

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

C. A. Appeal No. 521/99 (F)

D. C., Balapitiya Case No. 2076/P

Vitharanage Premadasa de Silva
of Kuleegoda

2ND DEFENDANT-APPELLANT

VS.

Muthalerennga Gretus Livere of
Wellabada,
Madampe, Ambalangoda.

PLAINTIFF-RESPONDENT

1. Muthamerennga Ernest
de Silva of Parot Junction,
Madampe, Ambalangoda
(Deceased)

1A. Priyawardena
Priyadharshana de Silva of
Parrot Junction,
Madampe, Ambalangoda

And others

DEFENDANT-RESPONDENTS

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : S. A. D. S. Suraweera for the 2nd Defendant-Appellant

Rohan Shabandu P.C. for the Plaintiff-Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 29.08.2018 (by the 2nd Defendant-Appellant)

12.07.2018 (by the Plaintiff-Respondent)

DECIDED ON : **07.02.2019**

M. M. A. GAFFOOR, J.

The Plaintiff-Respondent (hereinafter referred to as the “Respondent”) instituted this partition action on 03.10.1991 against the Defendants seeking to partition the lands called Lots 4, 5, 7, 8, 9, 10A and 10B of “Mahagedarawatte” *alias* “Kopiwatta” containing in extent 2 Roods and 13 Perches.

The original plaint was subsequently amended by the Respondent on 23.02.1994. As per the said amended plaint, the Respondent stated that as per the final decree marked P1, entered in the Partition Case beating No. 5590 the Lots 4, 5, 7, 8, 9, 10A and 10B were allotted as follows:

Lot 4 – T. Araliyas De Silva

Lot 5 – T. Owishamy

Lot 7 – Kalugala Corenelishamy
Lot 8 – Kalugala Karthishamy
Lot 9 – kalugala Basthiyan
Lot 10A and 10B – Jandoris Appu

According to this final decree entered in the said case, Lot 6 was allotted to Kalugala Nandoris Silva, and the Lots 4, 5, 7, 8, 9, 10A and 10B were sold in execution of writ against the defendants who were allotted the said Lots and Kalugala Nandoris Silva who was allotted Lot 6 purchased the said allotments at the sale. The documents which had been produced marked as P2, P3, P4 and P5 established in fact that to the sale report marked P4 Nandoris Silva was declared the purchaser.

The Respondent in his plaint pleaded that the chain of title commencing from said Nandoris Silva and claimed a share of 80/96 to him and the balance share was assigned to the 1st and 3rd to 11th Defendants. The Respondent further averred that the Appellant who does not have any rights from and out of the corpus had been named as a party since he is in forcible occupation and possession of the corpus and in a building thereon.

In contrast, the 2nd Defendant-Appellant (hereinafter referred to as the “Appellant”) filed his statement of claim denying the averments of respondent and pleaded *inter alia* that said Nandoris Silva did not have any title to the land in suit, and his mother Liasohamy had been in possession and occupation of the entire land even after the final decree in the previous

partition action. Thus, the Appellant was claimed a prescriptive title to the entire corpus.

The case was proceeded to trial on many points of contests raised on behalf the Respondent and the Appellant. The Respondent raised 8 issues and gave evidence producing documents X, X1, P1 to P8, whilst the Appellant raised 2 issues and led his evidence producing documents 2V1 to 2V3.

After conclusion of the trial, the learned District Judge delivered his judgment on 10.06.1999 answering the points of contests in favour of the Respondent and entered judgment for the Respondent as prayed for in the plaint.

Being aggrieved by the said judgment, the Appellant preferred this appeal to set aside the judgment of the learned District Judge of Balapitiya.

In this appeal, main averment of the Appellant was that the Respondent had failed to adduce any fiscal's conveyance which would have transferred title to the alleged purchaser Nandoris Silva. He further alleged that on an examination of the sale report and the final decree bearing No. 5590, the said certified copies have been obtained in the year of 1979 and even, at that stage, the case record had been available in the previous action. But the Respondent had not obtained a Copy of the Fiscal's conveyance.

Therefore, it was the position of the Appellant that the Respondent and his predecessors are not entitled to the benefit of a certificate of sale in the absence of Fiscal's Conveyance which the Respondent do not have.

It is conceded by the Respondent that a Fiscal's Conveyance is not available to be produced, although, the Respondent stated that there was Fiscal sale supported by the judgment P3, Seizure Notice P2 and Fiscal Report on the Sale P4. Therefore, the Respondent believes that these documents may prove the title to the land.

When we read to Section 289 of the Civil Procedure Code it could be argued that a person is not entitled to claim a clear title from certificate of sale unless and until a Fiscal's Conveyance is executed upon the issuance of such a certificate. Section 289 of the Civil Procedure Code reads thus:

"The right and title of the judgment-debtor or of any person holding under him or deriving title through him to immovable property sold by virtue of an execution is not divested by the sale until the confirmation of the sale by the court and the execution of the Fiscal's conveyance. But if the sale is confirmed by the court and the conveyance is executed in pursuance of the sale, the grantee in the conveyance is deemed to have been vested with the legal estate from the time of the sale".

In the case of ***Muttu Caruppen et al Vs. Rankira et al*** [13 N.L.R. 326], it was mentioned that:

"the purchaser at a Fiscal's sale when the sale is confirmed by Court after the lapse of thirty days, must procure his conveyance forthwith".

Also, in the case of ***Hendrick Singho Vs. Kalanis Appu et al*** [23 N.L.R. 80], it was held that:

"Section 289 of the Civil Procedure Code does not override the provisions of Section 238; the title of the purchaser at the Fiscal's sale does not, on the issue of the Fiscal's Conveyance, prevail over any intermediate alienation by the execution-debtor, unless the Fiscal's seizure was registered."

