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

In the matter of an application for Appeal in terms of Section 5(c)(1) of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006.

Kuruppu Arachchige Don Sunil
Kuruppu
Talagala,
Gonapola Junction.

Plaintiff

SC Appeal No. 05/2012
SC (HC) CALA/242/11
WP/HCCA/AV/576/08/(F)
DC Homagama case No.3713/L

V.

1. Don Punchisingho Abeysinghe
No. 532,
Old Road,
Kottawa,
Pannipitiya.

2. C. P. Morawaka
(Deceased)

2a. Ramani Sandya Morawaka
No. 44,
Kottawa,
Pannipitiya.

Defendants

AND BETWEEN

1. Don Punchisingho Abeysinghe
No. 532,
Old Road,
Kottawa,

Pannipitiya.

1st Defendant-Appellant

V.

Kuruppu Arachchige Don Sunil
Kuruppu
Talagala,
Gonapola Junction.

Plaintiff-Respondent

2a. Ramani Sandya Morawaka
No. 44,
Kottawa,
Pannipitiya.

2a Defendant-Respondent

AND NOW BETWEEN

Kuruppu Arachchige Don Sunil
Kuruppu
Thalagala,
Gonapola Junction.

Plaintiff-Respondent-Appellant

V.

1a. Dinesha Shavithri Abeysinghe
Also known as Dinesha Kumari Liyanage
No. 264, 2/1,
High Level Road.

1b. Panduka Abeysinghe
No. 7/282,
Kotte Road,
Mirihana,
Nugegoda.

Substituted 1st Defendant-Appellant-Respondents

2a. Ramani Sandya Morawaka
No. 44,
Kottawa,
Pannipitiya.

Substituted 2nd Defendant-Respondent -Respondent

Before : **E. A. G. R. Amarasekara, J**
Achala Wengappuli, J
K. Priyantha Fernando, J

Counsel : Shiral Lakthilaka with Asha Rathnayake instructed by Asha Rathnayake for the Plaintiff-Respondent-Appellant.

H. Withanachchi with Shantha Karunadhara for the Substituted 1st Defendant-Appellant-Respondent.

Argued on : 06.09.2024

Decided on : 18.12.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) instituted an action bearing no. 3713/L in the District Court of *Homagama* against the 1st and 2nd Defendant-Appellant-Respondents (hereinafter referred to as the Defendants) seeking for a declaration of title to the property described in the schedule to the plaint marked Lot 4 of partition plan 2234 [1V1], the right

to use the access which is also described in the schedule to the plaint as Lot 11, without any obstruction/ hindrance and for a mandatory order of the removal of the gate fixed by the 1st Defendant-Appellant-Respondent at the beginning of the said Lot 11.

2. After trial, the learned District Judge, by judgment dated 31.07.2007 held in favor of the plaintiff as prayed for in the prayer to the amended plaint. Being aggrieved by the said judgment of the learned District Judge, the 1st defendant preferred an appeal to the Civil Appellate High Court of the Western Province holden in *Avissawella*, bearing No. WP/HCCA/AV/576/8[F].

3. Upon hearing of the said appeal, the learned Judges of the Civil Appellate High Court, by judgment dated 26.05.2011 allowed the appeal of the 1st defendant, set aside the judgment of the District Court and dismissed the District Court case subject to cost.

4. The instant appeal was preferred to this Court by the plaintiff against the said judgment of the Civil Appellate High Court and leave to appeal was granted by this Court on the following question of law set out in para 32(c) of the petition dated 04.07.2011.

> *"Have the Hon. High Court Judges erred in law by setting aside the judgment of the learned District Judge of Homagama which was based on factual evidence led at the trial ? "*

5. Although, initially this Court granted leave to appeal for the above question of law, when this case was taken up for hearing, both Counsel submitted that, due to it being too wide it would be more prudent to have the question of law reframed in a manner that is more specific, thus encapsulating the substantial question to be decided upon. Thereafter, the question of law was reframed in the following manner ;

I. *"Have the Hon. High Court Judges erred in law by setting aside Judgment of the learned District Judge on procedural issues without considering the actual evidence led at the trial?"*

II. *"If the above question is answered in the affirmative whether this Court can affirm the judgment of the learned District Judge?"*

6. In light of that, the main issue pertaining to the questions of law is whether the learned Judges of the Civil Appellate High Court have appropriately evaluated the factual evidence presented at the trial in reaching their decision to set aside the said judgment delivered by the learned District Judge.

7. At the hearing, the learned Counsel for the plaintiff submitted that, the learned Judges of the Civil Appellate High Court have improperly identified faults in the judgment of the learned District Judge on several grounds. These grounds include,

i. the plaint's non-compliance with Section 40(d) of the Civil Procedure Code,

ii. the plaintiff's failure to adequately establish title to the property in dispute

iii. the absence of a gate at the commencement of Lot 11.

8. Addressing the issue on the title of the plaintiff, the learned Counsel for plaintiff submitted that, at the trial stage the plaintiff submitted deed No.1001 [P–1], dated 17.03.1997 attested by *Aruna Rohan Gamlath* N. P to Court as evidence to his title to the property in dispute. The Counsel submitted that the deed was bestowed on the plaintiff as a gift by his mother who was the initial title holder of the land in dispute.

9. The learned Counsel for the plaintiff contends that, notwithstanding the plaintiff's submission of the deed and the

establishment of title to the property, the judges of the Civil Appellate High Court erred in their judgment that the plaintiff has failed to prove his title to the land in dispute. The Counsel further submitted that this erroneous conclusion was based on a procedural issue, specifically the assertion that deed No.1001 was not included in the case record as it could not be located.

10. According to the survey plan No.1580 of Court commissioner *Mr. K.P Wijeweera,* which was prepared based on the partition plan 2234 [1V1], Lot 11 consists of trees aged 15-20 years. The Counsel for the plaintiff submitted that, although the 1st defendant has asserted rights over this land and its cultivation there is no actual evidence to show that he cultivated them nor enjoyed its fruits.

11. The learned Counsel for the plaintiff, addressing the 1st defendants claim on prescription to Lot 4 and Lot 11 submitted that, there is no evidence put forth by the plaintiff that proves the plaintiff had independent and uninterrupted possession of the land. He further submitted that, Lot 11 acting as a servitude to Lot 4, cannot be prescribed upon as it is a common amenity reserved to all parties from the partition decree of 1972. The Counsel further contended that although the 1st defendant claimed prescription to the property in suit from the date of final decree of partition, there is no actual evidence to asserting such prescriptive title.

12. It is the contention of the learned Counsel for the plaintiff that the Learned Judges of the Civil Appellate High Court overturned the trial Court's Judgment without considering the factual evidence presented therein and without any material evidence to support such a decision.

13. The learned Counsel for the 1st defendant submitted that, as per the initial partition decree, the 1st defendant has received Lot no. 9 and has later purchased Lots 5,6,7,8, and 10. He further stated that, the 1st defendant has possessed those allotments together with the plaintiff's property which is described in the schedule to

the original plaint as Lot 4 and acquired prescriptive title to the same.

14. It was further contended by the Counsel for the 1st defendant that, the road access in question described as Lot 11 in plan No.2234 was not physically on the ground at present and that it consists of old trees and claimed that he has acquired prescriptive title not only to the plaintiff's property (Lot 4) but also to Lot 11 which was given as a road access to the parties in the aforementioned partition action.

15. At the hearing of this appeal, the learned Counsel for the 1st defendant asserted that the 1st defendant has been in possession of the land since 1963 and has continued to possess it even after the partition decree of 1972. The Counsel further submitted that, since 1972, the mother of the plaintiff has neither visited the property nor enjoyed the servitude on Lot 11.

16. According to the learned Counsel for the 1st defendant, the 1st defendant has prescribed to Lot 4 along with Lot 11. Although, at first, he only received Lot 9 from the partition decree of 1972 [1V2], he later acquired lots 5,6,7,8, and 10 as well. Lot 11 remains as a common amenity co-owned by all parties to the said partition action.

17. Although, the learned Counsel for the plaintiff has stated that, the roadway lot 11 acts as a servitude for lot 4, as per the partition decree of 1972, lot 11 was declared a common amenity where all the co-owners held common soil rights over it. Therefore, lot 11 cannot be considered as a servitude as one cannot claim a servitude over his own land. However, it is a common access owned by all the co-owners.

18. Sri Lankan Law has identified instances where a co-owner has later prescribed for the co-owned land. However, in these instances there has been specific emphasis on the overt act done by the party claiming prescription. The case of ***Siyathuhamy and others V Podimenike and others [2004] 2 SLR 323*** discusses how there cannot be prescription among co-owners

unless a party is able to prove that there had been an act of ouster prior to the running of prescription.

19. **Section 3 of the Prescription Ordinance** provides,

> *" 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 acknowledgment 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…"*

20. Based on Section 3 of the Prescription Ordinance, there is a specific time period mandated for one to claim prescription and therefore it is important to establish the commencement date of the adverse possession of the land. In the instant case, it is notable that the 1st defendant has not provided an exact date indicating when the adverse possession commenced by an overt act in relation to Lot 11. Therefore, though 1st defendant has taken the defense of prescription for lot 11, the defendant has failed to prove the same.

21. The 1st defendant has also claimed prescription over the property marked lot 4. With regard to lot 4 the facts that are in favor of the defendant are the evidence that he himself presented which stated that he is in possession of the said property since the partition decree. Evidently as seen in [IV-4], which is a letter dated 21.07.93, the 1st defendant through his lawyer has replied to the letter [1V-3] dated 29.06.93 sent on behalf of the plaintiff's mother stating that he has prescribed to the land. However, during the cross-examination [P-10], the 1st defendant has admitted that he did not adversely go and takeover the land …*"මම ඒ අයගේ ඉඩම බලහත්කාරයෙන් අයිති කර ගත්තේ නැහැ"*….. Accordingly, it is evident from the statement that the 1st defendant did not forcibly take possession of Lot No. 4. The absence of such adverse

possession concerning Lot No. 4 leads to the conclusion that the defendant's claim over the said property cannot be sustained.

22. Additionally, it is important to consider that in the document marked [P-3a], surveyor, T.D.W.P. Perera, who prepared Survey Plan No. 1109 on commission for the 1st defendant, testified that the 1st defendant had informed him of a promise to purchase the Lot 11 in dispute from the plaintiff, but was later unable to do so for various reasons. The surveyor has stated, "... පැමිණිළිකරුට අයත් ඉඩම් කොටස මිලදීගැනීමට 1වන විත්තිකරු පොරොන්දුවූ බවත්, පසුව වෙනත් හේතූන් මත මිලදීගැනීමට නොහැකිවූ බවත් 1වන විත්තිකරු පවසන ලදි...". . From this statement it is clear that the 1st defendant was infact intending to purchase lot No.11. If the 1st defendant had prescribed to the land, there would be no need for the 1st defendant to purchase it. This shows that even if the 1st Defendant was in possession, it was not adverse to the title of the plaintiff or his predecessor in title.

23. When the evidence indicates the contradicting positions taken by the defendant, it is his duty to prove the commencement of the adverse possession which in the instant case, the 1st defendant has failed to do so. The defendant has failed to prove that there was undisturbed adverse possession where 10 years had lapsed. Therefore, the defendants' claim for prescription for Lot 4 too has failed.

24. Further, upon reviewing the 1st defendant's answer to the plaint dated 16.03.2004 [P-4a], it is observed in the prayer that the 1st defendant did not seek a counter-declaration to establish his title. This clearly indicates that the 1st defendant is uncertain about his position regarding prescription of the lands in question. As per Section 3 of the Prescription Ordinance, one can establish prescriptive title only through a decree of Court.

25. According to the evidence submitted in the District Court, the plaintiff has clearly produced deed No.1001 [P-1] without any objection to establish his title to the property in suit. There was an admission (No.5) that, the donor of the said deed who is the mother of the plaintiff became the owner of the property in suit as per the partition decree No.10684. Therefore, the learned Judges of the Civil Appellate Hight Court have erred in arriving

at the decision that, the plaintiff has failed to prove his title, as he has not produced the aforementioned deed.

26. Furthermore, at the time of the hearing the learned Counsel for the plaintiff contended that, the Judges of the Civil Appellate High Court has erroneously found fault in the learned District Judge's judgment based on the reasoning that the plaint was not properly in compliance with Section 40(d) of the Civil Procedure Code.

Section 40 (d) of the Civil procedure code provides,

> *" The plaint shall be distinctly written upon good and suitable paper, and shall contain the following particulars :—*
>
> *(d) a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered paragraphs; and where two or more causes of action are set out, the statement of the circumstances constituting each cause of action must be separate, and numbered; "*

In light of that, one must consider Paragraph 5 of the amended plaint marked [P-1b] which states,

> *" පලවන විත්තිකරු පහත දෙවන උපලේකනයේ වැඩිදුරටත් විස්තර කරනු ලබන ඉඩමට යාමට ඇති පිඹුරු අංක 2234 හි ලොට් 11 දරන පාරේ එකී පිඹුරෙහි මනාව විස්තර වන පරිදි පරන පාර පටන් ගන්නා ස්ථානයේ පැමිනිලිකරුට අයත් ඉඩමට යාමට බාදා වන හා නොහැකි වන අයුරු ගේට්ටුවක් බලහත්කාරයෙන් සවිකර පැමිනිලිකරුගේ පරවශ්‍යතා මාර්ග අයිතියද බාදා කරමින් ආරවුල් කරන බවද, පැමිනිලිකරු කියා සිටී."*

When considering the above it is clear that this is an occurrence of a disturbance which was caused at the time of filing the amended plaint [P-1b]. Therefore, the time as to when the cause of action arose here is the time the plaint was filed. Thereby, it is clear that the plaint was in fact in compliance with the aforementioned provision of the Civil procedure code and that the learned Judges of the Civil appellate High Court has erroneously found fault in the judgment of the learned District Judge.

27. On the above considerations I'm of the view that the learned District Judge had correctly evaluated the evidence led during trial and accordingly is right at arriving at the decision that the 1st defendant has not prescribed to the land in question.

28. Hence, the questions of law are answered in the affirmative, the judgement of the learned Judges of the High Court dated 26.05.2011 is set aside and the judgment of the learned District Judge dated 31.07.2007 is thus affirmed.

The appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R AMARASEKARA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI

I agree

JUDGE OF THE SUPREME COURT