnayake C.J. held that; "The payment of rates is by itself not proof of possession for the purpose of section 3 of the Prescription Ordinance, for rates can be tendered by a tenant or one who occupying any premises with leave and licence of the owner or by any other person." The receipt from the Coconut Development Board, therefore, does not advance the case of the Defendant.

In a *rei vindicatio* action the burden of proof of title rests entirely on the Plaintiff. Whilst the Plaintiff has paper title the Defendant may have been in possession and claiming prescriptive title. In the present case the position is different. Whilst the Defendant has paper title the Plaintiff asserts his long prescriptive title. Merely because the Defendant has a paper title, it will not deprive the Plaintiff of his prescriptive title if it is proved by cogent evidence that he has been in uninterrupted possession over 10 years. In the absence of any evidence that Defendant's predecessor in title had been in possession prior to 1989, and that possession was interrupted by the Plaintiff, the Defendant's paper title alone by the deed executed in 1989 will not give her any ownership in the land in dispute.

In the instant case, the defendant until she bought the land from her vendor, did not know the location or boundaries of the land. It is evidence that even her predecessors were not in possession of the land for a very long time. Since the land in dispute was unoccupied, the Plaintiff who owns the adjoining Lot 9 has annexed the land in dispute

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[7] 66 C.L.W. 112

with his Lot 9 and possessed it. This possession was uninterrupted by any one. In ***Karunadasa v. Abdul Hameed***[8], Sansoni, J. held that, in a *rei vindicatio* action it is highly dangerous to adjudicate on the issue of prescription without first going into and examining the documentary title of the parties. Without going into the title of the parties, the District Court should not consider only the question of possession-*see* (1935) 17 C. L. Rec. 83. Where legal or paper title and a title based on prescription are in issue, the Court should first make a genuine effort to decide in which party the legal title is vested. If neither party has succeeded in establishing it, the Court should then proceed to decide the case on the issue of prescription. The burden of proof of prescriptive title depends on the question of legal ownership. ***Thajudeen v. Natchiya***[9]. This problem has been gone into by the learned District Judge in this case. Admittedly, the defendant has a paper title to the land in dispute but which is possessed by the plaintiff uninterruptedly for very long time, as part and parcel of his land, which gives the benefit of the law of prescription in favour of the plaintiff. I am of the view that the learned District Judge has analysed the evidence adduced in this case and has correctly come to the decision that plaintiff has prescriptive title to Lots 4,5,6,7, and 8 which are claimed by the defendant by her deed.

In the circumstances, I hold that the learned District Judge had correctly held that the Plaintiff has prescribed to the land in dispute and I do not wish to interfere with the judgment. I affirm the judgment entered in this case and dismiss the appeal without costs.

JUDGE OF THE COURT OF APPEAL

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[8] (1958) 60 N.L.R. 352
[9] 57 C.L.W 57.