LEISA AND ANOTHER
v.
SIMON AND ANOTHER

COURT OF APPEAL
WIGNESWARAN, J. AND
TILAKAWARDANE, J.
CA NO. 443/93 (F)
DC GAMPAHA NO. 26653/L
SEPTEMBER 28, 2000.

Rei Vindicatio – Prescriptive rights – Presumption of right to possess – Difference between possession, occupation and dominium – Prescription Ordinance, section 3 – Plaintiff claims paper title as well as by prescription – Should the plaintiff prove prescription?

The plaintiff-appellants instituted action seeking declaration of title and ejectment of the defendants from the premises in question. The defendants claimed prescriptive rights. The plaintiff's action was dismissed.

On appeal –

Held:

(1) The contest is between the right of dominium of the plaintiffs and the declaration of adverse possession amounting to prescription by the defendants.

(2) The moment title is proved the right to possess it, is presumed.

(3) Thus, even if the Court found that the defendants had prescribed to the corpus, the proper answer to the 1st issue would have been yes, but the defendants have prescribed.

(4) An averment of prescription by a plaintiff in a plaint after pleading paper title is employed only to buttress his paper title.

(5) For the Court to have come to its decision as to whether the plaintiff had dominium, the proving of paper title is sufficient.

(6) The mere fact that the plaintiff claimed both on deeds as well as by long possession did not entail the plaintiff to prove prescriptive title thereto. Their possession was presumed on proving paper title. The averment of prescription in the plaint did not cast any burden upon the plaintiff to prove a separate title by prescription in addition to paper title.

(7) Once paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them.

Per Wigneswaran, J.

> "A person is in possession of a house for example, when he or his servants or licensees are living in it, if he or they are absent from it, he would still be held to be in possession, if such absence was only temporary. In this case the brother of the 1st plaintiff (1st defendant) could have been in occupation and still the 1st plaintiff would have been in possession simultaneously."

APPEAL from the judgment of the District Court of Gampaha.

Case referred to:

1. *Pathirana* v. *Jayasundera* – 58 NLR 169 at 177.

G. L. Geethananda for plaintiff-appellants.

Dinesh de Alwis with *Janaki Nawaratne* for defendants-respondents.

Cur. adv. vult.

January 16, 2001

WIGNESWARAN, J.

This appeal by the plaintiff-appellants is against the judgment dated 1
24. 09. 1993 delivered by the Additional District Judge, Gampaha, wherein this action of the plaintiffs for a declaration in their favour in respect of the land described in the schedule to the plaint (viz. Lot A in plan No. 1177 (P3)), ejectment of the defendants therefrom, demarcation of the southern boundary of the said land, damages and costs was dismissed with costs. The learned Additional District Judge had found that the defendants had prescribed to the land in dispute.

The 1st plaintiff is the elder sister of the 1st defendant. The 2nd plaintiff is the son of the 1st plaintiff and the 2nd defendant is the daughter of the 1st defendant.

There cannot be any dispute that by P1 the 1st plaintiff and by P2 the 2nd defendant on the same day (04. 08. 1966) obtained title from the same source to Lot A in extent A0 R1 P32 and Lot B in extent 38 perches, respectively. The 1st defendant Marasinghe Pedige Simon was in fact a witness to deed P2 executed in favour of his daughter the 2nd defendant.

At pages 168 to 170 of the Brief, Simon had accepted that his sister became owner of Lot A by P1. His evidence is as follows:

ප්‍ර. කොච්චිම එදා වයිරසිංහ මහතා 1 වෙනි පැමිණිලිකාරිය ලැයිසා යන අයට පැ. 1 දරණ ඔප්පුවෙන් තමයි ලියලා දුන්නේ එම ඉඩම් කැබැල්ල?

උ. ඔව්.

ප්‍ර. එතකොට ඒ ඉඩම් කැබැල්ල තමන් දන්නවා මොකක්ද කියා?

උ. ඔව්.

ප්‍ර. තමන් පිලිගන්නවා එම්. එස්. පෙරේරා මිනින්දෝරු මහතා මැනලා ප්ලැන් හැදූ ඉඩම් කැබැල්ලනේ?

