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

SC Appeal No. 53/2011

SC/HCCA/LA Application No. 328/2010
HCCA Gampaha Case No.
WP/HCCA/GAM/218/03 (F)
DC Negombo Case No. 5155/L

Al Hareen Bin Ahamed
No. 700, Galle Road,
Colombo. 3

PLAINTIFF

Vs.

Mohamed Rafi Ismail Bin Hassan
No. 44/1, Wajira Lane,
Off Vajira Road,
Colombo 4.

DEFENDANT

AND

Mohamed Rafi Ismail Bin Hassan
No. 44/1, Vajira Lane,
Off Vajira Road,
Colombo 4.

DEFENDANT-APPELLANT

Vs.

Al Hareen Bin Ahamed
No. 700, Galle Road,
Colombo. 3

PLAINTIFF-RESPONDENT

AND NOW AND BETWEEN

Al Hareen Bin Ahamed
No. 700, Galle Road,
Colombo. 3

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Mohamed Rafi Ismail Bin Hassan
No. 44/1, Wajira Lane,
Off Vajira Road,
Colombo 4.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.

Priyantha Jayawardena P.C., J &

Anil Gooneratne J.

COUNSEL: M.U.M. Ali Sabry P.C. with Shamith Fernando
for the Plaintiff-Respondent-Appellant

Dr. S.F.A. Cooray for the Defendant-Appellant-Respondent

ARGUED ON: 06.11.2017

WRITTEN SUBMISSIONS FILED ON:

20.06.2011 (By the Plaintiff-Respondent-Appellant)
30.08.2011 (By the Defendant-Appellant-Respondent

DECIDED ON: 29.11.2017

GOONERATNE J.

This is an action rei vindicatio. Plaintiff-Respondent-Appellant by his plaint dated 18.12.1995 prays for a declaration that the Plaintiff is the owner of lot 10 in plan No. 14/1959 and damages as prayed for in the plaint i.e until the Plaintiff-Respondent-Appellant is placed in possession of the said lot 10. The above plan was prepared by Surveyor Cross Dabarera in January 1959. Defendant-Appellant-Respondent prayed for a dismissal of the action. The action was filed in the District Court of Negombo. Parties proceeded to trial on 17 issues. It was admitted that estate called 'Sabadeeya' estate was owned by Ibrahim Bin Ahamed. The extent of the estate was 210 acres, 3 roods and 23 perches. It was also admitted that the said I. Bin Ahamed on or about 31.03.1931 sold the entire estate to Mohamed Ismail Bin Ibrahim by deed No. 1223.

Thereafter the said M.I. Bin Ibrahim gifted the said land to his 4 children including the Plaintiff's mother namely Sithy Rahima Binthi Mohamed Ismail. The co-owners being the above 4 children, according to the plaint amicably partitioned the said land and became entitled to a divided and defined portion of land in extent of 53 acres, 2 roods. The above Sithy Rahima Binthi Mohamed Ismail by deed of gift bearing No. 9431 of 29.09.1994 gifted 5 acres which is depicted as lot 10 in plan No. 14 of 17.01.1959 out of an extent of 52 acres and 2 roods to her son the Plaintiff in this action.

The said lot 10 is the subject matter of this suit. (described in schedule 'B' of plaint). Plaintiff's case is that his uncle Hassan Bin Ismail (brother of Plaintiff's mother) was in occupation of the said land gifted to him by his mother by deed No. 9431 with the permission, leave and licence of his mother to look after that portion of land. However the uncle Hassan Bin Ismail died on July 1993. Thereafter the Defendant the son of H. Bin Ismail continued to remain in occupation, on the same terms and conditions. Plaintiff's mother requested the Plaintiff to take over the said lot of land and she also terminated the leave and licence. Plaintiff called upon the Defendant to hand over possession but the Defendant failed to do so. As a result this action was filed.

