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

In the matter of an appeal against the judgment of the Civil Appellate High Court of Kegalle

Batuwanage Siripala
Plaintiff

SC Appeal 15/2010
SC/(HC)CALA 106/2009
Civil Appellate High Court Kegalle
SP/HCCA/ KAG/221/2007(F)
DC Kegalle 4232/L

Vs

RA Jayatilleke (Deceased)
Defendant

AND

RA Shirley Anura
Substituted Defendant-Appellant

Vs

Batuwanage Siripala

Plaintiff- Respondent

AND NOW BETWEEN

Batuwanage Siripala (Deceased)

1A Suneetha Nipuna Arachchi
1B Batuwanage Adeesha Sahan

Substituted Plaintiff- Respondent-Appellants

Vs

RA Shirly Anura
Substituted Defendant-Appellant-Respondent

Before : Rohini Marasinghe J
Sisira J De Abrew J
Priyantha Jayawardene PC,J
Counsel : W Dayaratne PC with R Jayawardene
for Substituted Plaintiff- Respondent-Appellants
DMG Dissanayake for Substituted -Defendant-Appellant-Respondents

Argued on : 13.5.2015
Decided on : 2.11.2015

Sisira J De Abrew J.

Batuwanage Siripala, the Plaintiff-Respondent- Appellant (hereinafter referred to as the (Pliantiff-Appellant) instituted this action for a declaration of title and for ejectment of the Defendant-Appellant-Respondent RA Jayatilleke (hereinafter referred to as the Defendant-Respondent) from the land described in the schedule to plaint. After trial the learned District Judge delivered the judgment in favour of the Plaintiff- Appellant. But on appeal, the High Court by its judgment dated 27.4.2009 set aside the judgment the learned District Judge. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellant has appealed to this court. This court, by its order dated 1.3.2010, granted leave to appeal on questions of law set out in paragraph 20 (a),(c), (d),(e) and (f) of the amended petition of appeal dated 11.11.2009 which are reproduced below.

1. Did their Lordships err in law when they came to the conclusion that the Substituted Defendant-Appellant-Respondent has acquired prescriptive rights to the land in dispute?

2. Did their Lordships err in law when they failed to consider that the Substituted Defendant-Appellant-Respondent has failed to establish a starting point for the acquisition of the prescriptive rights?
3. Did their Lordships err in law when they came to the conclusion that the Substituted Defendant-Appellant-Respondent has started his adverse possession from the date of the final decree in the partition case bearing No. 9740/P?
4. Did their Lordships err in law when they failed to consider that a person who has established the title by valid deeds is not required to prove possession of the corpus?
5. Did their Lordships err in law when they came to the conclusion that the original Defendant's possession has superseded the paper title of the Plaintiff-Respondent-Petitioner?

It is undisputed that the corpus in this case is a part of the subject matter in case No. DC Kegalle 9740/P; that the said land was depicted as Lot No. 2 in final plan No.701/A prepared by D. Liyanage Licensed Surveyor; and that Lot No.2 of the said plan No.701/A was allotted to one TA Liliyan Margret Dayawathi by the partition decree of the said case dated 11.9.1963.

In an action for declaration, who has the burden to establish the title to the land? To answer this question, I would like to consider certain judicial decisions

> In Wanigarathne Vs Juwanis Appuhamy 65 NLR 167 Justice Heart observed: "In an action rei vindicatio the plaintiff must prove and

> establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established."
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> In Lokumanika Vs Gunasekara [1997] 2 SLR 281, Justice Ranaraja observed that in an action for declaration of title, the plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant.
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> In Peeris Ve Savunhamy 54 NLR 281 Justice Dias held thus: "Where, in an action for declaration of title to land, if the defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium."

Having considered the above judicial decisions, I hold that in an action for declaration of title, the burden lies with the plaintiff to prove his title to the land. I will now consider whether the Plaintiff-Appellant has discharged this burden. TA Liliyan Margret Dayawathi who was allotted Lot No.2 of Plan No.701/A by the final partition decree in case No.9740, by deed No.557 dated 16.1.84 (P4), transferred the said Lot No.2 to Pathma Varunalatha. The said Varunalatha , by deed No.5443 dated 25.10.1988 (P5), sold the said Lot No.2 to Batuwanage Siripala, the Plaintiff-Appellant. When I consider the above matters, I hold that the Plaintiff-Appellant has discharged his burden and proved his title to the land which is the subject matter in this case. For the purpose of this case, on a commission issued by court, GAR Perera licensed Surveyor prepared plan No. 838 dated 30.4.1990 and superimposed his plan on

plan No.701A. Lot No.1 of plan No.838 is claimed by the Defendant-Respondent which is also described in the 2nd schedule to the plaint.

The Defendant-Respondent contends that he had been in possession of the land described in the 2nd schedule to the plaint (lot No.1 of plan No.838 prepared by GAR Perera Licensed Surveyor). The Defendant-Respondent claims prescriptive title to the land on the basis that he had been in possession of the said land for over a period of ten years. If a person claims prescriptive title, he must prove that he has been in undisturbed, uninterrupted and adverse possession of the land for a period of ten years (Section 3 of the Prescription Ordinance). This is the law of the land. For the purpose of clarity I would like to state the following judicial decisions.

> In Sirajudeen and Others Vs Abbas [1994] 2 SLR 365 GPS De Silva CJ held thus: "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 Ranasinghe Vs Somawathi [2004] 2SLR 154 Justice Dissanayake observed thus: "A right of way by prescription has to be established by proof of the existence of the following ingredients, inter alia, (a) adverse possession; (b) uninterrupted and independent user for at least 10 years to the exclusion of all others"

I will now consider whether the Defendant-Respondent has proved uninterrupted, undisturbed and adverse possession for a period of ten years. The Defendant-Respondent relies on the Surveyor's report. On the day of the survey the Defendant-Respondent had claimed that he had cultivated the land. Is this evidence sufficient to prove the above ingredients? A person who claims prescription can complain to the surveyor on the day of the survey that he cultivated the land even if he had not cultivated it. This claim is only the version of the complainant. This type of claim cannot be considered as strong evidence to prove undisturbed, uninterrupted and adverse possession. The son of the Defendant-Respondent has stated in his evidence that his father was in possession of the land for a long period. Apart from this evidence there is no any other evidence. Mere statements of witnesses that the Defendant-Respondent was in possession of the land in dispute for over a period of ten years are not evidence of uninterrupted, undisturbed and adverse possession. This was the view expressed by GPS De Silva CJ in Sirajudeen Vs Abbas (supra).

The other question that must be considered is whether the above evidence of the son of the Defendant-Respondent could be accepted. I now consider this question. The Defendant-Respondent was the 3rd defendant in

partition case No.9740P. He made an application to exclude lot No.2 of plan No.701/A, but was not successful. Attorney-at-Law for the plaintiff in the said partition case thereafter moved notice of writ on the 3rd defendant (the Defendant-Respondent in this case) but notice could not be served on him even on 25.11.1965. The fiscal had reported that the 3rd defendant was not in the village. Later notice of writ was served on the 3rd defendant in the partition case but he did not come to court. Attorney-at-Law for the plaintiff in the said partition case moved the District Court to vacate the order for reissue of notice of writ on the 3rd defendant as the plaintiff had taken possession of the land. The 3rd defendant in the partition case (No.9740P) is the Defendant-Respondent in this case. The above facts were established by journal entries of case No.9740P. The above evidence has clearly established that the Defendant-Respondent was not in possession of the land although he claimed so. For the above reasons, I hold that the evidence of the son of the Defendant-Respondent cannot be accepted and he was not in uninterrupted, undisturbed and adverse possession of the land in dispute. Learned High Court Judges were of the opinion that although final partition decree was entered on 11.9.1963, no steps had been taken to recover the possession. The plaintiff in the partition case took over the possession of the land without the writ of execution being executed and the Attorney-at-Law for the plaintiff had informed this matter to the District Court. Therefore it appears that the learned High Court Judges were in error when they made the above observation.

For the above reasons, I hold that the judgment of the High Court is wrong and cannot be permitted to stand. I answer the questions of law raised by the Plaintiff-Appellant in his favour.

For the above reasons, I set aside the judgment of the High Court dated 27.4.2009 and affirm the judgment of the learned District Judge dated 29.7.2004. I allow the appeal. The Substituted Plaintiff-Respondent-Appellants are entitled to recover costs fixed at Rs.50,000/- from the Defendant-Respondent.

Appeal allowed.

Judge of the Supreme Court.

Rohini Marasinghe J

I agree.

Judge of the Supreme Court.

Priyantha Jayawardene PC J

I agree.

Judge of the Supreme Court.