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

In the matter of an Application for Leave to Appeal to the Honourable Supreme Court of the Republic of Sri Lanka made under and in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 125/2018
SC HCCA LA 518/17
WP/HCCA/LA No. 13/2014F
DC Colombo Case No. DLM 68/08

Ramakrishnan Dharmalingam,
No. 23, Sedawatta, Wellanpitiya.
Plaintiff

Vs

Ramakrishnan Sivalingam,
No. 23, Sedawatta, Wellanpitiya.
Defendant

AND

Ramakrishnan Dharmalingam,
No. 23, Sedawatta, Wellanpitiya.
Plaintiff-Appellant

Vs

Ramakrishnan Sivalingam,
No. 23, Sedawatta, Wellanpitiya.
Defendant-Respondent

AND NOW

Ramakrishnan Sivalingam,

No. 23, Sedawatta, Wellanpitiya.
Defendant-Respondent-Petitioner

Vs

Ramakrishnan Dharmalingam,
No. 23, Sedawatta, Wellanpitiya.
Plaintiff-Appellant-Respondent

BEFORE: Buwaneka Aluwihare PC, J.
V. K. Malalgoda PC, J. &
Preethi Padman Surasena J.

COUNSEL: P. P. Gunasena for Defendant-Respondent-Appellant.
Shrihan Samaranayake for Plaintiff-Appellant-Respondent.

ARGUED ON: 01.04.2019

DECIDED ON: 16. 10. 2020

JUDGEMENT

Aluwihare PC. J.,

The Plaintiff-Appellant-Respondent (hereinafter sometimes referred to as the 'Plaintiff') filed action before the District Court against the Defendant-Respondent-Petitioner-Appellant (hereinafter sometimes referred to as the 'Defendant') and sought a declaration that the Plaintiff has prescribed to a half share of the land and the building bearing No. 23, Sedawatte, Wellanpitiya.

Consequent to a trial, by judgement dated 10th March 2014, the Learned District Judge dismissed the action of the Plaintiff for the reasons set out therein.

Aggrieved, the Plaintiff moved the High Court of Civil Appeal (Colombo) by way of an appeal and the High Court of Civil Appeal by its judgment dated 24th October 2014, set aside the judgement of the Learned District Judge aforesaid and entered judgment in favour of the Plaintiff.

The Defendant moved this court by way of Leave to Appeal and Leave was granted by the Court on 27th August 2018 on the questions of law referred to in sub-paragraphs (c) and (h) of paragraph 11 of the Petition of the Defendant dated 4th December 2017. The said questions in verbatim, are as follows;

11. (c) Whether the High Court of Civil Appeal holden in Colombo has failed to consider that the Learned Trial Judge has properly identified the cause of action?

(h) Whether the High Court of Civil Appeal holden in Colombo has erred by coming to the conclusion that the Respondent ***[Plaintiff]*** *has a prescriptive right to the said property?* (emphasis added)

Facts

The Plaintiff and the Defendant are brothers. According to the Plaintiff, at the time he testified before the District Court he was living at the premises No. 23, Sedawatte, Wellanpitiya, the subject matter of this case. The Defendant along with his family (wife and child) also were living in the same house.

Somewhere in 1960, the Plaintiff's parents had come to reside in these premises along with the Plaintiff and his siblings. They had paid rent to the landlord one Madanayake.

Sometime after 1973, the impugned premises had been vested with the Commissioner of National Housing in terms of the provisions of the Ceiling on Housing Property Law, No. 1 of 1973 and in 1975, they had received a letter in the name of their father, requesting him to take over the property. According to the Plaintiff, by that time his father had passed away.

The Plaintiff had said in his evidence that after the demise of the father, he took the responsibility of managing affairs of the household including meeting the expenses. His mother and the siblings (including the Defendant) had given their consent in

writing, to have the impugned property transferred in the name of the Plaintiff ('P3'). However, the Commissioner of National Housing had transferred the same in favour of their mother ('V1').

According to the Plaintiff their mother had surreptitiously transferred the property in favour of the Defendant and the Plaintiff says that the Defendant showed him the Deed of Gift ('V2') sometime in the year 1990, and that however, he continued to occupy the premises even after he got to know that the property had been transferred in favour of the Defendant.

The Plaintiff also has stated that his family and the family of the Defendant occupied two distinct portions of the disputed premises and that the Defendant never occupied or used the area of the premises occupied by the Plaintiff. He has added that until his children got married, they were also living with him at this premises. According to the Plaintiff, after the demise of his father it was he who had paid all dues relating to the premises up to 1988.

It is conceded by both parties that, over numerous frictions between the families, there had been several police complaints made at various points of time (Such complaints made on 28th June1990 ('P4') and 24th June 2007 ('P5') were produced but not others, due to them allegedly being in a state of decay, at the Police station). At least five police complaints are alleged to have been made by the Plaintiff and the parties have gone to the Mediation Board as well on several occasions due to disputes between the Plaintiff and the Defendant. Nevertheless, the Plaintiff had continued to remain in residence of the premises. The Defendant has dismissed the complaints stating that his brother has a habit of running to the Police station even for trivial misunderstandings.

The Issues

The Defendant's argument before this Court was simply that he became entitled to the corpus by virtue of the Deed of Gift 'V2' and was continuously in possession of the disputed premises. He asserts that under those circumstances, the Plaintiff is not entitled to claim prescription and, furthermore, that the Plaintiff has failed to adequately identify the half portion that he claims from and out of the premises in suit

and therefore has failed to establish the identity of the portion of the corpus in relation to which the Plaintiff sought a declaration from the District Court.

I shall refer to the latter two arguments later in the judgment.

The Plaintiff's action had been dismissed by the District Court on the basis that the portion of the corpus to which the Plaintiff claimed prescriptive title had not been established by way of a plan and that consequently an executable decree cannot be entered in favour of the Plaintiff.

The learned District Judge had concluded that although the Plaintiff had placed evidence (as to the possession) in relation to the portion of the impugned property that he was in possession, however, he had not taken steps to establish by way of a plan the dimensions of the portion that the Plaintiff is so enjoying (pages 10 and 11 of the judgement). The learned District Judge had reiterated this aspect again on page 17 of the judgement and had held that, it would pose a practical difficulty to the court if it were to give possession to the Plaintiff on prescriptive rights due to the reason that the portion the Plaintiff is claiming, has not been identified by way of a plan prepared sequel to a Court Commission. From what the learned District Judge had deduced, if nothing else, one thing is certain, that is, the learned District Judge had not rejected the evidence of the Plaintiff and more specifically that he was in possession of the impugned property continuously since the 1960s.

On the other hand, the Defendant had not challenged this position either. The learned Judges of the High Court of Civil Appeal have made specific reference to the evidence of the Defendant where he had said in the examination in chief that; the wife of the Plaintiff left him in 1985 and even before that, the Plaintiff and his wife were residing at the impugned premises. He had gone on to say that even after the wife left him, the Plaintiff continued to occupy the house (page 163 of the brief). The Defendant had added that after the wife left, the Plaintiff's two children were taken away by their grandmother for upbringing. Thus, from the Defendant's own evidence, it is established that the Plaintiff's whole family were residing there, even prior to 1985.

The High Court of the Civil Appeal on the other hand, held that the Plaintiff had sufficiently described the portion of the premises that he enjoyed possession to enable the court to identify the portion of the house occupied by him.

The Questions of Law

The first question on which Leave to Appeal was granted, as to whether the High Court of Civil Appeal ***"failed to consider that the Learned District Court judge has properly identified the cause of action".***

As far as the cause of action is concerned, I do not see any misdirection on the part of the learned judges of the High Court of Civil Appeal. The Defendant's own written submissions filed before the Civil Appellate High Court refers to the cause of action as: "*Originally this action was instituted by the Plaintiff seeking a declaration that half share of the land and the building (assessment no. 23)* ***belongs to the Plaintiff by way of prescriptive title",*** which was not granted by the District Court. The learned High Court Judges have commenced their judgement having identified the Plaintiff's case in the following terms: *"The appeal of the Plaintiff is that* ***his action based on prescription*** *was not allowed."* (emphasis added).

The High Court having identified the cause of action as referred to above, had proceeded to consider the evidence placed before the District Court by the parties as to the nature of possession the plaintiff alleged to have enjoyed in relation to the premises in issue (pages 2-6 of the judgement). The High Court had made specific reference to parts of the evidence led at the trial and had come to a clear finding that the Plaintiff has established prescriptive title to (part of) the premises in issue, which was the subject matter of the action, before the District Court.

As referred to earlier in the judgement, it is evident from the evidence that the Plaintiff has clearly occupied a portion of the impugned premises with a manifest intention to hold and continue the possession against the claim of the Defendant, a possession that could be termed as hostile or adverse to the rights of the Defendant who had paper title to the property. Going by the Defendant's own admission, the occupation of the premises by the Plaintiff clearly exceeds the prescriptive period.

In the circumstances, I do not see a misdirection on the part of the Judges of the High Court of Civil Appeals *in failing to consider that the District Judge has correctly identified the cause of action* as contended on behalf the Defendant.

In the circumstances aforesaid, I answer the question of law referred to in sub paragraph (c) of Paragraph 11 of the Petition of the Defendant in the negative.

Prescriptive Right of the Plaintiff

At the hearing of the appeal, the Defendant premised his argument mainly on two (legal) issues, in order to substantiate the second question of law on which leave was granted, namely; that only a '***defendant'*** can rely on a plea of prescription and that the Plaintiff had failed to identify the corpus in the manner prescribed in Section 41 of the Civil Procedure Code.

Section 3 of the Prescription Ordinance states that "*proof of undisturbed and uninterrupted possession by* ***a defendant*** *in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action…for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs.*"

A plaintiff, however, is not barred from claiming title by prescription, for Section 3 goes onto say that *"…And in like manner,* ***when any plaintiff shall bring his action,*** *or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property,* ***proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff*** *or intervenient, or by those under whom he claims,* ***shall entitle such plaintiff or intervenient to a decree in his favour with costs:…***" (emphasis added).

The Defendant, relied on the decision in **Terunnanse v. Menike** (1895) 1 NLR 200 to substantiate the point raised that, prescription can only be used as a defence, and not as a weapon of offence, to the effect that the Plaintiff as the party bringing the action, cannot rely on prescription to claim the title.

Although Chief Justice Bonser in **Terunnanse v. Menike** (*supra*) has indeed stated that; "*the Ordinance…as I venture to think… was intended to be used as a shield only, and not as a weapon of offence*" it was immediately followed with the opinion that "*If* ***the person in possession*** *were sued by the true owner,* ***he could plead the Ordinance*** *or he* ***might take the initiative if his possession was disturbed or threatened, and apply for a decree establishing his title and quieting him in possession.***"(emphasis added). Thus, the court has considered pleading relief under the Prescription Ordinance as well as seeking a declaration of title, as acceptable courses of action available to a

person in possession whose possession has been disturbed or threatened. It must be noted, however, that Withers J. who participated in that decision **(Terunnanse v. Menike)** preferred a different view. Withers, J opined;

"the only law relating to the acquisition of private immovable property by prescription is to be found in the third section of the Ordinance No. 22 of 1871. That section determines the mode of acquisition of a prescriptive title. It has been held over and over again by this court that a decree of title to such immovable property can be granted under the circumstances set forth in that section"

There can be instances where a person who had acquired prescriptive title is forcibly ejected and, in such situations, the ejected party should be able to go before the law and vindicate its rights. In the case of **Naker v. Sinatti** 1860 Ramanathan Reports 75, Creasy C.J commented, "*The result would be that men* ***who were turned out of lands and houses*** *would lose all the benefit of prescriptive title, unless they ran off to the courthouse and instituted a suit on the very day on which wrongful act was committed".* (emphasis added). Although these observations were made by his Lordship in giving expression to the phrase *'possession for ten years previous to'* that occurs in Section 3 of the Prescription Ordinance, it recognised the right of a party, seeking title based on prescription, to invoke the jurisdiction of the court in order to vindicate its rights.

In **Banda v. Banda** 44 NLR 302 Moncreiff J. observed that Section 3 of the Prescription Ordinance deals with three classes of **plaintiffs**. His Lordship observed (at page 303); *"When* ***any plaintiff shall bring his action*** *for the purpose of being quieted in his possession of lands or other immovable property or to prevent encroachment or usurpation thereof or to establish his claim in any other manner to such land or other immovable property, proof of undisturbed and uninterrupted possession by him or by those under whom he claims, by a title adverse to or independent of that of the defendant for ten years previous to the bringing of such action shall entitle the plaintiff to a decree in his favour with costs.*" (emphasis added).

Thus, it appears that there is ample jurisprudence developed by our courts over the years, for the proposition that prescription is not only to be used as a shield but also can be used to vindicate one's title to land or other immovable property.