උ. ඔව්.
(පැ. 1 වන ඔප්පුව කියවයි)

ප්‍ර. එක තමන් පිලිගත්තානේ?

උ. ඔව්.

ප්‍ර. ලැයිසා කීවේ තමන්ගේ සහෝදරිය?

උ. ඔව්.

ප්‍ර. ලැයිසාට දුන් ඉඩම නාපකැඟල් කොටකන්දේ ඉඩමේ 'ඒ' කැබැල්ල කීවා?

උ. ඔව්.

ප්‍ර. එතකොට 'ඒ' කැබැල්ල ලැයිසාට අයිතිය කියා පිලිගන්නවානේ?

උ. ඔව්.

On 18. 03. 1983 the 1st plaintiff sold 6/10th share of Lot A abovesaid to the 2nd plaintiff by P4. As per plan 'X' No. 4670 dated 10. 06. 1985 prepared by K. A. J. Amerasinghe, Licensed Surveyor, prepared for this case, Lot 1 in plan X was Lot A in plan 1177 and Lot 2 and 3 in plan X were Lot B in the said plan No. 1177. When this action was filed on 10. 04. 1984 the paper title to Lot A depicted in plan 1177 (P3) (Lot 1 in plan X) was with the 1st and 2nd plaintiffs.

Once the paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them. In fact, the following dictum of Gratian, J. in *Pathirana* v. *Jayasundera*[1] at 177 became applicable.

"In *a rei vindicatio* proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. 'The plaintiff's ownership of the thing is of the very essence of the action'. Maasdorp's Institutes (7th ed.) vol 2, 96."

In this connection it is useful to consider the submissions of the learned Counsel for the defendant-respondents at this stage. He has submitted as follows:

(1) Unless paper title *coupled* with prescription was proved, the plaintiffs in this case could not have obtained a decree in their favour.

(2) The evidence of the 1st plaintiff proved that she was not in possession of the premises in suit.

(3) No obstruction to the construction of any fence had been proved there being no physical division between Lots A & B depicted in plan No. 1177 (P3).

(4) The defendant-respondents had been in possession of Lots A & B (in plan P3) from 1947 and even after P1 was executed.

(5) Boutique in Lot B had been given on rent to the 2nd plaintiff-appellant.

(6) The land and premises in suit were part of Lot S in plan 932 (preliminary plan) submitted in DC Gampaha Case No. 16214/P.

Each of the above submissions would now be examined.

1. ***Paper title plus prescription must have been proved.***

Wille in his book "Principles of South African Law" (3rd edition) at page 190 states as follows:

"The absolute owner of a thing has the following rights in the thing:

(1) to possess it;
(2) to use and enjoy it; and
(3) to destroy it; and
(4) to alienate it."

In discussing the right to possession, he states, also at page 190:

"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindicatio or reclaim recover the possession from any person in whose possession the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant".

Thus, in this action there was no question of the plaintiffs having to prove their title by deeds *as well as* prescription. The contest in

an action of this nature is between the right of dominium of the plaintiff and the declaration of adverse possession amounting to prescription by the defendant. The moment title to the corpus in dispute is proved the right to possess it is presumed. Thus, even if the Court found that the defendants had prescribed to the corpus the proper answer to the first issue would have been "Yes. But, the defendants have prescribed to the corpus". An averment of prescription by a plaintiff in a plaint after pleading paper title is employed only to buttress his paper title. Such pleading also acts as an advance assertion against any averment of prescription that may be claimed by the defendants. For the Court to have come to its decision as to whether the plaintiffs in this case had dominium over the corpus, the proving of paper title was sufficient. The mere fact that paper title was claimed both by deeds as well as by long possession amounting to prescription did not entail the plaintiffs to prove prescriptive title thereto. Their possession was presumed on proving paper title. The burden was cast on the defendants to prove that by virtue of an adverse possession they had obtained a title adverse to and independent of the paper title of the plaintiffs. The averment of prescription in the plaint did not cast any burden upon the plaintiffs to prove a separate title by prescription in addition to the paper title as asserted by the learned Counsel for the defendant-respondent.

2. *Possession by plaintiffs*

The learned Counsel seems to confuse between possession and occupation – two important concepts in Land Law. It must be noted that the brother of the 1st plaintiff (1st defendant) could have been in occupation and still the 1st plaintiff could have been in possession simultaneously. A person is in possession of a house, for example, when he or his servants or licensees are living in it. If he or they are absent from it, he would still be held to be in possession, if such absence was only temporary or if he could return and re-enter at any moment if he chose, without asking anyone's permission or without any preliminary ceremony. But, the moment anyone else enters into

and remains in possession of the premises *without his consent* the former possessor is ousted. According to section 3 of the Prescription Ordinance such a possession must be undisturbed, uninterrupted, adverse to or independent of that of the former possessor and should have lasted for at least 10 years before he could transform such possession into prescriptive title.

In this instance the possession of Lot A by Simon was not of such nature. The 1st plaintiff stated at pages 114 and 115 of the Brief as follows:

ප්‍ර. ඒ ඉඩමේ ගෙඩි කඩා ගත්තේ කවිද?

උ. එයාත් කඩා ගත්තවා. මමත් ගත්තවා.
ඒ ඉඩම ගැන මට කිසීම කරදරයක් තිබුණේ නැහැ.
පොදුවේ දෙන්නම බුක්ති විඳගෙන ආවා.

ප්‍ර. ගස්වල ගෙඩි කඩා ගැනීමට සහෝදරයාට ඉඩ දුන්නේ මොකද?

උ. සහෝදරයා නිසා එයාත් ගත්තවා. මමත් ගත්තවා.

ප්‍ර. එයා තනිවම බුක්ති විඳින ඉඩමෙ තමා ඒකට පැනලා කඩා ගත්තවා නේද?
උ. එහෙම කළේ නැහැ. අල්ලපු ඉඩමෙ කඩයක් තිබෙනවා. ඒ කඩේ දමාගෙන ඉන්නේ පුතා.
තවත් කඩ 2ක් තිබෙනවා. ඒ කඩ දෙකම කුලියට දී තිබුනා. මේ විත්තිකරු. මේ විත්තිකරුට
අසිති ඉඩමක මගේ පුතා කඩේ දමාගෙන සිටියේ. ඒ ගැන ප්‍රශ්නයක් තිබුණේ නැහැ.

Further, at pages 122-123 she stated as follows:

ප්‍ර. මේ නඩුවේ 2 වෙනි පැමිණිලිකරු වන තමාගේ පුතාට පැ. 4 ඔප්පුවෙන් ලියා දුන්නේ කොයි ඉඩමද?

උ. මගේ උරුමෙ

ප්‍ර. ඒ කියන්නේ තමා බුක්ති විඳගෙන එන එකක්?

උ. ඔව්

ප්‍ර. විත්තිකරු බුක්ති විඳින එක ලියා දුන්නේ නැහැ නේද?

උ. .....

ප්‍ර. විත්තිකරු බුක්ති විඳින ගේ සඳහන් ඉඩම් ලියා දුන්නද?

උ. මගේ කොටසයි මා ලියා දුන්නේ.

ප්‍ර. තමා ලියා දුන්න එකේ තමාට බුක්තියක් තිබුණාද?

උ. ඔව්. එහි තිබෙන දේවල් මා කනවා, පොල්, කොස් කනවා. පුවක් කනවා.

ප්‍ර. තමා පදිංචිවෙලා නැහැ?

උ. මා ඉන්නේ ඒ අයගේ දුවගේ ගෙයි. මා ලියා දුන්නේ මා පදිංචි එකක් නොවේ. මා පුතාට (2 වෙනි පැමිණිලිකරුට) මුළු ඉඩමෙන් 6/10 ක් ලියා දුන්න. අනෙක් 4/10 තව පිරිමි හතර දෙනෙක් ඉන්නවා. ඔවුන්ට ලියා දී නැහැ.

The abovesaid pieces of evidence prove that the defendants did not have exclusive possession of Lot A. The 1st plaintiff did possess Lot A and enjoyed produce from her land though she did not object to Simon, her brother, taking whatever he wanted. She had given an undivided share to her son the 2nd plaintiff and intended to give some shares to her other sons too. Thus, the relationship of parties as sister and younger brother was very relevant in examining the nature of possession. There was no evidence placed before Court that the relationship between 1st plaintiff and 1st defendant was strained until 1984.

At pages 158 and 159 the 1st defendant gave evidence as follows:

"මම ගිය දිනයේ කීවා 1 වෙනි පැමිණිලිකාරිය සහ 2 වෙනි පැමිණිලිකරු වන පුතා සමඟ මගේ අවසරයෙන් කුලියට එම ඉඩමට ආව බව කීවා. 1984 ඉඳලා ඒ අය කුලී ගෙවන්නේ නැහැ. ඒ හොල්ලන්ගෙන් මම කුලියට දෙන කොට ලියවිල්ලක් ගත්තේ නැහැ. මගේ එකකුස උපන් අක්කා නිසා මම ලියවිල්ලක් ගත්තේ නැහැ."

1st defendant admitted the smooth relationship between him and his sister though he sought to bring in the idea of renting out the premises to the 2nd plaintiff. No contemporaneous records pertaining to any payment of rents was produced. No letters or correspondence was produced. No questions were put to the 1st plaintiff when she gave evidence about her son occupying premises belonging to 1st defendant's daughter, the 2nd defendant, on rent.

In any event the question of actual occupation by 1st plaintiff of the land and premises in suit was irrelevant so long as her possession of the land and premises in suit *through her brother* the 1st defendant was perceivable and presumable from the evidence.

If suppose a third party was laying claim to the disputed land and the 1st defendant brother had been in occupation, such occupation of the brother as against the third party would have been taken to be possession by the 1st plaintiff even though she may not have been in occupation.

Thus, the occupation of the brother must be considered to have been the 1st plaintiff's possession unless there was sufficient evidence of adverse possession by him.

3. *No obstruction proved*

The proof of obstruction, again, is an incidental matter. It is the disputing of the paper title of the plaintiffs that is relevant for the first relief claimed - viz. declaration of title to Lot A abovesaid.

At pages 147/148 of the Brief the 1st defendant stated as follows:

"මේ සැලැස්මේ මට පෙනෙනවා පස්යාල සිට මිරිගම දක්වා තිබෙන පාර. මම මිරිගම පැත්තට හැරුනොත් වම් අත පැත්තේ මේ ඉඩම තිබෙන්නේ. ඒ ඉඩමේ තිබෙනවා මේ සැලැස්මේ කොටස් දෙකක් වශයෙන්. කොටස් දෙකක් තිබෙනවා කොටස් දෙක වෙන්වන්න මායිමක් මම දුල තිබෙනවා."

But, the surveyor at pages 141 and 142 of the Brief stated as follows:

ප්‍ර. තමා මැන්න ඉඩම කොටස් දෙකකින් ලකුණු කළාට තනි ඉඩමක් වගේ තිබෙන්නේ මැදින් වැටක් නැතුව?

උ. වැටක් තිබුණේ නැහැ.

ප්‍ර. අංක 1, 2 කැබලි දෙක පෙන්නුම් කෙරෙන්නේ තනි ඉඩමක් වශයෙන්?

උ. තනි ඉඩමක් වශයෙන්.

The plan X filed of record also showed that there was no demarcating boundary and that it was shown by fixing stakes on the ground (vide pages 235 and 237 (line 7) of the Brief). 210

Hence, it is to be understood that the 1st defendant was averse to the 1st plaintiff constructing any fence between Lots A & B since he was trying to lay claim to the entirety (Lots A & B) with his daughter.

4. *Possession from 1947 by 1st defendant-respondent*

As stated earlier occupation from 1947 has no relevance. Possession and occupation must be distinguished. What is referred to as possession by the learned Counsel was in fact occupation by the 1st defendant. So long as such occupation was as a brother of the 1st plaintiff and therefore as a licensee of the 1st plaintiff, the long period of occupation would not make it an adverse possession unless there 220 had been an overt act of ouster as in the case of prescription among co-owners. The long occupation by the brother must in law be deemed as possession by the sister through her younger brother. The learned Judge also seems to have overlooked the difference between long occupation as a licensee and adverse possession. There was only a long period of occupation as a licensee in this instance. There was no adverse possession until 1984. Action itself was filed in 1984.

5. *Boutique in Lot B*

As earlier referred to there is insufficient evidence of the boutique being given on rent to the 2nd plaintiff-appellant. No question regarding the boutique being given on rent was put to the 1st plaintiff when she related in her evidence about the existing state of affairs pertaining to cordial relationship between the families of the sister and the brother. The story about the boutique being given on rent to the 2nd plaintiff-appellant must have been an after thought to show that the occupation of Lot A by the 1st defendant was independent and that the 2nd plaintiff was only a licensee on Lot B. In any event the possession of the 1st defendant prior to 04. 08. 1966 was as a licensee of the previous owner. (vide page 193 of the Brief).

6. *DC Gampaha Case No. 16214/P*

The abovesaid partition case was for an estate in extent 24 acres 1 rood 18.5 perches (vide plan 932 (V1)). Though P1 and P2 had been executed in 1966, yet Lot S encompassing the lands transferred on P1 and P2 to the 1st plaintiff and the 2nd defendant, respectively, was also surveyed for this partition case without excluding it (Lot S). The plan only referred to the 8th defendant (Simon the 1st defendant in this case) being in occupation at the time of Survey. in fact, neither P1 nor P2 executed in 1966 was in his favour. There was no statement of claim filed by him. In any event for him to claim adverse possession against his sister, the plan V1 abovesaid was drawn up in 1972 while his sister obtained title on P1 in 1966. In this connection his evidence at pages 177 and 178 is revealing –

ප්‍ර. තමන් මේ නඩුව දැන කාලයේ, වසිරසිංහ මහතාගේ ඉඩම් පාලනය කරන කොට මේ නඩුව තිබුණා?

උ. ඔව්

ප්‍ර. තමන් උසාවියට කීවා යම් ඉඩම් කැබැල්ලක් තමන් බුක්ති විඳ්දු කියා?

උ. ඔව්

ප්‍ර. ඒ වයිරසිංහ මහතාගේ ඉඩම් පාලක වශයෙන් තමන් බුක්ති විඳින්නේ කිනම්?

උ. ඔව්

ප්‍ර. වයිරසිංහ මහතාගේ ඉඩම් පාලකයා වශයෙන් කටයුතු කළේ තමාගේ? 260

උ. ඔව්. ඉස්සරලාම පියා සිටියා. ඊට පස්සේ පියා මලාම මම තමයි එවා බලා ගොයා ගත්තේ."

Hence, the 1st defendant's claim to the Surveyor was not as an owner in his own rights of Lots A and B in plan No. 1177, but as the caretaker of the Virasinghe family.

The said action (case No. 16214/P) was not proceeded with, but was dismissed in 1973 (vide V3 at page 308 of the Brief).

Thus, the legal arguments put forward by the learned Counsel for the defendant-respondents though accepted by the Additional District Judge, Gampaha, were in fact, erroneous and contrary to admitted 270 legal principles pertaining to occupation, possession and dominium. The Additional District Judge had erroneously concluded that long possession automatically gives rise to prescription. This need not be so.

We, therefore, allow the appeal.

We set aside the judgment dated 24. 09. 1993 and enter judgment in favour of the plaintiff-appellants as prayed for in the plaint dated 10. 04. 1984. We direct the learned District Judge of Gampaha to take steps to ensure the demarcation of the southern boundary of Lot A in plan 1177 in terms of prayer (*c*) of the plaint. The damages 280 claimed appear reasonable and therefore we have allowed prayer (*d*) together with taxed costs in both Courts (Original and Appellate).

TILAKAWARDANE, J. – I agree.

Appeal allowed.