

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

Wijesinghe Arachchige Don Nadeeja
Wijesinghe,
No. 457/1,
Mawaramandiya,
Siyambalape.
Substituted Plaintiff Appellant

CASE NO: CA/373/1999/F

DC GAMPAHA CASE NO: 26937/L

Vs.

Amitha Luxmi Kalugampitiya,
No. 225,
Ihala Biyanwila,
Kadawatha.
And Several Others
Defendants Respondents

Before: A.L. Shiran Gooneratne, J.
 Mahinda Samayawardhena, J.

Counsel: Athula Perera for the Plaintiff-Appellant.
 S.A.D.S. Suraweera for the Defendant-
 Respondents.

Argued on: 04.09.2019

Decided on: 19.09.2019

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court against the 1st-5th defendants seeking ejectment of them from the house in Lot No.10 of Plan marked P4 at the trial¹ and damages. The defendants filed the answer seeking bare dismissal of the action without making a claim in reconvention. However, at the trial, several issues have been raised on behalf of the defendants seeking substantive reliefs not prayed for in the prayer to the answer. This has been rightly objected to², but the learned District Judge, without giving any reason whatsoever, has accepted them.³ I totally disapprove that course of action, which is not in consonance with the law. The defendants, by way of issues, have, *inter alia*, claimed the land on (a) co-ownership and (b) prescription.⁴ The learned District Judge, in the Judgment, has answered those issues in favour of the defendants and dismissed the plaintiff's action with costs. It is against this Judgment, the plaintiff has filed this appeal.

At the trial, on behalf of the plaintiff, the plaintiff and the surveyor who prepared Plan P4, have given evidence. The plaintiff's case has been closed reading in evidence P1-P5 without any objection. On behalf of the defendants, only the 3rd defendant has given evidence. The defendants' case has been closed reading in evidence document marked D1.

¹ Vide 1st admission at page 60 of the Brief.

² Vide page 63 of the Brief.

³ Vide JE No.26 at page 20 of the Brief.

⁴ Vide issue Nos. 14-16 at page 62 of the Brief.

It is the case of the plaintiff that at one point Marthelis was the owner of the land where the house in suit is standing by virtue of Deeds marked P1 and P2, and thereafter, Marthelis gifted the land including the house (excluding undivided $\frac{3}{4}$ Acre) to him by Deed marked P3 subject to the life interest of Marthelis. The wife has predeceased Marthelis and they have had no children. Marthelis has died in 1973. It is the position of the plaintiff that the defendants were permissive occupiers of the house as licensees, first under Marthelis, and after the death of Marthelis, under him.

The fact that Marathelis was the owner of the land including the house and thereafter Marathelis gifted aforementioned undivided rights to the plaintiff was admitted or not contested by the 3rd defendant in her evidence.⁵ Deeds P1-P3 tendered to prove the said transactions were not marked subject to proof. The plaintiff's undivided rights to the land by Deed P3 is therefore established. The plaintiff is a co-owner of the land.

The 1st defendant who had been living in the house has died pending action. She had been unmarried⁶, and after her death, case has proceeded against the remaining defendants.⁷ She was the elder sister of the 3rd defendant's father, Johannas.⁸ The 2nd-5th defendants are siblings.

I must emphasize that only the 3rd defendant gave evidence at the trial. The 3rd defendant in her evidence has stated that she claims the property on her father's rights.⁹ But when questioned how her

⁵ Vide pages 119 and 124 of the Brief.

⁶ Vide page 127 of the Brief.

⁷ Vide JE No.53 at page 29 of the Brief.

⁸ Vide page 122 of the Brief.

⁹ Vide pages 116, 117, 129 of the Brief.

father got rights, she has failed to explain it.¹⁰ It appears that she claims rights on inheritance. That claim is entirely based on the premise that the land was subject to *fidei commissum* created by the Last Will of John Appuhamy, onetime owner of the property. At the argument before this Court, learned counsel for the defendants candidly admitted that, in the facts and circumstances of this case, there is no room for creation of a *fidei commissum*. Therefore, the learned counsel for the defendants admitted that the defendants' claim for co-ownership of the land is unsustainable. Hence it is clear that the learned District Judge has erred on that vital matter. The Judgment of the District Court is based on the premise that the defendants are co-owners of the land on *fidei commissum* created by the Last Will. The defendants are not co-owners of the land.

The submission of the learned counsel for the defendants is that the defendants were even born in this house and they have thereby prescribed to the house and the land appurtenant to the house. As much as a party to an action cannot present at the trial a case materially different from what he has pleaded in his pleadings, a party cannot present in appeal a case materially different from what he has placed before the original Court.¹¹ In the District Court the defendants' position was that they acquired their undivided rights (by virtue of them being co-owners of the land) by prescription (“චින්තිකරුවන් ඔවුන්ගේ නොබෙදූ අයිතිය කාලාවරෝධයෙන් හිමිකර ගෙන තිබේ”).¹² In the first place, as they are admittedly not co-owners, they cannot acquire their purported undivided rights by

¹⁰ Vide pages 129-130 of the Brief.

