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

Court of Appeal Case No:
CA 1095/1999(F)
District Court (Avissawella)
Case No. 15849/P

Dematapitiyage Upali,
Arukwatta,
Padukka.

Plaintiff

Vs

1. Ambagahawattage Misinona
   Arukwatta, Padukka
2. Ambagahwattage Simon Perera
   Arukwatta, Padukka
3. Ambagahawattage Suvithan
   Arukwatta, Padukka
4. I.M. Robo Singho
   Arukwatta, Padukka
5. K.D. Abeythilake (Notary Public)
   Arukwatta, Padukka
6. Kabagamuwage Maihamy
   Arukwatta, Padukka
7. Kalupahanage Podisingho
   Arukwatta, Padukka
8. Kalupahanage Martin
   Arukwatta, Padukka

6. (a) Kalupahanage Nandawathie
   AmarasingheMawatha,Arukwatta,
   Padukka
7. (a) Kabagamuwage Maihamy
   Arukwatta, Padukka

Defendants

And between

1. Ambagahawattage Misinona
   Arukwatta, Padukka
2. Ambagahawattage Simon Perera
   Arukwatta, Padukka

1-2 Defendants – Appellants

Vs

Dematapitiyage Upali
Arukwatta, Padukka

Plaintiff – Respondent

3. Ambagahawattage Suvithan of Arukwatta, Padukka
and others

Defendants – Respondents

Before: C.P. Kirtisinghe – J
Mayadunne Corea – J

Counsel: K. Sivapathasundaram with Daya Guruge for the Appellants
N. Jayasinghe for substituted Plaintiff - Respondent
Bhagya Herath with Sajeevi Jayasinghe for 8C and 8D Defendant-Respondents

Argued On :01/12/2021
Decided On :08/02/2022

C.P. Kirtisinghe – J

The 1st and 2nd Defendant-Appellants have preferred this Appeal from the judgment of the learned District Judge of Avissawella dated 30.11.1999. The learned District Judge has decided the corpus dispute in this case in favour of the Plaintiff.

The Plaintiff had instituted this Partition Action to partition the corpus in this case – "Lindagawa Kabella" which is morefully described in the schedule to the Plaint. The Commissioner in this case S.R. Yapa L.S. who had done the preliminary survey had produced the Preliminary Plan No. 2906 marked 'X'. In the aforesaid Preliminary Plan the corpus is depicted as Lots 1, 2, 3 and 4. At the Preliminary Survey, the Plaintiff had informed the surveyor that Lot 1, 2, 3 and 4 form the corpus and the 1st and 2nd Defendants had informed the surveyor that

Lot 1 and 2 are not a part of the corpus. At the trial the 1st and 2nd Defendants had taken up the position that they had possessed the aforesaid lots 1 and 2 as a part of Kanuketiya deniya (කුණුකැටියදෙණිය) alias Kanuketiya deniya Kumbura (කුණුකැටියදෙණිය කුඹුර) and acquired a prescriptive title to it. Plan No. 118816 made by the Surveyor General in January 1881 which was marked 'Z' at the trial depicts the land called Kanuketiya deniya claimed by the 1st and 2nd Defendants. D.M. Gamage L.S. had superimposed that plan on the Commissioner's Plan No. 2906 and prepared the Plan No. 528 අ which was marked 'Y' at the trial. The superimposed boundaries of T.P No. 118816 are shown in red. According to that superimposition, Commissioner had included a portion of Kanuketiya deniya into the corpus. Surveyor Gamage had excluded that portion from the corpus in his plan 'Y' and shown the corpus as lots 1, 2 and 3. But he had not excluded the entirety of Lot 1 and 2 in the Preliminary Plan marked 'X'. According to the evidence of Surveyor Gamage he had excluded the entirety of Lot 1 and a portion of Lot 2 in Plan X. A portion of Lot 2 in Plan X continues to be inside the corpus.

In their amended Statement of Claim dated 09.06.1994, the 1st and 2nd Defendants had taken up the position that Lot 1 and 2 in Plan X are a portion of the adjoining land Kanuketiya deniya alias Kanuketiya Deniya Kumbura and sought for an exclusion of the said lots on the basis that they are a part of Kanuketiya deniya alias Kanuketiya Deniya Kumbura. They had also prayed for a prescriptive right to the aforesaid lots.

