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

In the matter of an application for Leave to Appeal from Judgment dated 19th August 2010 of the High Court of Civil Appeal of the Sabaragamuwa Province Holden in Ratnapura in Appeal No.SP/HC CA/RAT/09/2008.

SC Appeal No:-102/2011

SC [HC] CA LA No:-381/2010

HCCA NO.SP/HCCA/RAT/09/2008 (FA)

DC Ratnapura Case No.10124/Partition

1.Uyanwattalage Piyarathne

2.Uyanwattalage Jayarathne

Both of Hangamuwa, Ratnapura.

Plaintiffs

V.

1.Rajapakse Mudiyanselage Somapala Rajapaksha,

Demalaporuwa Karangoda.

2.Malini Somalatha Wakkumbura nee

Weerasena,

Bopitiya Road, Pelmadulla.

3.Lalani Nirmala Wakkumbura,

Radella, Karannagoda, Ratnapura.

4.Habarakada Arachchige

Hansawathie (deceased)

4A.Lalani Nirmala Wakkumbura

Radell, Karannagoda, Ratnapura.

Defendants

AND BETWEEN

1.Uyanwattalage Piyarathne

2.Uyanwattalage Jayarsthne

Both of

Hangamuwa Ratnapura.

Plaintiff-Appellants

V

1.Rajapakse Mudiyanselage

Somapala Rajapaksha

Demalaporuwa, Karannagoda.

2.Malini Somalatha Wakkumbura

Bopitiya Road, Pelmadulla.

3.Lalani Nirmala Wakkumbura,

Radella, Karannaoda, Ratnapura

4.Habarakada Arachchige

Hansawathie (deceased)

4A.Lalani Nirmala Wakkumbura

Radella, Karnnagoda,

Ratnapura.

Defendant-respondents

AND NOW BETWEEN

Lalani Nirmala Wakkumbura

Radella, Karannagoda,

Ratnapura.

3rd [4A] Defendant-Respondent-Petitioner-Appellant

V.

1.Uyanwattalage Piyarathne,

2.Uyanwattalage Jayarathne

Both of

Hangamuwa, Ratnapura.

Plaintiff-Appellant-Respondent-Respondents

AND

1A. Karangoda Gamage

Kusumawathie

1B. Ajith Mohan Rajapakse

1C. Gihani Sandhaya Rajapakse

1D. Thanuja Rajapakse

1E. Chaminda Rajapakse

1F. Udeshika Rajapakse

All of Demalaporuwa,

Karannagoda, Ratnapura.

1A -1F Substituted Defendant-Respondent-Respondent-Respondents

2.Malini Somalatha Wakkumbura

Nee Weerasena.

Bopitiya Road, Pelmadulla.

4.Habarakada Arachchige

Hansawathie (deceased)

2nd & 4th Defendant-Respondent-Respondent-Respondents

BEFORE:- S.E.WANASUNDERA, PCJ.

PRIYANTHA JAYAWARDENA, PCJ. &

H.N.J.PERERA, J.

COUNSEL:-Kaushalya Molligoda for the 3rd (4A) Defendant-Respondent-Petitioner—Appellant

Anuruddha Dharmaratne for Plaintiff-Appellant-Respondent

Respondent.

ARGUED ON:-03.08.2016

DECIDED ON:-10.11.2016

H.N.J.PERERA, J.

The Plaintiff-Appellant-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondents) instituted this partition action to partition a land called Ellagawahena and Galellahena more fully described in the schedule to the plaint. The land described in the schedule to the plaint is depicted in plan No 27 dated 05.08.1994 made by surveyor J.Somasiri. There was no corpus dispute in this case. All parties conceded that the land sought to be partitioned was as depicted in Preliminary Plan No.27 produced marked "X".

It was common ground between all parties that the title to the entire land sought to be partitioned was at one point of time owned by Wakkumburage Chandanahamy.