¹¹ Candappa nee Bastian v. Ponnambalampillai [1993] 1 Sri LR 184 at 189

¹² Vide issue No.16 at page 62 of the Brief.

prescription. Secondly, co-owners cannot prescribe to their undivided rights. It is meaningless and against the concept of prescription. A person, whether a co-owner or otherwise, can claim prescriptive rights for a defined area. The learned District Judge has palpably gone wrong on the question of prescription.

In the facts and circumstances of this case, the assertion of the plaintiff that the defendants were licensees, first under Marthelis, and after the death of Marthelis, under the plaintiff, is more acceptable.

The 3rd defendant has also clearly admitted in evidence that, after the death of Marthelis (in 1973), the plaintiff allowed them to continue to occupy the house until they were asked to vacate the house in 1980, which they refused. As this admission is vital and cuts across the defence of the defendants that they were occupying the house on their own, I must quote the relevant part verbatim.

ප්‍ර: මම යෝජනා කරනවා ලයනල් විෂේසිංහ මර්තේලිස් මියගියාට පසු තවදුරටත් තමාලට ඉන්න දුන්නා කියා?

උ: එහෙමයි. පිළිගන්නවා.

ප්‍ර: 1978 දී පමණ අම්මා සන්ධ්‍යා නිවස අතහැර ගියා කීවා?

උ: ඔව්.

ප්‍ර: 1980 ඊළඟ අවුරුද්දේ ලයනල් විෂේසිංහ තමාලට කීවා මේ ගෙදරින් ඉවත් වෙලා යන්න, එයාලට නිරවුල් භුක්තිය අවශ්‍යයි කියා?

උ: ඔව්.

ප්‍ර: තමාලා එකඟ වුනා නේද යන්න?

උ: නැහැ.¹³

¹³ Vide page 137 of the Brief.

I hold that the defendants came into occupation of the house as licensees of Marthelis and thereafter continued with their occupation with the leave and licence of the plaintiff.

This is further fortified by the evidence of the 3rd defendant where she admitted that her father, Johannas, earlier lived in a house close to the house in suit with his wife and children. That belies the evidence of the 3rd defendant that they were born in the house in suit. Let me reproduce that portion of evidence as well.

ප්‍ර: ඒ ඉඩමේ තිබෙන්නේ එකම ගෙයයි?

උ: ඔව්. මර්තේලිස් 1973 දී මියගියා. මියයනතුරු ඔහු පදිංචිව සිටියේ ඒ ගෙදර.

මර්තේලිස් පමණක් නොවේ, මර්තේලිස්ගේ භාර්යාව ඒ ස්ථානයේ සිටියා. මුලින්

මියගියේ මර්තේලිස්ගේ භාර්යාව. 1958 ඇය මියගියා. මම ඉපදුනේ 1957 දී.

මර්තේලිස් සහ ඔහුගේ භාර්යාවට දරුවන් නැහැ.

ප්‍ර: ඒ අවස්ථාවේදී තමා දන්නවා නඩු කියන ඉඩමට කිට්ටුව වෙනත් ඉඩමක වෙනත් ගෙදරක ඡොහැන්ස් කළුගම්පිටිය, ඔහු සහ ඔහුගේ දරුවන් සහ බිරිඳ සමඟ පදිංචිව සිටියා?

උ: ඒ කාලයේ පදිංචිව සිටියා.¹⁴

If the defendants were born in this house and continued occupation as such, I fail to understand why the 3rd defendant did not produce a scrap of paper to prove it.

Even if they were so in possession, *“It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention*

¹⁴ Vide page 119 of the Brief.

*unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.”*¹⁵

According to the evidence of the 3rd defendant, the defendants manifested the fact of changing the character of possession from subordinate to adverse in 1980 by refusing to vacate the house.¹⁶ This case has been filed in 1984. There is no 10 year adverse possession to stake a claim on prescription.

The 3rd defendant in evidence stated that all her siblings have got married and left the house leaving only the 5th defendant unmarried sister in the house.¹⁷ However, the 5th defendant did not come forward to give evidence to make a claim to the house.

After the leave and licence given to the defendants were admittedly terminated in 1980¹⁸, the defendants became trespassers. A co-owner is entitled to sue a trespasser for ejection of the whole land.¹⁹

The 3rd defendant has admitted in evidence that the plaintiff could have earned Rs. 350/= per month if he were the owner of the property.²⁰ That is the damage which the plaintiff has asked in the plaint from 21.05.1983 until restoration of possession. Hence that relief can also be granted.

¹⁵ Seeman v. David [2000] 3 Sri LR 23 at 26. Vide also Sahabandu v. Gunasekera [2006] 2 Sri LR 208

¹⁶ Vide pages 124, 137 of the Brief.

¹⁷ Vide pages 128-129 of the Brief.

¹⁸ Vide page 137 of the Brief.

¹⁹ Hevawitharane v. Dangan Rubber Co. Ltd. (1913) 17 NLR 49

²⁰ Vide page 139 of the Brief.

For the aforesaid reasons, I set aside the Judgment of the District Court and allow the appeal with costs both in this Court and the Court below. The learned District Judge is directed to enter Judgment as prayed for in the prayer to the plaint.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal