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

S.C. Appeal No. 15/2008
S. C. (Spl.) L.A. No. 01/2008
C.A. Application No. 362/1995
D.C. Tangalle No. 215/L

In the matter of an Application for Special Leave to Appeal under Article 128 (2) of the Democratic Socialist Republic of Sri Lanka.

Hewa Alankarage Rosalin Hami,
Kanumuldeniya West,
Olu Ara,
Walasmulla.
2nd Defendant-Appellant-Petitioner

Vs.

1A. E. Hewage Hami
1B. L.H. Indrasena
1C. L.H. Dharmawathi
1D. L.H. Somawathi
1E. L.H. Weerasena
1F. L.H. Chandrasena
1G. W.L. Serasinghe
1H. L.H. Somapala
1I. L.H. Dharmasena
All of Kenumuldeniya South,
Nathuwala,
Walasmulla.
Substituted Plaintiff-Respondent-Respondents

BEFORE : **Ms. TILAKAWARDANE.J**
AMARATUNGA.J &
IMAM.J

COUNSEL : Faiz Musthapha, P.C., with Amarasiri Panditharatne for the 2nd Defendant-Appellant-Petitioner.
D.M.G. Dissanayake for the Substituted Plaintiff-Respondent-Respondents.

ARGUED ON : 28.10.2010.

DECIDED ON : 03.12.2010

Ms. S. TILAKAWARDANE.J

Special Leave to Appeal was granted on the Application of the 2nd Defendant-Appellant-Petitioner (hereinafter referred to as the Appellant) on the questions of law set out in paragraph 8 (a) - (g) of the Petition dated 01.01.2008.

However at the commencement of the arguments Counsel agreed that the only two matters for determination was whether possession had been handed over to the Plaintiff by the Fiscal in District Court Tangalle Case No. L/882 and whether there is evidence to prove exclusive and uninterrupted possession of the disputed corpus by the 2nd Defendant-Appellant-Petitioner

An earlier action was instituted in District Court Tangalle Case bearing No. L/882 by the Plaintiff-Respondent-Respondents in relation to the same land that is presently in dispute, between the parties who were in occupation of the land at that time, and the Appellant at the time of the institution of the said action was not a party, but was the spouse of the 1st Defendant in that case. The Appellant did not seek to intervene in the said action.

The Plaintiff-Respondent (hereinafter referred to as the Respondent) who had instituted action in this case relied on the pedigree set up by him and on the chain of title depicted in

Deeds P1 to P5 and submitted that he had purchased the land in 1954 from Kirigoris by a Deed of Sale dated 19.09.1954 bearing No. 1944 (marked P6) attested by D.B. Karunanayake, Notary Public.

The parties in the present case admitted the identity of the corpus. It was also further admitted that the corpus had been correctly depicted in plan No. 137 (marked P10) prepared by T. Weerasinghe, Licensed Surveyor which was 1R 22P in extent, and which was prepared through a Court Commission issued in District Court Tangalle Case bearing No. L/882.

Case bearing No. L/882 of District Court Tangalle was filed by the Respondent, to obtain a declaration of title and possession through eviction of the 1st Defendant, who was at the time, in occupation of this land, and who is the spouse of the present Appellant. The Respondent had obtained Judgment in his favour, and obtained an Order of eviction against the 1st Defendant in that case. The Appellant at that time was not a party to the case and had made no Application to intercede. It is evident that her purported claim on Deed bearing No. 3829 dated 03.10.1961,was prior to the possession being handed over to the Respondent by the Fiscal 17.09.1962, but at the time she did neither sought to challenge the execution of the said writ in Court nor intervened in the case.

The Counsel for the Appellant claimed that though the Judgment had been entered in favour of the Respondent in District Court of Tangalle case No. L/882, the writ for possession was never executed and that possession of the land had not been delivered to the Respondent, a fact that was strongly challenged by the Respondent. .

In this context, this court has carefully perused a writ of delivery of immovable property issued by the Learned District Court Judge. This was executed on 23.07.1962. In terms of the Fiscal Report pertaining to the execution of this writ and the affidavit dated 17.09.1962 of D. de S. Abeyweera the Fiscal Officer, there is an explicit endorsement that the possession of the land had been delivered to the Respondent. (The Plaintiff in Case No.L/882 referred to above) This was marked as P11 and produced as evidence in the present case. In this context, this Court rules on a statutory presumption in favour of the execution, in terms of Section 114 (d) of the Evidence Ordinance. This Section reads as follows;

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case – that judicial and official acts have been regularly performed."

This evidence contained in the affidavit has not been challenged either by raising an issue on this matter or calling the Fiscal Officer who executed the writ and eliciting the fact that possession had not been handed over as claimed by the Appellant. No independent evidence was led to rebut this presumption.