As referred to earlier, it was also argued on behalf of the Defendant that the Plaintiff has not complied with Section 41 of the Civil Procedure Code.

Section 41 of the Civil Procedure Code stipulates that- "*When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only.*"

The Defendant relied on the decision of the Court of Appeal, in the case of **David v. Gnanawathie** 2000 (2) SLR 352. This was a case where the plaintiff claimed that he has exercised by prescriptive user a right of way over a defined route. In delivering the judgement, his Lordship Justice Jayasuriya observed that "*Strict compliance with the provisions of Section 41 of the Civil Procedure Code is necessary for the judge to enter a clear and such definite judgement declaring the servitude of a right of way and such definiteness is crucially important when the question of execution of the judgement and decree entered arises for consideration.*"

It must be noted that the above case related to a prescriptive praedial servitude of a right of (defined) way over a servient tenement and no court would be in a position to determine the issue without a sketch or plan depicting the road way the party claims that was used over a period of time and in those circumstances, the requirement of strict compliance with Section 41 of the CPC is understandable.

In an earlier case, however, the Supreme Court took a different view as to satisfying the requirements of Section 41 of the Civil procedure Code. In the case of **Abdulla v. Junaid** 44 CLW 84 Chief Justice Basnayake observed; *"That section (Section 41)* ***does not require*** (emphasis is mine) *that when a right of way of necessity is claimed over a servient tenement the path or way claimed should be described by physical metes and bounds or by reference to a sufficient sketch, map or plan. It provides that:-*

(a) Where a specific portion of land is claimed that portion of land must be described in the prescribed manner,

(b) Where some share or interest in a specific portion of land is claimed, then the portion of land *in which the share or interest is claimed must be described in the prescribed manner."*

Also *"… They (the plaintiffs) claim a right of necessity to proceed along a defined path which has been indicated in the sketch annexed to the plaint and the plan subsequently prepared on a commission issued by the Court. Although a person claiming a way of necessity has no right to a specific way of necessity until it is constituted by a grant or a decree of Court, it is open to the claimant to indicate the path along which he wishes to proceed so that the Court may decide whether the claim is reasonable or not and grant the right either along the path claimed or prescribe another which causes the least amount of detriment to the servient tenement. The onus of proving the necessity is on the claimant."*

Thus, if a party to a case of this nature describes the property in the plaint to a degree or to an extent, that enables the court to enter a clear and a definite judgement and if the description of the property would not impede the execution of the decree, that would be sufficient compliance with Section 41 of the Civil Procedure Code. In each case the court has to consider this issue based on the facts and circumstances of that particular case. The contrasting decisions in the cases cited above (case of **David** and the case of **Abdulla**) amply demonstrate this factor.

In the case before us, the schedule to the plaint describes the tenement by reference to; its assessment number, the extent, the plan that identifies the lot number in which the 1.92 perch tenement is constructed as well as the northern, eastern, southern and western boundaries of that lot. This description tallies with the schedule of the deed of conveyance issued in favour of the mother of the Plaintiff and the Defendant in this case, by the Commissioner of National Housing ('V1'). In his testimony the Plaintiff has clearly stated that of these premises, he has separated a portion in extent of 13 ½ feet x 13 ½ feet and possessing it as his own (page 125 of the brief). The evidence referred to above, cumulatively, has crystallized the identity of the premises and the portion claimed by the Plaintiff. Under these circumstances, I do not envisage any difficulty on the court to make a declaration for that portion of the impugned premises, based on the description given in the schedule to the plaint.

The learned Judges of the High Court of Civil Appeals had given their mind to the evidence led and the decisions in the cases of **Leslin Jayasinghe v. Illangaratne** 2006 2 SLR 39 and **Muttu Caruppen v. Rankira** 13 NLR 326 and had come to a finding that the Plaintiff had established prescriptive title to the portion of the impugned premises described by him in his evidence.

Considering the above, I cannot fault the learned Judges of the High Court for reaching the said conclusion and as such, I answer the second question of law on which leave to appeal was granted also in the negative.

Accordingly, I affirm the judgement of the High Court of Civil Appeal dated 24th October 2017 and direct the learned District judge to give effect to the said judgement.

Plaintiff would be entitled to the cost of this appeal.

Appeal dismissed

Judge of the Supreme Court

V. K. Malalgoda PC, J.

I agree.

Judge of the Supreme Court

Preethi Padman Surasena J.

I agree.

Judge of the Supreme Court