At the trial the following two issues were raised by the 1st and 2nd Defendants.

10) මෙම නඩුවට සාදා ඇති එස්.ආර් යාපා මහතාගේ අංක 2906 දරණ සැලැස්මේ කැබලි අංක 1 හා 2 කොටස 1, 2 විත්තිකරුවන් කණුකැටියේ දෙණිය හෙවත් කණුකැටියේ දෙණියේ කුඹුරේ කොටස් සියල්ලම නිදහස්ව හා නිරවුල්ව අවුරුදු 10 කට වැඩි කාලයක් භුක්තිවිඳ කාලාවරෝධි අයිතිවාසිකම් හිමිකරගෙන ඇත්තේද?

11) ඉහත විසඳිය යුතු ප්‍රශ්නයට 'ඔව්' යන පිළිතුර ලැබෙන්නේනම් බෙදීමට අදාළ ඉඩමෙන් අංක 2906 දරන මූලිබ සැලැස්මෙන් (මූලිබ සැලැස්මේ) කැබලි අංක 1, 2 ඉවත් කල යුතුද?

The learned District Judge had answered the Issue No. 10 in the negative. By answering the issue in the negative the learned District Judge has come to the conclusion that the 1st and 2nd Defendants had failed to prove a prescriptive right to Lots 1 and 2 in the Preliminary Plan marked 'X'. Therefore, the Issue No. 11 does not arise.

In his judgment, the learned District Judge has observed as follows,
"මුලින්ම මෙම විෂයවස්තුව මැන පිඹුරක් ඉදිරිපත් කල මිනින්දෝරු යාපා මහතාගේ X දරණ සැලැස්මේ පෙන්වාදී ඇති කැබලි අංක 1 සහ 2 හි කොටසක් විෂයවස්තුවෙන් ඉවත්විය යුතු බව මෙම අධිකරණයට මෙම නඩුවේ ඉදිරිපත්වූ සාක්ෂි අනුව පෙනීයයි..... ඒ අනුව මෙම විෂයවස්තුව මෙම නඩුවේ X දරණ සැලැස්මේ මිනින්දෝරු යාපා මහතාගේ අංක 2906 දරණ සැලැස්මේ කැබලි අංක 1, 2 හි කොටසක් විෂයවස්තුවෙන් ඉවත්විය යුතු බවත් ඒ අනුව මැන බෙදාගැනීමට ඉල්ලා සිටින විෂයවස්තුව Y සැලැස්මේ කැබලි අංක 1, 2, 3 වියයුතු බවට තීන්දු කරමි."

Therefore, the learned District Judge has come to the conclusion that the corpus consists of lots 1, 2, 3 in the Plan marked 'Y' and a portion of lots 1 and 2 in Plan marked 'X' should be excluded. In preparing the Plan marked 'Y' Surveyor Gamage has excluded the portion of lots 1 and 2 in Plan X which are portions of the adjoining land 'Kanuketiya Deniya' alias 'Kanuketiya Deniya Kumbura' from the corpus and depicted the corpus as lots 1, 2 and 3 in plan marked 'Y'. According to the evidence of Surveyor Gamage and the superimposition shown in Plan 'Y', the entirety of lot 1 and a portion of lot 2 in plan 'X' has been excluded. Yet a small portion of Lot 2 in Plan 'X' has come into the corpus and forms a part of lot 1 in Plan 'Y'. Surveyor Gamage has not shown that portion as a separate lot and it is merged with the rest of the land in lot No. 1 of Plan 'Y'.

According to the Issues No. 10 and 11, the 1st and 2nd Defendants are seeking to establish a prescriptive right to lot 1 and 2 in Plan X and they are seeking to exclude those 2 lots on that basis. The entirety of lot 1 and a portion of lot 2 in Plan 'X' has already been excluded from the corpus in Plan 'Y' and only a portion of lot 2 in Plan 'X' has come into the corpus and forms part of lot 1 in Plan Y and the 1st and 2nd Defendants will have to confine their prescriptive claim to that portion of land which is not shown as a separate lot.

The law governing the term of prescription for immovable property is contained in Section 3 of the Ordinance No. 22 of 1871 as amended by Ordinance No. 2 of 1889. Section 3 declares that "proof of the 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 (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs".

It is settled law that where the legal title is in the plaintiff the burden of proving prescriptive title falls on the defendant (**Siyanaris Vs Jayasinghe Udeni De Silva 52 NLR 289**, **Juliana Hamine Vs. Don Thomas 59 NLR 546**, **Sirajudeen and two others Vs. Abbas 1994 (2) SLR 365**).

Therefore, the burden is on the 1st and 2nd Defendants to establish their prescriptive right to the portion of lot 2 in Plan X which has come into lot 1 in Plan Y. On a balance of probability of evidence, the 1st and 2nd Defendants should prove that they have possessed that portion of land for a period exceeding 10 years prior to the institution of this action by a title adverse to or independent of that of the Plaintiff and other co-owners of the corpus and their possession was undisturbed and uninterrupted.

Although the 1st and 2nd Defendants had raised the Issues No. 10 and 11 on the basis that they had prescribed to lot 1 and 2 in Plan X and seeking to exclude those lots, the learned counsel for the 1st and 2nd Defendants had cross-examined the Plaintiff on the basis that the entirety of lot 1 in Plan Y should be excluded.

(පෙන්වා Y සැලැස්මය)

ප්‍ර : මෙම සැලැස්මයේ කැබලි අංක 1 ගස්වැටියෙන් බස්නාහිරට ඇති ඉඩම බෙදීමට අදාළ ඉඩමෙන් වෙන් විය යුතුයි.

උ : නැහැ. මෙතනින් මෙහා. (සාක්ෂිකරු පිඹුරේ බස්නාහිර පැත්ත පෙන්වයි)

According to the superimposition only a portion of lot 2 in Plan X is excluded in lot 1 of Plan Y and according to Issues No. 10 and 11, the 1st and 2nd Defendants will have to confine their prescriptive claim to that portion of lot 1. They cannot ask for an exclusion of the balance portion of lot 1 in Plan 'Y'. The learned District Judge also had gone on the assumption that the 1st and 2nd Defendants are seeking to exclude the entirety of lot 1 in Plan Y and come to the conclusion that the 1st and 2nd Defendants had failed to establish a prescriptive right to lot 1 in Plan Y.

The 1st and 2nd Defendants had not come forward to give evidence in court to establish their prescriptive claim. Instead, they have led the evidence of a witness in the name of Devage Romiel who stated that he cultivated the field as the cultivator of Misi Nona, the 1st Defendant. He had cultivated the field for 14 years. In the examination in chief this witness had stated that he cultivated lot 2 in Plan 'X' which is a paddy field. In cross-examination, when the superimposed Plan No. 358 අධි was shown to the witness, he stated that he cultivated the lot

shown as lot 'අ' which is the portion that was excluded from the corpus. He had answered as follows,

ප්‍ර : කොලපාට ඉරෙන් මේ පැත්තේ වැඩකලේ?

උ : (එම සැලැස්මේ 'අ' වශයෙන් ලකුණු කර ඇති කොටස පෙන්වයි).
වතුර පාරෙන් උතුර පැත්ත වැඩකලේ.

This witness had pointed out lot 'අ' in the superimposed Plan No. 358 අයි marked 'Z' as the portion of the field which he had cultivated for the 1st Defendant and that portion of land has been excluded from the corpus. This witness had never stated that he cultivated lot 1 in Plan 'Y' or a portion of lot 1 for the 1st Defendant. In view of the unsatisfactory nature of the evidence regarding the prescriptive possession of the 1st and 2nd Defendants, the fact that there is a row of trees (ගස්වැටිය) as a physical demarcation of the common boundary between lot 1 and 2 in Plan 'Y' cannot salvage the case of the 1st and 2nd Defendant-Appellants.

Therefore, on a balance of probability of the evidence, the 1st and 2nd Defendants had failed to establish a prescriptive right to the portion of lot No. 2 in Plan X which is included in lot 1 of Plan 'Y'. The learned District Judge has come to a correct conclusion regarding this matter and we see no reason to interfere with the findings of the learned District Judge.

For the aforementioned reasons, we affirm the judgment of the learned District Judge dated 30.11.1999 and dismiss the Appeal of the 1st and 2nd Defendant-Appellants. The 1st and 2nd Defendant-Appellants shall pay the substituted Plaintiff-Respondent Rs. 10,500/- as the cost of this Appeal.

Judge of the Court of Appeal

Mayadunne Corea – J
I agree

Judge of the Court of Appeal