The Defendant takes up the position that this is a case of prescription, among co-owners. Defendant's father was also a co-owner owning an undivided 1/4th share. It is also averred that lot 10 never existed as a separate land on the ground. Answer disclosed several deeds which had been executed after 1959 by co-owner of the larger land, disregarding plan 14/1959. Defendant also state that lot 10 was never possessed by Plaintiff or his predecessors in title. Lot 10 never existed as a separate block. Lot 10 was always possessed by Defendant and his predecessors in title. Lot 10 is part of the said divided portion possessed by the Defendant in lieu of his undivided shares. It is also stressed by the Defendant that plan P1 of Cross Dabarera was never signed by the co-

owners. No cross deeds executed in terms of the said plan P1 to end co-ownership. No evidence of boundary fences or boundary walls. As such it is argued on behalf of the Defendants that a commission was not taken by Defendants to show the boundaries or separate lots. P1 was never superimposed on a plan.

The learned District Judge held with the Plaintiff and entered Judgment in favour of the Plaintiff. However the High Court set aside the Judgment of the District Judge and dismissed the plaint. The Supreme Court on 05.05.2011 granted Leave to Appeal on questions set out in paragraph 16(a), (c) & (n). It reads thus:

(a) The said order is contrary to law, pleadings and evidence placed before their Lordships the Judges of the Provincial High Court for adjudication.

(c) Their Lordships the Judges of the Provincial High Court have failed to appreciate the fact that the subject matter had been divided and defined by virtue of the plan marked "පැ1" as far back as in 1959 and Deed of Gift bearing No. 9431 marked "පැ 10" had been executed based on the said plan and the Respondent has never disputed the said plan and or Deed of Gift.

(n) Their Lordships the Judges of the High Court have erred in law in interpreting and applying the provisions of Prescription Ordinance to the present case in that failed to appreciate that fact that all the parties to the amicable partition plan marked and produced as "පැ 1" had been possessing their portion exclusively since 1959.

The learned High Court Judges have not given their mind to the question of leave and licence granted to the Defendant and his father. Instead based on Defendant's submissions the High Court examined title to lot 10 of plan P1 and thought it fit to conclude on the provisions contained in Section 3 of the Prescription Ordinance, and to the question of their being no signatures on the plan P1 of the co-owners and the absence of a partition deed. Prior to all this there is a vital point to be considered i.e the question of leave and licence of the Defendant and his father. Plaintiff closed his case by leading in evidence documents marked P1 to P28, without any objection. I would emphasise the fact that letter P21, P22 and P23 were marked and produced in court and there was no objection to same and as such it is evidence in court for all purposes.

Letter P21 dated 2.11.1995 sent by an Attorney at Law on behalf of Plaintiff to Defendant refer to the fact that lot 10 in plan P1 was made by Mr. Croos Dabarera which lot was gifted to Plaintiff by his mother. This letter specifically state that the leave and licence granted to Defendant's father was terminated. In that letter it is stated that the mother requested the son (Plaintiff) to take over possession of lot 10. Letter P22 is from Plaintiff to Defendant which is self-explanatory. There again it is stated that Defendant's father was given this lot 10 to look after the said lot 10 with the permission of the mother of Plaintiff. P22 is a request to hand over possession. P23 is a police

complaint against the Defendant by the Plaintiff stating that the Defendant is in unauthorised occupation. This court is more than satisfied that the leave and licence given to Defendant's father and the Defendant had been terminated for all purposes of this case.

In plan P1 land was divided into 10 lots. Lot 10 is the subject matter of this dispute more fully described in schedule 'ඇ' of the plaint. The Surveyor Cross Dabarera was called by the Plaintiff to given evidence. He prepared P1 and P2. In cross-examination of Surveyor several positions were put to the Surveyor but the Surveyor testified that he went to the land in dispute on several occasions and saw the boundaries of the several lots on the ground. Evidence led at the trial reveal that the co-owners were gifted the land described in P1 may be undivided at the time the gift was made to them by their father but from 1959 onwards the co-owners amicably possessed as divided lots the land as described in P1. Hasan the father of the Defendant possessed the lot allotted to him as a divided portion of land and as a divided portion of the land he alienated his plot of land by deeds පැ11, පැ13, පැ14, පැ15,පැ16 & පැ26. The said deeds are all annexed to the court record. It reveal that the donor (Hassan) gifted all divided portions of the land to the several donees. As such I agree that divided separated portions were alienated by way of gift, by the said Hussan and also the Plaintiff's party. As the learned District Judge observes in his Judgment

Hassan or his son the Defendant is estopped in law and cannot get out of that position by their own conduct.

