PODIHAMY
V.
ELARIS AND OTHERS

COURT OF APPEAL
GOONEWARDENA, J., & VIKNARAJAH, J.
C.A. NO. 365/79 (F)
D.C. MT. LAVINIA NO. 10538/L
FEBRUARY 17 and 18, 1988.

Vindicatory suit — Judgment delivered after long delay (1¼ years). Concession made by attorney-at-law — Can it be resiled from in appeal? Prescription

Where the impression created by the conduct and evidence of a witness does not play a significantly important role, a delay of 1¼ years (some of it excusable being caused by the transfer of the Judge) in delivering the judgment is not fatal to the validity of the judgment.

Where on the invitation of Counsel the District Judge answered issues relating to the identity of the disputed land thus eliminating the dispute regarding it, and held in favour of plaintiff's title it is not possible to reagitate in appeal the questions involved in such issues.

Counsel, attorney, pleaders and other such persons would doubtless be regarded by the Court as empowered to make admissions on behalf of their clients in all matters relating to the progress and trial of the matter in issue. In the case before Court it was not an admission but rather a concession that Counsel made that upon the evidence before it he could not properly invite the Court to answer the issues any other way. The substance of the concession is also supported by the evidence.

The evidence did not establish prescriptive possession especially in view of the fact that the parties were close relations who had been living in amity earlier which suggests the need to look for ouster as a starting point for prescriptive possession. There is no evidence pointing in this direction. The accuracy of the plan relied on by the defendant was also open to question.

Cases referred to :

1. *Saravanamuttu v. Saravanamuttu* 61 NLR 1.
2. *Phillippu v. Ferdinands* 1 Matara Cases, 207
3. *Fernando v. Girigoris Appu* 26 NLR 469
4. *Punchi Banda v. Punchi Banda* 42 NLR 382
5. *De Mel v. De Alwis* 13 Ceylon Law Recorder 207
6. *Payn v. Estate Rennie and another* SALR 1960 (4) p.261

Appeal from the Judgment of the District Court of Mount Lavinia.

N. R. M. Daluwatte P.C. with *H. M. P. Herat* for 1st respondent-appellant

P. A. D. Samarawickreme P.C. with *M. B. Peramuna* for plaintiff-respondent.

Cur. adv. vult.

March 31, 1988

GOONEWARDENE, J.

In this action the plaintiff-respondent sought from the District Court a declaration of title to an allotment of land called Delgahawatte situated at Pannipitiya and described upon his original plaint of 2nd April 1964 as being the Southern portion out of Lot C thereof as shown on plan dated 22nd April 1914 made by D. J. W. Edirisinghe Licensed Surveyor (P6). Upon a commission issued to S. Jegadeesan Licensed Surveyor at the instance of the plaintiff, a survey was done and he thereafter described the subject matter in his amended plaint of 14th July 1976 by reference to a plan prepared after such survey bearing No. 1516 A (P5A) as Lot Z1 on such plan.

The plaintiff's case was that the entire Lot C of Delgahawatte originally belonged to one Themis Appuhamy who on P8 of 1917 transferred it to P. Menchihamy who together with her husband William Appuhamy on P9 of 1931 transferred the property to their daughter Jane Nona the wife of the plaintiff who having gifted it on P 10 of 1952 to Sisilawathie and Sarnelis the sister and brother-in-law respectively of the plaintiff, got it back on P11 of 1952 and thereafter transferred it to him on P12 of 1960. The plaintiff's position was that Lot C as it originally stood in course of time got broken up into two portions by reason of the High Level Road passing through the land, that Lot Z1 in plan P5A was the portion that fell to the South of such High Level Road and that the 1st defendant the widow of Arnolis Wijeratne (who was his wife Jane Nona's brother) was without title in unlawful possession of the same.