"If the seizure is not registered, the necessary implication of Section 238 is that a bona fide private alienee is statim secures. Section 289, as regards relation back, must be read in the light -of section 328, and its operation should not be extended to a case where the seizure has not been registered."

However, this accustomed position has been modified through the decision of **S.C APPEAL 110/2014 [SC Minutes dated 22.11.2017]**. In this case, the Supreme Court held that in a partition action it is not necessary to execute

a Fiscal Conveyance consequent to a Decree of Sale in order for title to effectively pass the purchaser. Anil Gooneratne, J. (agreeing with Sisira J. de Abrew, J and Vijith K. Malalgoda P.C., J) further observed as follows:

“The only point for decision in this case is whether the certificate of sale confers valid title on the successful purchaser, at a sale held according to the provisions of the Partition Law. At this point in this Judgement I have to mention that prior to the present Partition Law of 1977, we had from earlier times the Partition Ordinance No. 10 of 1863 and Partition Act No.16 of 1951. The case in hand relates to an alienation of land under Partition Ordinance No. 10 of 1863. It is a certificate of sale issued under the hand of the District Judge...”

In the text on “The Law of Partition in Ceylon by D.A.St. V. Jayawardena Pg. 187 – The certificate takes the place of a conveyance from the former owner to the new owner. The certificate should

- (1) Be signed by the Judge*
- (2) State that the property was sold on the Order of the Court*
- (3) Give the names of the purchaser; and*
- (4) State the purchase money has been duly paid.*

At. Pg. 188.... Sir Joseph Hutchinson, C. J. in the case of Cathirihami Vs. Babahamy 11 NLR 20, where he said that the intention of the Partition Ordinance was to give an indefeasible title to the purchaser to whom the land was sold when the sale was affirmed and completed by the certificate of the Court under Section 8, intended to say anything more than that the title of the purchaser was indefeasible as regards the estate that passed to him under the Decree.

I observe, as the description given above on the relevant certificate of sale and in comparison with the above authority refer to and demonstrate that the certificate of sale would pass good title to the purchaser in this case the said O.L.M. Mohamed Ismail the purchaser.

(Page at 6 & 7 - Emphasis added)

In the above case, said three bench judges from the Supreme Court overruled the decision of **C.A Appeal No. 534/95 (F) [Court of Appeal Minutes dated 28.01.2014]** which was urged the applicability of Section 289 of the Civil Procedure Code.

In the above stated reason, I hold that in this case it is not necessary to execute a Fiscal Conveyance consequence to a Decree of Sale in order for title to effectively pass to the purchaser.

The Appellant's another contention was that his mother Laishamy is the person who started possessing the land in suit after the final decree in 5590/P was entered. However, the said Laishamy the Appellant's mother was never a party in the said partition action No. 5590. It is also observed that no party to the said final decree challenged the shares allotted as per the said decree, and accordingly the Appellant's cannot challenge the said final decree without a valid basis, therefore, the Trial Judge was mindful of these facts.

The learned District Judge had observed the evidence given by one Dharmasena on behalf of the Appellant, that the boutique constructed in Lot 10A was built in 1990 under the agreement made by the Appellant to the Respondent to remove same whenever necessary. Also it is seen from the evidence that the Appellant earlier had agreed to purchase the said portion of land from the Respondent on several occasions and since the Appellant is a relative of the Respondent, did not take any action to remove the said construction made in Lot 10A.

It is further important to note a fact that, when the Appellant giving his evidence, he stated that he is unaware of Nandoris Silva, but he stated at a later stage that Nandoris Silva is the grand-father of his mother, and also once he stated that he is unaware of witness called Dharmasena, but as per the evidence of Dharmasena he had been to the Appellant's house and said Dharmasena is a son of Nandoris Silva. Therefore, the learned Trial Judge has concluded the fact that the Appellant is not a credible witness.

In regard to this, this Court observes that in the case of ***De Silva & Others Vs. Senaviratna and Another*** [(1981) 2 SLR page at 07]- when an appellate court is invited to review the findings of the trial judge on the question of facts, the principles that should be guided is as follows:-

- a. *where the finding on questions of fact are based upon the credibility of witnesses on the footing that the trial judge's perception on such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if appears to the appellate court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the appellate court is convinced by the plainest considerations that would be justified in doing so.*
- b. *that however where the of fact are based upon the trial judge's evaluation of facts, the appellate court is then in in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge.*
- c. *where it appears to an appellate court that on either of the grounds the findings of fact by a trial judge should be reversed then the appellate court "ought not to shrink from that task"*

Furthermore, the Trial Judge correctly held that the Appellant has not proved how he becomes entitled to the Lot 11. The said Lot 11 was owned by Samel Appu who is the father of Laisohamy (the mother of the Appellant) and the Appellant could not explain how he got an independent possession from Samel Appu.

It is settled law that a person who claims prescriptive title against the rightful owner who has the paper title or some other equivalent title has a very heavy burden to prove all the requirements prescribed in Section 3 of the Prescription Ordinance. Therefore, mere possession over ten years is not prescriptive possession. The possession shall be by title adverse to or independent of that the rightful owner.

In ***Sirajudeen Vs. Abbas*** [(1994) 2SLR 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 rights”

In the all circumstances of this case, I am of the firm view that the District Judge correctly held with the Respondent. Therefore, I do not wish to interfere with the judgment.

The judgment of the District Court is affirmed and the appeal is dismissed but without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL