SAMARAPALA

v.

JAGODA

COURT OF APPEAL.
H. A. G. DE SILVA, J. AND DHEERARATNE, J.
C.A. 7/79 (F)–D.C. GALLE 8481/L.
OCTOBER 24 AND 25, 1985.

Unallotted lot in Partition Decree–Prescriptive possession–Plaintiff fails to prove title–Can he rely on weakness of defendant's title?

The plaintiff claimed title to a lot left unallotted in a partition decree on the basis of his predecessor having prescribed to it. The 1st defendant also claimed title to the same lot by prescription. He was in possession but a deed executed by his father militated against his claim to prescriptive title.

The plaintiff was a purchaser who had not been given possession by his vendor. He had to rely on the prescriptive title of his vendor and her father who was her predecessor in title. The vendor had a brother who survived her father.

It could be inferred the vendor herself did not have possession because–

(1) if she had possession she could have placed the purchaser (plaintiff) in possession

(2) the purchaser held back Rs. 1,000 of the consideration to be paid after he was given possession.

Held–

In a vindicatory suit the plaintiff must prove his title. Having failed to prove his own title, he cannot rely on the weakness of the 1st defendant's title. Whatever the strength of the 1st defendant's case, if the plaintiff fails to establish his title, plaintiff's case must necessarily fail.

Cases referred to:

(1) *D. A. Wanigaratne v. Juvanis Appuhamy (1962) 65 N.L.R. 167.*

(2) *Carolisappu v. Anagihamy (1949) 51 N.L.R. 355.*

APPEAL from judgment of District Judge, Galle.

P. A. D. Samarasekera, P.C. with *Jayantha de Almeida Gooneratne, K. Abeypala* and *M. Hussein* for plaintiff-appellant.

N. R. M. Daluwatta, P.C. with *Miss S. Nandadasa* for the defendant-respondent.

Cur. adv. vult.

January 31, 1986.

H. A. G. DE SILVA, J.

The plaintiff instituted this action against the defendants seeking:

(1) a declaration of title to lot 17 of a land called Talawewatta which in final decree (P1) in D.C. Galle Case No. 38344 remained unallotted;

(2) an order of eviction of the 1st defendant therefrom and restoration of the plaintiff to possession thereof;

(3) Rs. 1,000 as damages for the cutting down of 40 rubber trees by the 1st defendant; and

(4) damages at Rs. 100 per mensem till the plaintiff is placed in quiet possession of the said land.

The 2nd defendant was said to be the predecessor in title of the plaintiff and had been made a party in order that she may warrant and defend the plaintiff's title. The learned District Judge after trial held that the plaintiff had failed to establish his title and dismissed the plaintiff's action with costs. It is from this judgment that the plaintiff has appealed.

The plaintiff's case was that lot 17 in extent 27.10 perches as depicted in plan 1252A (P2) filed in D.C. Galle Case No. 38344 was not allotted to any party in the final decree P1 dated 28th April 1945

but the 1st plaintiff in that case one Jagodage Charles Mathias who was allotted lot 4 possessed this lot 17 and after his death the prescriptive title thereto devolved on his daughter Kamala Piyaseeli the 2nd defendant. The latter by Deed No. 17341 of 10th August 1973 conveyed an undivided 3/4 share of lot 4 and the entirety of lot 17 to the plaintiff. Lot 17 is referred to in the second schedule to that deed and it also states that the said lot was held and possessed by her by virtue of prescriptive possession. The plaintiff alleged that on 26th August 1973, the 1st defendant without his permission entered the land and cut coconut trees and rubber trees and caused damage to him in a sum of Rs. 1,000.

The 1st defendant in his answer averred that in or about 1960 when lot 17 was overgrown with weeds and jungle, he had cleared the jungle and planted catch crops and in 1968 had planted tea clones on a portion of that land. The remaining portion had been planted with catch crops. He further averred that he was the owner of lot 19 which adjoins lot 17. He also stated that he had prescriptive possession to this lot for a period of over 10 years. He denied that Jagoda Carolis Mathias referred to in the plaint had at any time possessed this land. He further stated that Mathias had two children, viz. Kamala Piyaseeli the 2nd defendant and Premachandra at the time of his death and as such the ownership of the entire lot could not in any circumstances be conveyed by the 2nd defendant to the plaintiff. Premachandra had died after his father's death and was also an heir to his father's assets. It was the 1st defendant's position that when Deed P5 was executed, the plaintiff was aware that the 1st defendant was in possession and therefore he retained Rs. 1,000 out of the purchase price till the 2nd defendant gave him possession. The 2nd defendant had filed a case in M.C. Galle Case No. 157 seeking to recover the said Rs. 1,000 from the plaintiff.

The 2nd defendant Kamala Piyaseeli did not file answer nor did she give evidence on behalf of the 1st defendant.

The learned trial judge has quite correctly held that even if Kamala Piyaseeli purported to convey lot 17 to the plaintiff by Deed P5 she could have done so only if she herself had prescriptive title to lot 17.

It was the plaintiff's position that though the land was sold to him on Deed P5 for Rs. 2,500 he had paid only a sum of Rs. 1,500 before the notary and he had retained the balance Rs. 1,000 to be paid when

he was placed in possession. He had up to date not paid that money as he was never placed in possession. The question then arises, if Kamala Piyaseeli was in fact in possession of that land what was the difficulty for her to have handed over possession to the plaintiff. This, of course, she could not have done if she was not in possession and someone else such as the 1st defendant was in possession. One thing is clear, the plaintiff never entered into possession of that land. He has so admitted in his evidence.

In *D. A. Wanigaratne v. Juvanis Appuhamy* (1) Herat, J. in his judgment at page 168 states as follows:

"In this case the plaintiffs-respondents brought an action rei vindicatio in respect of a paddy field against the 1st defendant-appellant.

They joined as defendants their vendors so as to warrant and defend quiet possession.

It has been laid down now by this Court that in an action rei vidicatio the plaintiff should set out his title on the basis of which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.

In the case, the plaintiffs produced a recent deed in their favour and further stated in evidence that they could not take possession of the shares purchased by them because they were resisted by the 1st defendant. No effort was made to call any of the vendors to the plaintiffs to prove the possession or title of the vendors".

In this case too the plaintiff has not been in a position to call his predecessors-in-title, viz. Charles Mathias and his daughter Kamala Piyaseeli, the 2nd defendant. The former as he was dead and the latter as the relations between the plaintiff and the 2nd defendant were not cordial as a result of the plaintiff withholding Rs. 1,000 from the purchase price till possession was handed over to him.

I will now consider what evidence the plaintiff has placed before Court either oral or documentary to prove prescriptive possession by Mathias and thereafter by his daughter the 2nd defendant as learned counsel for the plaintiff-appellant cited the case of *Carolisappu v. Anagihamy* (2) where it was held that–

> "The period of possession of an intestate person can be tacked on to a possession of his heirs for the purpose of computing the period of ten years required to acquire prescriptive title under section 3 of the Prescription Ordinance".

The final decree P1 in D. C. Galle case No. 38344 was entered on 28th April 1943 and lot 17 remained unallotted therein. Lot 4 was allotted to the 1st plaintiff, i.e. Jagodage Charles Mathias. To establish possession of lot 17 by Charles Methias, oral evidence was given by the plaintiff and his brother Haramanis, who were both children of Mathias's sister. According to P3 dated 10th November 1943, the plantation on lot 17 consisted of 5 coconut trees, 2 jak trees, 53 rubber trees, another 5 rubber trees and 41 tea bushes.

Journal entry P4 of 23.5.44 in D. C. Galle Case No. 38344 shows that the 8th defendant acknowledges payment of Rs. 426.50 from the 1st plaintiff, i.e. Mathias, as compensation due from the 1st plaintiff in respect of lot 17. In journal entry of 2.8.44 P4(*a*) the 8th defendant has moved to be permitted to deposit Rs. 170.03 in favour of 1st plaintiff for lot 17 received by the 8th defendant by mistake. There is also a motion P4(*e*) dated 5th June 1946 which seeks an order of payment in favour of the 8th defendant in that case for the sum of Rs. 170.02 deposited by the 8th defendant. It further states that the 8th defendant was declared entitled to the rubber plantation of lot 17 and the owner of lot 17 was ordered to pay to the 8th defendant Rs. 170.02 as compensation for the rubber. This lot 17 however was left unallotted and the 8th defendant continued to possess the rubber. The plaintiff offered compensation for lot 17 and the 8th defendant unthinkingly accepted it and issued a receipt. Soon afterwards when he realised that he had accepted compensation for the unalloted lot 17 he offered the money to the plaintiff and when he refused to accept it, deposited the money in Court. The 8th defendant had then filed action in C. R. Galle Case No. 25872 against the plaintiff to get possession of the rubber on lot 17 but the case was settled and the plaintiff was allowed to remain in possession of the rubber as he had paid compensation. The 8th defendant now sought to withdraw the money he deposited.

This evidence would show that after the final decree in 1943, Mathias the plaintiff in that case, had gone into possession of lot 17 and was in possession in 1946. According to the plaintiff, Mathias died about 25 years before 1978, i.e. about 1953. Mathias had only one child but 1D1 shows that Mathias had a son Jagodage Romis Premachandra who died on 8.8.1954 and had survived Mathias and 1D3 indicates that Romis Premachandra had a son Kulasiri Amarawardena born on 20.4.1954.

It was the plaintiff's position that after Mathias died, the 2nd defendant his daughter possessed the land and he knew personally that the 2nd defendant tapped the rubber trees on the land and plucked coconuts just as her father had done previously. In cross-examination the plaintiff has said that possession of the land was never handed over to him by the 2nd defendant after the execution of Deed P5 in 1973 but in the complaint P7 made to the police on 10.7.1974 regarding the forcible cutting of trees by the 1st defendant he has stated that after he purchased this land he had cultivated it with catch crops. He further stated that the 1st defendant had entered the land and cut the rubber trees in August 1973 but he made the complaint to the Police about it only in July 1974, nearly an year later and according to it, the 1st defendant had entered the land only on 8th July 1974. There were obvious contradictions in the positions that he had taken up in his evidence and in the complaint to the police.

Haramanis in his evidence stated that Mathias possessed this lot and during this period he was in the habit of getting the rubber trees tapped, and the coconuts plucked by labourers while his daughter the 2nd defendant and her brother used to pluck the tea leaves. Later he stated that no labourer was employed to tap the rubber trees and this was done by the 2nd defendant herself. According to him Mathias had died about 15 years before 1978, i.e. about 1963. This would be about 10 years after the year given by his brother, the plaintiff.

Further it has been conclusively proved that Mathias had another heir in addition to his daughter the 2nd defendant, viz. his son Romis Premachandra who survived Mathias and was himself survived by his son Kulasiri Amarawardena. In these circumstances, without cogent evidence to prove that the 2nd defendant only of Mathias's intestate heirs possessed this land, it would be difficult to hold with the

contention of the plaintiff that the 2nd defendant had prescriptive possession of this lot 17. The only person who could have given this evidence, viz. the 2nd defendant could not be called by the plaintiff. In this state of the evidence the trial judge has in my view quite justifiably held that the plaintiff has failed to prove possession by the 2nd defendant and consequently failed to establish his own title.

The learned trial judge has also held that the 1st defendant has himself not established prescriptive possession to this land in view of Deed P6 executed on 18th July 1973. The vendor is his father and the purchase price is Rs. 150. As the learned trial judge states, if the 1st defendant had prescriptive possession since 1960 what was the necessity for him to obtain this conveyance in 1973. In any event, whatever is the strength of the 1st defendant's case, if the plaintiff fails to establish his title, his case must necessarily fail. I am therefore of the view that the learned trial judge was correct in the conclusions he has come to and his judgment must be affirmed. The appeal stands dismissed with costs.

DHEERARATNE, J. – I agree.

Appeal dismissed.