

PERERA
v.
FERNANDO

COURT OF APPEAL
WIGNESWARAN, J.,
TILAKAWARDANE, J.
C.A. NO. 874/85 (F).
D.C. GAMPAHA NO. 19302/P.
FEBRUARY 24, 1999.
MAY 19, 1999.
JUNE 7, 15, 16, 1999.

Partition Law, No. 21 of 1977 – Relevant date to calculate exclusion – Prescription – Outsider – Knowledge – Prescription Ordinance S. 3.

The 19th defendant-appellant claimed the exclusion of lot 11 in plan X, the 29th substituted defendant-respondent in his cross appeal claimed exclusion of Lot 1 in the said plan, on prescription:

It was contended that an amicable partition was arrived at in case No. 8224/P on 29.9.1967 and the present partition action was filed on 10.6.1977, thus 10 years of uninterrupted and undisturbed possession had not passed since the amicable partition to give the 29th defendant-respondent prescriptive title over lot 1. It was further contended that rights of parties should be ascertained at the point at which the Surveyor went to the land and the 29th defendant made his claim, from there onwards there was knowledge of the action.

Held:

1. Adverse possession is in suspension as soon as a case is filed against a defendant who claims prescription.
2. When it comes to a claimant who is not a party to the case, but who is made a party either on his own intervention or on the Court determining such addition then prescription would run in his favour up to the date of such addition.

3. Mere knowledge of a case in which the plaintiff claimed certain adverse interests *vis-a-vis* the land occupied by such an outsider would not interrupt the adverse possession by such an outsider.
4. When such person makes a claim to the Surveyor in a partition action his claim is an assertion of his rights. Such assertion must be brought to the notice of Court by the Surveyor. Then the Court should direct notice to issue on such person and he should thereafter be served with such notice, and be added as a party. That would be the relevant date to calculate prescription.
5. The amicable partition was on 29.9.1967 the present action was filed on 10.6.1977 but the 29th defendant was made a party on 30.1.1978.
6. At most when an action is filed there would be suspension until the case is concluded and prescription would thereafter continue as if the unsuccessful action has not been filed. Such a suspension comes into being only because the person claiming prescription had been made a party to the case. Mere knowledge would not suspend the adverse possession of the claimant.

APPEAL from the judgment of the District Court of Gampaha.

Cases referred to:

1. *Chinnathamby v. Shanmugam* – 1 Current Law Reports 134.
 2. *Fernando v. Wijesooriya* – 48 NLR 320.
 3. *Lucihamy v. Hamidu* – 26 NLR 41.
- G. I. Geethananda* for 19th defendant-appellant.
- T. B. Dissanayake, PC* with *Kirthi Sri Gunawardena* for substituted 29th defendant-respondent.
- N. R. M. Daluwatte, PC* with *L. V. P. Wettasinghe* for substituted plaintiff-respondent and 9th and 12th defendant-respondents.
- G. D. Piyasiri* for 35th defendant-respondent.
- Nihal Senaratne* with *Roshan Dayaratne* for 3rd and 5th defendant-respondent.

July 2, 1999.

WIGNESWARAN, J.

While the 19th defendant-appellant has filed an appeal against the judgment of the District Judge of Gampaha dated 05.08.85 in this case, the 29th substituted defendant-respondent has filed a cross appeal. Neither the 3rd and 5th defendant-respondents nor 35th defendant-respondent have filed any appeal nor cross appeal.

The 19th defendant-appellant has claimed the exclusion of lot 11 in plan "X" from partition while the 29th substituted defendant-respondent has claimed exclusion of lot 1 in the said plan.

Having perused the evidence and the judgment and examined the submissions made by the learned counsel for the 19th defendant-appellant we find, as stated by the learned District Judge, that deed No. 6286 (19v1) which allegedly transferred Manuel's rights to William was not produced in Court. Presumably, due to lack of proof, certain shares have been left unallotted. It was suggested by Mr. Geethananda that the area to be defined and demarcated when sufficient proof was forthcoming, in lieu of the unallotted undivided shares, be left around lot 11 to which Mr. Daluwatte had no objection so long as the lots in lieu of the shares allotted to his clients were not affected. An appropriate order in this regard would be made at the end of this order regarding the claim of the 19th defendant-appellant.

The important matter that comes up in cross appeal for determination is the refusal by the learned District Judge to consider favourably the claim of prescription by the 29th defendant-respondent. Mr. T. B. Dissanayake claimed exclusion of lot 1 from the corpus on the ground of prescription.

An amicable partition was arrived at in the District Court of Colombo in case No. 8224/P on 29.9.1967. The present partition action was filed on 10.6.1977. Mr. Daluwatte argued 10 years' of uninterrupted

and undisturbed possession had not passed since the amicable partition to give the 29th defendant-respondent prescriptive title over lot 1. He pointed out that unlike in the earlier Partition Act the present Partition Law, No. 21 of 1977 required public notification of the institution of the partition action in the form of display of notices at his office by the Grama Seva Niladhari and by the Fiscal in a conspicuous position on the land which is the subject-matter of the partition action in terms of section 15. On 12.09.1977 the Grama Seva Niladhari had in fact displayed the notice, relating to the land to be partitioned on his notice board. Between 08.08.1977 and 08.09.1977 the Fiscal had displayed notice in terms of section 12 (2) of the Partition Law on the land. The survey by the Surveyor took place on 07.09.1977 having given notice to parties on 23.08.1977. The original 29th defendant was present at the survey. Thus, this partition action had definitely been filed within 10 years of the earlier partition case in that the 29th defendant had knowledge of the partition action well within the said period.

Mr. Daluwatte pointed out that bringing of the action was the relevant date to counter prescription and this had been done in this case. Mr. Daluwatte referred to the decision in *Chinnathamby v. Shanmugam*⁽¹⁾. He pointed out that the Indian Law was different. He also referred to *Fernando v. Wijesooriya*⁽²⁾. He referred to the following passage at page 325: "*If the continuity of possession is broken before the expiration of the period of time limited by the Statute, the seisin of the true owner is restored; in such a case to gain a title under the statute a new adverse possession for the time limited must be had*".

Mr. Dissanayake referred to *Lucihamy v. Hamidu*⁽³⁾ and pointed out that the rights of the 29th defendant were not affected by the filing of this partition action and the relevant date for calculation of the 10 years' period was the date on which the 29th defendant was made a party to the case or intervened in the case, which was 30.01.1978 long after the 10 years' period had passed.

Mr. Daluwatte pointed out that Justice Garvin's judgment in *Lucihamy v. Hamidu (supra)* was slightly different to Chief Justice Bertram's. Mr. Daluwatte referred to the following dictum of Justice Garvin – "*Upon what principle can it be said that his rights as against the plaintiff or any other party to the action should be ascertained at any date other than the actual date on which the plaintiff commenced legal proceedings against him?*". The rights of parties in this case, Mr. Daluwatte said, should be ascertained at the point at which the Surveyor went to the land and the 29th defendant made his claim. From then onwards there was knowledge of the action.

We have carefully perused the said judgment dated 05.08.1985 and the submissions made by counsel on both sides and examined the record pertaining to this case.

It is our view that adverse possession is in suspension as soon as a case is filed against a defendant who claims prescription. This view in fact was expressed by Justice Canekeratne in *Fernando v. Wijesooriya (supra)* at page 326 in the following manner:

"Where there is a contest as regards the title to a land if the claim of the parties is brought before a Court for its decision and there is an assumption that meanwhile the party occupying shall remain in possession, the running of the statute in favour of the defendant is suspended; otherwise a bar will all the while be running which the plaintiff could by no means avert. If the plaintiff fails in his action there has been no break in the continuity of possession of the defendant. If the plaintiff succeeds the continuity of possession of the one who was keeping the rightful owner out of his possession is broken; the result of finding of the Court is to restore the seisin of the plaintiff."

But, when it comes to a claimant who is not a party to the case, but who is made a party either on his own intervention or on the Court determining such addition, the prescription would run in his favour up to the date of such addition. Mere knowledge of a case in which the plaintiff claimed certain adverse interests *vis-a-vis* the

land occupied by such an outsider would not interrupt the adverse possession by such an outsider. When such a person makes a claim to the Surveyor in a partition action his claim is an assertion of his rights. It cannot be considered as the death knell of his adverse possession. Such assertion must be brought to the notice of Court by the Surveyor in his report giving the name and address and other particulars, if any, pertaining to such outsider claiming rights to the corpus or any part thereof. Then the Court should direct notice to issue on such person and he should thereafter be served with such notice and be added as a party. That would be the relevant date to calculate prescription. In this instance the notice was served and the 29th defendant was made a party only on 30.01.1978.

Any other interpretation based on "knowledge" could work hardship on a person in possession. For example, a person in possession who makes a claim to the Surveyor in a partition action may for some reason be not made a party to the case. Would it be possible for a plaintiff to allege in a subsequent case for declaration of title after 10 years' of adverse possession by such claimant, that the latter's adverse possession had been interrupted by the mere "knowledge" he obtained in the partition case? Section 3 of the Prescription Ordinance contemplates of a possession by an adversary who knowing the land to be not his by title deeds or otherwise, or mistakenly believes it to be his for whatsoever reasons, continuing in possession for over ten years undisturbed and uninterrupted creating thereby an adverse or independent title. Even the mere filing of an action against such outsider or trespasser and the abandonment of it does not affect prescriptive possession. In *Fernando v. Wijesooriya (supra)* it was held that the dismissal of a previous action was not an interruption of possession. At most when an action is filed there would be a suspension until such case is concluded and prescription would thereafter continue as if the unsuccessful action had not been filed. Such a suspension comes into being only because the person claiming prescription had been a party to the case. But, mere knowledge would not suspend the adverse possession of the claimant.

We, therefore, find that in this case the relevant date that should have been considered to calculate the period of prescription was 30.1.1978 and not 12.09.1977.

We find that the learned District Judge had erred in his conclusion with regard to the claim of the 29th defendant. Accordingly, we set aside that part of his judgment dated 05.08.1985 which refused to acknowledge the prescriptive title of the 29th defendant and hold that the 29th defendant had prescribed to lot 1 in plan No. 358 and therefore exclude the said lot 1 from partition. The substituted 29th defendant-respondent would be entitled to the taxed costs of this appeal.

As for the other defendant-respondents since they had not preferred any appeal nor cross claims, no order is made relating to their claims articulated by their respective counsel at the hearing of this appeal.

We direct the learned District Judge to allow the shares unallotted to cover the area around lot 11. We also direct him to proceed with the partition case in terms of the judgment dated 05.08.1985 but excluding from such partition lot 1 which we hold had been prescribed to by the 29th defendant. The 3rd, 5th, 19th and 35th defendant-appellants shall bear their own costs of appeal.

TILAKAWARDANE, J. – I agree.

Appeal partly allowed.

Appeal of the 29th defendant-respondent (cross appeal) allowed.