I observe that the co-owners in relation to deeds පැ11, පැ13, පැ14 &, පැ15 possessed the lots in question as separate lots of land. It is also relevant to note that the Defendant had admitted this position, and deeds පැ25 පැ26, පැ 27 &, පැ28 in cross-examination. As such the said co-owners dividedly and separately possessed there plots of land.

In the learned District Judge's Judgment he has dealt with so many primary facts. This court does not wish to interfere with same. Learned District Judge is entitled to form his own opinion on very many primary facts. Question of fact are such questions the Supreme Court or an Appellate Court would not unnecessarily overrule decisions of the lower court 1993(1) SLR 119; 20 NLR 332; 20 NLR 282; 1955 1 AER 583-4; 1955 1 AER 326.

The Defendant's father possessed lot 10 of plan P1 only as a licence. I have already dealt with this position. As such the Defendant cannot take up the position that he acquired prescriptive title to the land (lot 10) in question. Defendant argue that there was no partition among the co-owners. If that be so Defendant cannot take up the position that he had acquired prescriptive title against co-owners over an undivided land. This seems to be that the Defendant

is seeking to approbate and reprobate. Nor did the Defendant establish exclusive adverse possession, as regards his own rights.

I am unable to agree with the views expressed by the High Court by referring to several authorities that the co-owners have not signed the partition plan. If the parties concerned (co-owners) signed the partition plan it would have been very easy for all parties, but in the absence of such signatures, I cannot conclude the way the High Court Judges dealt with the case when there was sufficient oral and documentary evidence of the Plaintiff's party of amicable divisions of the land in dispute and separate and independent possession of same from the year 1959. The subsequent conduct of the co-owners and subsequent transfers of certain divided portion, out of the allocated share of land by the predecessors of parties and especially by Defendant's father by executing deeds පැ11, පැ13, පැ14, පැ15,පැ16 & පැ26 establish clearly of separate divided lots by the parties concerned. The Judgments cited by the learned High Court Judge have been applied to this case on an incorrect perspective. No doubt the Judgments cited is a guide to be only considered by a court of law. When there is full proof evidence with cogent reasons one has to consider the evidence led before the original court, which could be termed as the best evidence in the context and circumstances of the case in hand.

I refer to the case at *Dona Cecilia vs. Cecilia Perera and others 1987(1) SLR Pg. 235 (SC)*

Where a land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years

Where a land was divided in the presence of all the co-owners who acquiesced in the division and possessed their divided lots exclusively taking the produce thereof everything points to an intention to partition the land permanently and not just for convenience of possession and although the plan of division was not signed by the co-owners and no cross conveyances were executed, with ten years of such possession the co-owners would acquire prescriptive title to their respective lots. The successor to a co-owner could take on the period of possession of his predecessor in proving his prescriptive title.

The above well considered Judgment could be applicable to the facts of this case. Evidence transpired in the original court establish the fact that there had been an amicable partition between all previous co-owners of the land which consists of about 211 acres, 3 roods and 23 perches. Lot 10 of the said land was allocated to the mother of the Plaintiff who later on gifted same to her son the Plaintiff. Therefore I set aside the Judgment of the High Court. As such I answer the questions of law as 'Yes' in the affirmative.

Judgment of the learned District Judge is affirmed, and I set aside the Judgment of the High Court.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare P.C. J

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C. J.

I agree.

JUDGE OF THE SUPREME COURT