ALWIS
v.
PIYASENA FERNANDO

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
SC NO. 30/92.
CA NO. 49/84 (F).
DC PANADURA 15326/L.
20 MARCH, 1993.

Revindicatory suit–Encroachment upon land–Defendant's claim of prescription – Assessment of evidence as regard prescription.

The plaintiff sued the defendants for a declaration of title and ejectment in respect of a portion of a land, .78 perches in extent. The defendants claimed the said portion by prescription, the evidence to support their claim being the use of lorries over the prescriptive period. This evidence was rejected by the District Judge.

Held :

1. The burden of proving prescription is on the defendant.

2. The Court of Appeal should not have disturbed the findings of primary facts made by the District Judge, based on credibility of witnesses.

Per G. P. S. de Silva, C.J. :

"It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal".

APPEAL from judgment of the Court of Appeal.

N. R. M. Daluwatte, P.C. with *C. N. Ladduwahetty* for the appellant.

K. Balapatabendi for respondent.

Cur. adv. vult.

April 02, 1993.

G. P. S. DE SILVA, C. J.

The plaintiff instituted these proceedings in December 1977 against the 1st and 2nd defendants seeking a declaration of title to a portion of land shown as a shaded triangle in plan 357 of 24.9.77 made by Licensed Surveyor Fernando (P3), for ejectment, and damages. The 1st defendant who was the father of the 2nd defendant, died pending trial. The alleged encroachment was in extent, .78 of a perch. The plaintiff purchased lot D in plan No. 756 of 1903 (P2) on 9.10.73 from Dr. S. Fernando. The deed of transfer was marked P1. On P5 of 1948, Dr. S. Fernando became the owner of the said lot D. Plan P3 is the superimposition of P2 made by Surveyor Fernando. To the west of the plaintiff's land is the defendant's land.

After trial, the District Court entered judgment for the plaintiff. The 2nd defendant preferred an appeal to the Court of Appeal which set aside the judgment of the District Court. The plaintiff has now appealed to this court.

The case for the 2nd defendant was that he and prior to him his father had possessed the disputed portion of land for well over the prescriptive period and had thus acquired a prescriptive title thereto. The burden was clearly on the 2nd defendant to prove his prescriptive title. The disputed portion of land was at the entrance to the 2nd defendant's land. It was his claim that his father owned lorries and the lorries were parked on the land ; that these lorries could not have been taken into the land except by using the disputed portion, since the width of the entrance to the land was not sufficient to take a lorry. The 2nd defendant relied on the certificate of registration of

a lorry which belonged to his father (1D1) in proof of his assertion that lorries were taken into the land. 1D1 however proves that his father owned the lorry only for a period of about 6 months from July 1964 to January 1965. There is no documentary evidence in the form of certificates of registration to show that either the 2nd defendant or his father owned lorries from January 1965 till 1972. The point to be noted is that there is no proof that the disputed portion of land was used to bring lorries into the defendant's land from 1965 to 1972, a period of no less than 7 years. This is an important fact which considerably weakens the 2nd defendant's claim of adverse possession, for he relied strongly on his assertion that lorries were taken into his land over the disputed portion. The Court of Appeal in its judgment adverted to this weakness in the defendant's case, but unfortunately failed to draw the proper inference in relation to the plea of prescriptive possession.

In reversing the findings of the District Court, the Court of Appeal has also misread the evidence of Surveyor Fernando, who prepared the plan P3. According to P3 and the evidence of the Surveyor, the encroachment which is the subject matter of the action is on the north-west of the plaintiff's land. The Surveyor has also shown another small encroachment which is further to the south of the encroachment in question. The Court of Appeal has mistakenly considered the evidence in respect of the small encroachment which is not the subject matter of the action as evidence relating to the disputed portion of the land and thereby wrongly concluded that the encroachment in question was "an old one, as old as the huge trees mentioned by the Surveyor in his evidence". This was a serious misdirection on the evidence which vitiates the finding of the Court of Appeal.

This apart, there was another serious flaw in the judgment of the Court of Appeal, namely, the total failure to consider the evidence of two witnesses called by the plaintiff in support of his case. The two witnesses were Premawathie Fernando and Dr. S. Fernando and their testimony was accepted by the trial Judge. Premawathie Fernando who was 35 years of age said that she was born on the land of the plaintiff and lived there till 1972. Until she left in 1972 no vehicles were brought on to the land and that the 2nd defendant's father had only a bicycle and a hand-cart ; that there was an old fence separating the land of the plaintiff and the defendant but the position of that

fence was altered later encroaching upon the plaintiff's land ; that no lorries were brought to the land prior to 1972. The plaintiff's vendor, Dr. S. Fernando too in his evidence said that the 2nd defendant's father had a bicycle and a cart.

The substantial basis of the 2nd defendant's plea of prescriptive possession was that from 1964 his father owned lorries and those lorries were brought into his land (which adjoined the plaintiff's land) over the disputed portion. The trial Judge however preferred to accept the evidence of both Premawathie Fernando and Dr. S. Fernando. Their testimony clearly was that the 2nd defendant's father had a cart and a bicycle, and that no lorries were brought to the land until 1972. In concluding that the 2nd defendant has prescribed to the disputed portion of land, the Court of Appeal was in grave error, as the Court failed to consider the evidence of two important witnesses accepted by the trial Judge.

It is well established that findings of *primary facts* by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings in this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge.

The appeal is accordingly allowed, the judgment of the Court of Appeal is set aside, and the judgment of the District Court is restored. The 2nd defendant-respondent must pay the plaintiff–appellant costs of appeal in both courts fixed at Rs. 2,500.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.