Chandanahamy has conveyed 3 acres by Deed marked 1V1 to Malini, who by Deed marked 1V2 has conveyed it to the 1st Defendant. Chandanahamy by Deed 1V5 has also transferred 7 acres to the 1st Defendant. Accordingly, the fact that the 1st Defendant is entitled to 10 acres out of the corpus has been admitted by all parties. The deceased 4th Defendant claimed the balance portion of the said land by Deed No.109 (3V1). By the said Deed marked 3V1, Chandanahamy had conveyed all his rights to the deceased 4th Defendant. Accordingly, the only dispute at the trial was with regard to the entitlement of the Plaintiff-Respondents on one hand and the 3rd Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as 3rd Defendant-Appellant).

The position of the Plaintiff-Respondents is that, Chandanahamy by Deed marked P8 dated 26.05.1975 transferred the ownership of that portion of the land to Simon with the condition that it has to be re-transferred within a period of 2 years on payment of the principal sum and interest stated thereon; and since Chandanahamy did not get it re-transferred fulfilling the conditions Simon became the absolute owner of the said portion of land; and thereafter Simon conveyed it to the Plaintiffs by Deed marked P9 dated 07.01.1980. The 3rd Defendant-Appellant is Chandanahamy's daughter. After the death of her mother the 4th Defendant, the 3rd Defendant was substituted as 4A Defendant and her position was that the Deed P8 is a Mortgage and not a conditional transfer upon which the possession of the land was never given to the Plaintiffs; and therefore, Chandanahamy donated that 5 acres to her mother, the 4th Defendant (wife of Chandanahamy) by Deed 3V1 dated 11.07.1983. The3rd Defendant-Appellant has claimed title by deed as well as by prescription.

The Plaintiff-Respondents claimed title to the disputed land by deeds. The Plaintiffs also had claimed prescriptive title. Generally all parties in a partition case also claim prescriptive title in order to buttress their paper title. In Leisa and another V. Simon and another [2002] 1 Sri.L.R 148 it was held that an averment of prescription by a plaintiff after pleading paper title is employed to buttress his paper title. The mere fact that the plaintiff claimed both on deeds as well as by long possession did not entail the Plaintiff to prove prescriptive title thereto. His possession was presumed on proving paper title. The averment in the plaint did not cast any burden upon the Plaintiff to prove a separate title by prescription in addition to paper title. It was contended on behalf of the Plaintiff-Respondents that the 3rd Defendant-Appellant could not have prescribed to an undivided portion of land which was co-owned by the 1st defendant.

It was the contention of the 1st Defendant and the 3rd Defendant-appellant that they were at all times material to this action, in exclusive possession of divided and defined portions of land. It was the position of the 1st Defendant and the 3rd Defendant-Appellant that they had amicably divided the land described in the schedule to the plaint and was in possession of the said divided and defined portions of land adversely to the claims of each other and of any third party, for well over 10 years.

After trial, the learned District Judge has held in favour of the 3rd Defendant-Appellant, and decided that Deed P8 has no avail in law and the Plaintiff-Respondents are not entitled to any rights in the land to be partitioned. Accordingly, the learned trial Judge has ordered the corpus to be partitioned only among the 1st and 3rd Defendant-Appellant – 10 acres to the 1st Defendant and the balance to the 3rd Defendant-Appellant. The learned District Judge has held that the 1st Defendant and the 3rd Defendant-Appellants are co-owners of the said land and that they have possessed undivided portions of the said land to be partitioned. He has also held that as the 3rd Defendant-Appellant has paper title from 1983 and that the said land could be partitioned accordingly. He has answered all the issues raised on behalf of the said 1st and 3rd defendants in their favour. The trial Judge has accordingly entered Interlocutory decree to partition the land between the 1st and 3rd Defendants according to the lots they have possessed.

Being aggrieved by the said judgment of the learned trial Judge the Plaintiff-Respondents had preferred an appeal to the Civil Appellate High Court, Ratnapura. The learned Judges of the Civil Appellate High Court Ratnapura set aside the judgment of the learned District Judge and declared that the 1st and 2nd Plaintiffs each are entitled to 1/3 share of the corpus and the 1st Defendant to 4/6 shares.

Being aggrieved by the said judgment dated 19.10.2010 of the Civil Appellate High Court of Ratnapura, the 3rd Defendant–Appellant filed an application for leave to appeal to the Supreme Court and the Court granted leave on the following questions of law stated in paragraph 21 (F), (H) and (J) of the Petition.

21(f)-Did the High Court of Civil Appeal err in its findings that the commencement of adverse possession by the Petitioner must necessarily be with effect from 31.07.1981 –or the date of delivery of judgment of the Court of Appeal stemming from the order of the Debt Conciliation Board?

21(h)-In all the attendant circumstances and in the light of the applicable law, did the High Court of Civil Appeal err in its conclusion that the Petitioner failed in her claim for prescriptive title?

21(j)-In all the attendant circumstances of the case, did the High Court of Civil Appeal err in its conclusion that the Petitioner was not a bona fide possessor?

The Plaintiff-Respondents' position was that the said Chandanahamy has conveyed an undivided 5 acres or an equivalent 800/2403 shares to U.Simon on a conditional transfer No.18962 marked P8. Since a retransfer was not affected as stated in the said Deed, the said U.Simon became the owner or the rights referred to in the said Deed. The said Simon has conveyed the said rights to the Plaintiff-Respondents.

The said Deed P8 is a Notarially executed Deed of Transfer on 26.05.1975 by Chandanahamy in favour of U.Simon in respect of 5 acres out of the land to be partitioned for valuable consideration of Rs.7000/-with the right to call for a retransfer within a period of 2 years on payment to U.Simon of the principal and interest as stipulated .The said Deed has been marked without any objections from the 3rd Defendant-Appellant.

It was not marked subject to proof. The Plaintiff-Respondents had produced deeds marked P 1 to P9 to which no objection was taken at the close of the Plaintiff-Respondents case. The *cursus curiae* of the original Civil Court followed for more than three decades in this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. In this case the Plaintiff-Respondents have clearly proved their paper title.

The 3rd Defendant-Appellant in her evidence has stated that they went to the Notary's office several times in and around November and December 1979 informing Simon in advance to make the payment and get the property re-transferred, but Simon evaded. As stated in the said judgment of the Civil Appellate High Court , thereafter, as seen from documents marked 3V3 to 3V8, they have gone before the Debt Conciliation Board in 1980 to effect the transfer. The decision of the Debt Conciliation Board that Deed P8 is not a transfer but a Mortgage has been quashed by the Court of Appeal by way of Writ of Certiorari in 1981(3V9). The 3rd Defendant-Appellant admits that they have never gone before the Supreme Court against the said judgment.

It is a general principle of law "that no matter what name or designation the parties give to a contract or transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be." In De Silva V. De Silva 39 N.L.R. 169-Where the Plaintiff made a conveyance of property to defendant for a consideration. It was provided in the deed that if the vendor were to repay the said consideration with interest then the vendee shall retransfer the premises on any day within one year from its date. Plaintiff instituted an action after the expiration of the year to redeem the premises on the footing that they were transferred to the Defendant as security for repayment of a debt- it was held that the transaction was a

contract of sale with a right to repurchase, time being of the essence of the contract. The Civil Appellate High Court has very correctly held that Deed P8 is a transfer subject to certain conditions mentioned thereon which have admittedly not been fulfilled during the stipulated time, and therefore the transferor could not transfer the same on the subsequent Deed 3V1 to the 4th Defendant.

This Court was not inclined to grant leave to appeal on the proposed questions whether the said Deed marked P8 was a mortgage and /or whether the 3rd Defendant- Appellant can claim paper title to the corpus. This Court therefore has to accept and proceed on the basis that the said deed marked P8 is a conditional transfer, the condition therein was not fulfilled during the stipulated time and hence the Plaintiff-Respondents predecessor the said U.Simon gets undivided shares in the corpus in terms of the said deed marked P8, which is now owned by the Plaintiff-Respondents in terms of Deed marked P9.