The Appellant submitted that evidence of Wijemuni Arachchige Peiris should be relied upon to prove that possession had never been handed over as alleged, but his evidence was inconsistent in so much as under cross examination, he admitted that he was not there at the time the Fiscal came to execute the writ and in the circumstances, it can be determined that he is not in a position to testify that the Fiscal has not handed over the possession. Under these circumstances, this Court comes to a finding that the possession had been duly handed over on 17.09.1962 to the Respondent by the Fiscal executing the Writ of delivery of property.

In the circumstances this court holds that there was no error in law in the Judgment of the Court of Appeal where it concluded that the possession was handed over to the Respondent by the Fiscal in Case No. L/882, and this court further holds that the legality of the Fiscal's Report has not been assailed.

Therefore, the claim by the Appellant that the possession of the disputed land had never been handed over to the Respondent is untenable and is not based on the facts of this case.

The next matter urged by Counsel for the Appellant was whether there is evidence to prove exclusive and uninterrupted possession of the corpus by the Appellant. It is relevant to mention that the Appellant also produced Deed bearing No. 3829 dated 03.10.1961 attested by Lionel Amaraweera (marked 2V4) had been produced to purportedly prove her title. This Deed explicitly

stated that it was an undivided portion of the land and that her purported claim on the Deed was only for 5/90 of the said corpus, less than what is now being claimed by the Appellant.

In the case of Hariette Vs. Pathmasiri (1996) 1 SRI L R 358 (SC). the Plaintiff produced title Deeds to undivided shares in the land but her action being one for declaration of title to the entirety she cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster. Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land because the owner of the undivided share has an interest in every part and portion of the entire land. But such was not the case formulated by the Plaintiff.

As it was held in the case of Sura Vs. Fernando (1 ACR 95) a co-owner was allowed to maintain an action of *rei vindicatio* in respect of his share of his property in dispute where the whole property was claimed by the defendant, and where it was found possible to decide the action without interfering with or endangering the right of any other co-owners.

In considering the present case, it is pertinent to note that an action bearing No. 25101 (marked 2V3) dated 09.08.1963 had been instituted in the Magistrates Court of Walasmulla by the Respondent alleging that the Appellants had committed criminal trespass by forcibly entering the land on 18.10.1962. The case was dismissed on the grounds that the Respondent was absent in court on 10.07.1966. On 15.07.1966, the Respondent instituted a fresh action bearing No. 2844 in the Magistrate's Court of Walasmulla (marked 2V2) on the same basis against the Appellant, her spouse (the 1st Defendant in L/882) and his mother. It was admitted by the parties that this case was still pending in the Court. InDeed, a further complaint was lodged by the Respondent to the Grama Sevaka on 20.07.1978 (marked P12) that the Appellant was continually disturbing the possession of the Respondent in this case.

When one considers the fact that having obtained the possession, the Respondent had been in occupation until the possession was disturbed by the Appellant on 18.10.1962 , and that litigation is

continuing, the Appellant has not proved that she was in undisturbed and uninterrupted possession adverse to the Appellant as pending suits, even when they become dormant, stop prescription.

In the full bench decision of Siman Appu Vs. Christian Appu (1896) 1 NLR 288 it was stated that, "Possession" of a land must be continuous, and peaceful, and for a certain period. It is "interrupted" if the continuity of possession is broken either by the disputed legitimacy putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing it is not in occupation.

And possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user.

In Ettana Vs. Naide, (1878) 1 S.C.C.11 the Plaintiff sued the Defendant for the recovery of certain lands. The answer was filed nearly 12 years after the date of the libel and set up a right to hold the land sued for by prescription. The defendant admittedly held possession of the land during the whole of the interval between the date of the filing of his answer, and that of filing the libel and during some period antecedent thereto, but he failed to prove that the period of possession previous to the suit extended back so far as ten years.

It was held that the possession contemplated by the Prescription Ordinance is a possession of ten years previous to the institution of the suit, and that the possession of the defendant since the institution of this suit, though such possession should exceed the term of ten years, could not give him a title by prescription.

Indeed, even the title Deed (marked 2V4) which was referred to above which was relied upon by the Appellant refers to an undivided land where the boundaries do not tally with the plan which admittedly referred to the corpus in this case and which was marked as P10.

Under these circumstances, this Court finds that the Appellant has not proved prescription and that she has also failed to prove that she was in an undisturbed possession adverse to the interest of the Respondent for a continuous period of 10 years.

Furthermore, as the land is an undivided portion of the land which was co-owned the Appellant has not proved ouster or adverse possession against the Respondent in this case.

Accordingly for the above reasons the Appeal of the Appellant is dismissed. No costs.

JUDGE OF THE SUPREME COURT

AMARATUNGA.J

I agree.

JUDGE OF THE SUPREME COURT

IMAM.J

I agree.

JUDGE OF THE SUPREME COURT