The case of the 1st defendant was that her parents-in-law Menchihamy and William Appuhamy I earlier referred to upon 1D2 of 1917 acquired certain undivided interests in

Delgahawatte which came to be possessed as a defined portion situated both to the North and to the South of High Level Road, that they upon deed No. 98 of 1945 (1D1) conveyed a 2/3rd share of the rights they so acquired to Arnolis Wijeratne her husband who in lieu of such undivided 2/3rd share entered into exclusive possession of the land depicted on plan No. 182 of 16th January 1965 (1D16) and that upon his death she as his widow together with her children the other defendants acquired title to this land. The land depicted on 1D16 is shown to be composed of lots X and Y indicated thereon. In essence the case of the 1st defendant therefore was that after the deed 1D1 in favour of her husband Arnolis Wijeratne, he acquired title to Lot Y in plan 1D16 which is the Lot material to this case as the same it would appear is identical with the portion of Lot C in plan P6 to the South of High Level Road which the plaintiff claims is Lot Z1 in plan P5A and to which he sought to be declared entitled to in this action. The 1st defendant also set up a prescriptive title to such Lot Y in plan 1D16 as against the plaintiff.

At the conclusion of the trial the District Judge held with the plaintiff and hence this appeal.

It is convenient to refer at this point to the fact that there had been a dispute to the plaintiff's ownership of the portion of Lot C which lies to the North of High Level Road and described as Lot X1 in plan P5A(and also in plan P5). That dispute was one raised by one Marihamy Wijeratne another daughter of Menchihamy and William Appuhamy, I earlier referred to, which resulted in case No. 10537/L being instituted against her by the plaintiff (vide plaint in that case P14). The defence taken up there (vide answer P14A) was that Menchihamy and William Appuhamy upon deed No. 97 of 5th May 1945 (which was executed on the same day as deed No. 98 (1D1) I earlier referred to,) conveyed an undivided 1/3rd share of what they acquired on 1D2, inter alia to Marihamy (the remaining 2/3rd share being what was conveyed on 1D1 to Arnolis Wijeratne as I earlier referred to) which came to be represented by the land shown on plan 181 of 1965 prepared by the same Surveyor Anil Peiris on the same day as plan No. 182 (1D16). The plaintiff was successful in that action both in the District Court and in the Supreme Court, and

what is of importance as far as the present case goes is that there was a concurrent finding by both Courts that the plan there P5 prepared after a survey carried out by Surveyor Jegadeesan and the superimposition of plan P6 on the property surveyed by him namely the said Lot C in its entirety was accurate (a finding that would extend to the land in dispute in this case as well, namely Lot Z1 in plan P5A or plan P5 both of which are identical).

At the hearing before us the first point taken for the appellant was that contained in paragraph 5 of the position of appeal that the judgment of the District Judge was delivered after a lapse of one year and three months after the conclusion of the evidence in the case. It would appear from the journal entries that after the evidence was over, time had been obtained by the parties to tender written submissions and the District Judge had himself been transferred to another station. This would have rendered it necessary for the despatch of the case record from the District Court to the District Judge at his new station where undoubtedly he would have been engaged in his new work. There would also have been some element of delay occasioned by the need to take steps to have him gazetted to deliver judgment. Counsel referred to the case of *Saravanamuttu v. Saravanamuttu* (1) as suppporting his argument based upon this delay but I understand that judgment to emphasize the position that in that case the impression created by the witnesses whom the trial Judge saw and heard was of the utmost importance. This is brought out from the words of Sinnathamby J in his judgment where he says (at P. 5) "In a case which turns more on the impression created by the conduct and evidence of witnesses as in divorce proceedings than on the construction of documents as in commercial cases, the importance of making a decision where the facts and the impressions on the mind of the Judge are fresh and clear cannot be too strongly stressed". The present case as I see it is not such a one where the impression created by the conduct and evidence of witnesses plays any such significantly important role. This point I think in the circumstances of this particular case must be taken to fail.

The first two issues suggested for the palintiff at the trial of the case and adopted by Court are important in view of the next

submission of Counsel for the 1st defendant-appellant. They are therefore rendered into English and reproduced thus:—

(1) Is the Lot depicted as 'Y' in plan No. 182 of 20th January 1965 filed of record identical with Lot Z1 shown on plan No. 1516A of 5th October 1966 made by surveyor Jegadeesan also filed of record?

(2) Does the said Lot Z1 form part of Lot 'C' shown on plan dated 22nd April 1914 made by D. J. W. Edirisinghe Licensed Surveyor?

One can readily understand the importance of these issues with respect to the identity of the disputed portion and consequently the anxiety of Counsel to press his submissions with respect to them.

In his written submissions tendered to the District Court, Counsel appearing for the 1st defendant had with respect to these two issues invited the District Judge to answer them in the affirmative, thereby simplifying the case of the plaintiff and the task of the District Judge in no small measure. Accepting such invitation the District Judge did so, and in my view, correctly did so. The effect of this was that the District Judge, as he was asked to do by the 1st defendant's own Counsel, concluded that Lot Z1 in plan 1516A of Surveyor Jegadeesan (P5A) was identical with Lot Y in plan No. 182 (1D16) and that such Lot was part of Lot C in plan P6, made by Surveyor Edirisinghe. Upon that basis the District Judge decided that the plaintiff has established Lot Z1 in plan P5A in respect of which he sought a declaration of title to be a part of the land conveyed on P9 by Menchihamy and William Appuhamy to Jane Nona their daughter and the title to which came to reside in the plaintiff. He concluded that title to Lot Y in plan 1D6 shown to be identical with Lot Z1 in plan P5A therefore could not have passed to Arnolis Wijeratne the husband of the 1st defendant on 1D1 as was her case.

The submission of 1st defendant's Counsel at the hearing before us was that the invitations to answer issues 1 and 2 in this manner by her Counsel was not binding on the 1st defendant

and that it was permissible at the appeal to reagitate the questions involved in such issues. He contended that accordingly he was able to demonstrate arithmetically that the superimposition of plan P6 upon his plan P5A by Surveyor Jegadeesan was inaccurate and consequently that the plaintiff had failed to establish that the title he claimed to have upon P12 was with respect to Lot Z1 in plan P5A which was the title he sought to vindicate in this action. The point Counsel sought to make was that Lot C upon plan P6 is shown to be 24.62 perches in extent while the total of the extents of Lots X1 and Z1 allegedly portions of Lot C was 24.20 perches and that clearly and visibly that portion of Lot C included into High Level Road had to be more than the difference which was only 0.42 perches. He argued that there was therefore clearly an error in the superimposition and a consequent inaccuracy of plan P5A.

Counsel relied on the case of *Phillippu v. Ferdinandis* [2] as supporting his contention that the admission implicit in the written submissions of Counsel with respect to issue Nos 1 and 2 are not binding on the 1st defendant. In that case (at page 210) Burnside C. J. said thus: —" The District Judge in settling the issues says, it is admitted that the 1st defendant executed a deed of gift for the entirety of the land, but I have failed to find anywhere in the record any conclusive entry of such admission so as to conclude the defendants from disputing the effect of it. And I should hold that any admission which might be made for the defendants attempting to bind them to their manifest prejudice in the very essence of the defence on their pleadings and contrary to their contention on their evidence would not bind them without showing that they have expressly authorised their Counsel to make it and with a full knowledge of its effect".

In the case of *Fernando v. Singoris Appu* [3] it was held that when a proctor under the general authority given to him by a proxy enters into a compromise with regard to the action such a compromise is binding on the client.

The case of *Punchi Banda v. Punchi Banda* [4] was one where Soertsz J. (with Howard C.J.) agreeing had occasion to consider the case of *Philippu v. Ferdinandis* (supra). While not expressing

disagreement with it Soertsz J. yet said (at p.382) "It has been held in several cases that a proctor has the right to settle or compromise a matter or case entrusted to him even without consulting his client in regard to it (*Fernando v. Singoris Appuhamy*.26 N. L. R. 469 (3)) and I suppose Counsel may make an admission if he is instructed by his proctor to make it . . . . . ".

I think the effect of the authorities on this question is correctly stated in 'A Text Book of the Law of Evidence in Ceylon' by E. R. S. R. Coomaraswamy (1st Edition) at page 84 thus: "As regards Counsel, attorneys, pleaders and other such persons, they would doubtless be regarded by the Court as empowered to make admissions on behalf of their clients in all matters relating to the progress and trial of the matter in issue".

Upholding the contention of Counsel would imply that no Court can act upon what is conceded by Counsel appearing before it and this argument taken further would mean that if Counsel concedes something or accepts the correctness of something in this Court it would be possible to resile therefrom should the matter later proceed to the Supreme Court.

What I have said so far on this question is in regard to the position relating to admissions proper. What we are dealing with here however is something different from what the cases refer to. As I have already pointed out, at the couclusion of the trial Counsel made their addresses to Court (in writing in this case). The invitation by Counsel for the defendant made to the Court to answer the first two issues in this way has to be understood to mean that upon an examination of the material presented to the Court (including documents connected with the other case No. 10537/L I referred to that went up in appeal to the Supreme Court) it was not with any sense of responsibility possible to ask the Court to answer them in any other way; in my view a perfectly proper course for Counsel to adopt and one well within his authority. One cannot strictly say that there was an 'admission' in the sense Counsel argued. Rather, it was an act of concession by Counsel that upon the evidence before it he could not properly invite the Court to answer the issues any other way. I cannot agree therefore that this point is well taken.

Having said that, it is yet meaningful to point out that in any event the challenge to the accuracy of plan P5A is as I see it based upon a fallacy, that being that the extent of Lot C shown in plan P6 to be 24.62 perches has been computed correctly. That there was a computation error in the stated extent of Lot C in plan P6 seems reasonably clear. Surveyor Sathiyapalan who had done a survey in the case has in his report stated that upon a correct computation the extent of land shown as Lot C in plan P6 he found to be 29 perches while as the District Judge observes Surveyor Anil Peiris who gave evidence for the 1st defendant himself found such extent to be 26.07 perches. While not forgetting that the Supreme Court accepted the accuracy of the plan and superimposition as I have already pointed out, there is on the other hand sufficient material to come to the conclusion that Surveyor Jegadeesan was able to obtain a sufficient number of points of fixation in order to correctly survey the land and properly superimpose on his plan P5A the earlier plan P6.

The final point taken by Counsel for the 1st defendant was that the District Judge had not properly addressed his mind to the issue of prescription. His argument in this regard appears to be that upon the application of the doctrine of absorption as he termed it, it is clear that the defendant had acquired a prescriptive title to the disputed lot. He relied for this submission on two cases, namely *De Mel v. De Alwis* [5] and *Payn v. Estate Rennie* and another [6] as illustrating this doctrine. Upon a reading of these cases I have not been able to find an express reference in either to any such doctrine. They both deal with somewhat straight forward questions arising out of claims based upon prescriptive possession in the context of the facts applicable in each and are in my view of no particular assistance here.

The District Judge found that in support of her claim based on prescriptive possession although receipts showing payment of assessment rates were produced by the 1st defendant they had reference to buildings on the adjoining portion to the West the property of the defendants and their predecessor Arnolis Wijeratne and that there was nothing to show that they had reference to the disputed portion. I see no reason to believe

having regard to the evidence that the District Judge was wrong in such conclusion. In viewing the claim of the 1st defendant based upon prescriptive possession one must not lose sight of the very important fact that the parties are close relatives who had been living in amity during earlier times which therefore rendered it necessary for the 1st defendant to show some positive act suggesting ouster as a starting point for prescriptive possession to commence. Such an act I do not think the 1st defendant was successful in showing although in this connection the argument of Counsel was that plan 1D14 was a pointer in that direction. 1D14 purports to be a plan prepared by Surveyor W.M. Perera after a survey made on 9th April 1957 (less than ten years before the action was filed on 21st April 1964) and the property shown on it is said to have incorporated within it both the disputed Lot as well the land to the West of it being the property of the defendants with no division visible between them. Apart from what I have already pointed out that parties are close relatives, to give this plan the effect contended for, at the very least one must be able to say that it contains an accurate representation of the physical features found to be existing on the ground. That it is deficient in that regard, Counsel for the respondent convincingly pointed out by drawing attention to the fact that buildings standing upon it at the time of the survey are not shown. One must conclude therefore that its accuracy is questionable and thus cannot serve the purpose that Counsel for the defendant claimed it does. I am of the view that the District Judge adequately considered the question of prescriptive possession and came to a correct conclusion thereupon.

The District Judge I think properly addressed his mind to the questions before him and arrived at a correct decision in the case. His judgment is therefore affirmed and the appeal is dismissed with costs

VIKNARAJAH, J.

I agree

Appeal dismissed.