The Plaintiff-Respondents in this case had clearly proved their paper title to the land in dispute. The Plaintiff-Respondents had proved their paper title by marking and producing the Deeds P1 to P9. The Plaintiff-Respondents had proved that they are co-owners of the land to be partitioned. Mere non possession of the Plaintiff-Respondents who are co-owners would not deprive their title since the possession of one co-owner means and includes the possession of all co-owners. Admittedly the 1st Defendant too is a co-owner of the land to be partitioned. The parties have admitted that the 1st Defendant is entitled to 10 acres in the said corpus. The evidence led in this case establish that the 1st Defendant continued to possess a portion of the said corpus close to 10 acres as a co-owner. The mere fact that the 1st defendant had possessed a separate portion in the said land for convenience is not sufficient to prove prescriptive title.

In Corea V. Appuhami 15 N.L.R 65 it was held that:-

“A co-owner’s possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about the result.”

The 1st Defendant is deemed to have possessed the said land on behalf of all the co-owners.

The 3rd Defendant-Appellant has failed to prove paper title. Therefore the burden is clearly on her to prove prescriptive title.

In Sirajudeen and others V. Abbas [1994] 2 Sri.L.R 365 it was held that:-

“Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive right.”

As regard the mode of proof of prescriptive possession, mere general statements of witnesses that the defendant possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of 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 defendant. The occupation of the premises must be such character as is incompatible with the title of the owner.

In Hussan V, Romanishamy 66 C.L.W 112, it was held "that mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and also vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section."

The 3rd Defendant-Appellant has failed to prove that she has paper title to the corpus to be partitioned. The Civil Appellate-High Court has held that the mother of the 3rd Defendant-Appellant , 4th deceased Defendant got no rights to the land by the said Deed marked 3V1.

The Civil Appellate High Court had held that the 3rd Defendant-Appellant had failed to produce evidence to substantiate the fact she possessed and obtained prescriptive rights to the said land. The Civil Appellate High Court has held that the 3rd Defendant-Appellant had never stated in her evidence that they commenced adverse possession and all what she has stated in her evidence is that she continued with possession even after the Court of Appeal decision. And the Court of Appeal judgment had been delivered on 31.07.1981. The plaintiff-Respondents had instituted this action on 21.11.1990 before the completion of a period of 10 years from the date of the said judgment. The 3rd Defendant-Appellant's evidence clearly establish the fact that she had tried to effect the re-transfer of the land upon complying with the conditions and failed. Thereafter the Debt Conciliation Board decided P8 to be a Mortgage, which decision was quashed by the Court of Appeal on 31.07.1981. The 4th deceased Defendant and the 3rd Defendant-Appellant claimed rights from the deed marked 3V1 written in 1983 after the said judgment of the Court of Appeal. They continued to possess a part of the corpus claiming rights from the said deed marked 3V1. The 3rd Defendant-Appellant also claimed prescriptive title to the said portion of land but had clearly failed to prove prescriptive title to the same.

It seems to me that the Civil Appellate High Court had properly addressed its mind to the important fact that the burden is definitely on the 3rd Defendant-Appellant to establish her plea of prescriptive title. In my view in the present case there is significant absence of clear and specific evidence on such acts of possession as would entitle the 3rd Defendant-Appellant to a decree in favour in terms of section 3 of the Prescription Ordinance. The Civil Appellate Court had carefully analysed all the evidence led in this case and had held with the Plaintiffs.

Therefore I answer all the questions of law raised in this case in the negative in favour of the Plaintiff-Respondents. I affirm the judgment of the Civil Appellate High Court dated 19.10.2010 for the reasons set out. Accordingly the appeal of the 3rd Defendant-Appellant is dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT