SIRIYAWATHIE
v.
ALWIS AND OTHERS

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 114/92 (F)
DC COLOMBO NO. 13947/P
NOVEMBER 28, 2000
DECEMBER 05, 2000

Prescription Ordinance – S. 3 – Presumption of Ouster – Overt acts – Acquisition of prescriptive title.

The plaintiff-respondent sought to partition the land in question. The 9th defendant-appellant sought the dismissal of the action on the ground that he has acquired prescriptive rights to the entire land. The appellant was adopted by the original owner E without a formal order of adoption. After E died in 1969, his wife left the house leaving behind the appellant, and lived with her nephew, the plaintiff-respondent.

District Court dismissed the 9th defendant's claim.

On appeal –

Held:

The appellant has prescribed to the land as seen from –

(1) Continued possession of the corpus after the death of E and from 1969 after the widow left the corpus.

(2) Planting with coconuts, etc., and enjoying the produce.

(3) Friends and relations arranging a marriage in 1970, with the marriage ceremony being taken in the house and premises in suit.

(4) The widow of E not attending the marriage ceremony.

(5) Building extensions, effecting repairs, renting a portion of the house in 1970.

(6) Continued possession after marriage.

(7) Payment of rates and taxes from 1973.

(8) Long and undisturbed possession of the corpus been corroborated by the evidence of the Grama Sevaka.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to :

1. *Hamidu Lebbe v. Ganitha* – 27 NLR 33.
2. *Anthonisz v. Cannon* – 3 CLR 65.
3. *Government Agent, Western Province v. Perera* – 11 NLR 337.
4. *Maduranwela v. Ekneligoda* – (1898) 3 NLR 213.
5. *Orloff v. Grepe* – 1907 – 10 NLR 183.
6. *Lebbe Marikkar v. Sainu* – 1907 – 10 NLR 339.
7. *Alwis v. Perera* – 21 NLR 321.
8. *Tilakaratne v. Bastian* – 21 NLR 12.
9. *De Silva and Others* v. *Seneviratne and Another* – 1981 2 SLR 7.

P. A. D. Samarasekera, PC with *Wijedasa Rajapakse* for 9th defendant-appellant.

P. L. Gunawardena for defendants-respondents.

Cur. adv. vult.

June 29, 2001

DISSANAYAKE, J.

The plaintiff-respondent by his plaint dated 22. 02. 1979 and amended [1] subsequently instituted action to partition the land called Diyabethmeovita, morefully described in the schedule to the plaint, and depicted as lot 1 in the preliminary plan No. 2195 dated 03. 07. 1979 made by Licensed Surveyor A. F. Sameer.

The 9th defendant-appellant in her statement of claim whilst denying the claim of the plaintiff-respondent sought the dismissal of the action

on the ground that he has acquired prescriptive rights to the entire land.

The case proceeded to trial on 8 points of contest.

At the conclusion of the trial the learned District Judge by his judgment delivered on 23. 04. 1992 dismissed the 9th defendant-appellant's claim and directed to enter an interlocutory decree to partition the land as prayed for in the plaint.

It is from the aforesaid judgment that this appeal is preferred.

Learned President's Counsel appearing for the 9th defendant-appellant contended that the learned District Judge has misdirected herself in rejecting the evidence of the 9th defendant-appellant. He submitted that her evidence was based mainly on facts admitted in evidence by the plaintiff-respondent and corroborated by documentary evidence.

The plaintiff-respondent's case was presented on the basis that Elabodage Juwanis Perera was the original owner of the corpus who by deed No. 6987 dated 12. 09. 1907 (P1) gifted 1/2 share of the corpus to his two children Elabodage Babasingho Perera and Elabodage Punchinona Perera and on the death of Juwanis Perera, Babasinghc and Punchinona Perera became entitled to the other half share.

The said Punchinona Perera and her husband A. K. John Perera, by deeds bearing No. 3577 dated 27. 06. 1917 (P2) and No. 11075 dated 18. 02. 1928 (P3) transferred their rights to Eliyas Perera.

The aforementioned Elabodage Babasingho who entered the Buddhist Priesthood in the name of Subonanda transferred his 1/2 share by deed No. 1911 dated 12. 11. 1931 (P4) to the said Eliyas Perera who thereby became the owner of the entirety of the corpus.

Thereafter, Eliyas Perera died intestate and the estate was administered in the District Court of Colombo in case No. 24834/T and by administration and by deed No. 2297 dated 15. 11. 1975 (P5) the widow of Eliyas Perera, Engaltina Perera became entitled to 1/2 share of the corpus. The balance 1/2 share devolved on the other brothers and sisters of Eliyas Perera and their children.

Engaltina Perera by deed No. 396 dated 06. 04. 1997 (P6) transferred her 1/2 share to the plaintiff-respondent.

It is common ground that Eliyas Perera was married to Engaltina Perera and they did not have children, and the 9th defendant was adopted by them without a formal order of adoption.

It is also common ground that Eliyas Perera died in 1968, and that after the 3rd month almsgiving Engaltina Perera left the house in 1969 leaving behind the defendant-appellant and lived with the plaintiff-respondent who was her nephew, at No. 85, Kajugahawatta Road, Gothatuwa, Angoda.

The 9th defendant-appellant was not made a party to this action at the time it was instituted. But when surveyor Sameer prodeeded to the land to survey the corpus the 9th defendant-appellant made a claim to Lot No. 1 which included the house and the plantations and thereafter she was added as a defendant.

The case of the 9th defendant-appellant was that since her *de facto* adoption by Eliyas and Engaltina Perera she lived with them in the corpus and 3 days after the death of Eliyas Perera in 1968 Engaltina Perera left the house and never returned. The 9th defendant-appellant continued to live in the house. The 9th defendant-appellant sought to assert that she pointed out to the surveyor the land, the plantations planted by her and the late Eliyas Perera who adopted her.

She asserted, that after her marriage she made improvements to the house by building 3 extensions to the house. She further asserted that she effected repairs to the roof and the well and lavatory, etc.

Since the 9th defendant-appellant was only a *de facto* adopted child of Eliyas Perera and does not get any rights on the death of Eliyas Perera, it is necessary to examine whether the 9th defendant-appellant has acquired prescriptive rights to the property in suit.

In examining this question, it is necessary to bear in mind, that a person who has commenced possession in a subordinate and a dependant character, cannot claim to be adverse user of the property, until by ouster he changes his subordinate or dependant character.

It is of significance to observe that the following circumstances from the conduct of the 9th defendant-appellant give rise to the presumption of ouster against Engaltina Perera and her successors in title.

(1) The continued possession of the corpus by the 9th defendant-appellant after the death of Eliyas Perera in 1968, and from 1969 after Engaltina left soon after the 3rd month almsgiving.

(2) Planting the corpus with coconuts, king coconuts, and other plantations and enjoying the produce.

(3) Friends and relatives arranging a marriage for her in 1970, and the marriage ceremony being taken in the house and premises in suit.

(4) That Engaltina Perera while living at Angoda with her nephew the plaintiff-respondent not attending the wedding ceremony.

(5) Building 3 extensions to the house, effecting repairs to the roof, lavatory, the old well, and renting a portion of the house in 1970.

(6) The continued possession of the corpus after the marriage, as evidenced by birth certificates of children.

(7) Payment of rates and taxes to the Mulleriyawa Town Council from 1973 to 1983 as evidence by the tax receipts produced marked 9 V18 to 9 V35.

The 9th defendant-appellant's long and undisturbed possession of the corpus has been corroborated by the evidence of Ranjith Perera, the Grama Sevaka of Mulleriyawa.

In *Hamidu Lebbe v. Ganitha*[1] where a co-owner of land sought to establish a prescriptive title against another by reason of long and continued exclusive possession, it was observed, that it depends on the circumstances of each case whether it is reasonable to presume an ouster from long continued exclusive possession.

In the case *Anthonisz v. Cannon*[2] where one of the issues was whether the plaintiff had established a title by prescription to a house, twenty-five years before the action was brought, the plaintiff had obtained her father's permission to occupy the house. She and her husband lived in the house by themselves until the latter's death some seventeen years previous to the action. Since her husband's death, the plaintiff lived in the house continuously. Her version was that she occupied the house rent free, that she repaired it from time to time at her own expense and that she paid the Municipal taxes on account of it. Bonser, CJ. and Withers, J. held that a person who has been in possession of land belonging to another for 10 years previous to the institution of an action in terms of section 3 of the Ordinance No. 22 of 1871 acquires title by prescription, even though his possession originally commenced with the permission of the owner. Withers, J. at page 67 paraphrased section 3 of the Prescription Ordinance as follows: "Once given exclusive power to deal with immovable property, if that power is continuously exercised without disturbance and interruption and without any act of acknowledgement of another's title

for ten years previous to action brought the *animus possidendi* shall be imputed to him who has so exclusively exercised that power, if he chooses to claim the property for himself, and a decree shall be awarded him accordingly."

In the case of *Government Agent, Western Province v. Perera*[3] where the usufructuary mortgagees of land purchased the same at a sale by the fiscal under a subsequent mortgage and claimed to set off the amount due on their mortgage against the purchase money, and did not obtain any Fiscal's transfer, but possessed the land for over ten years. It was held that the usufructuary mortgagees had acquired title by prescription to the land, inasmuch as after their purchase at the Fiscal's sale, the character of the possession changed over thereafter they must be considered to have passed *ut domini* and not quo-mortgagees. Woodrenton, J. at page 343 has stated thus: "Where a person who has obtained possession of the land of another, in a subordinate character, for example, as tenant or mortgagee, seeks to utilize possession is the foundation of a title by prescription, he must show that by an overt act, known to the person under whom he possess, he has got rid of his subordinate position." *Vide Maduranwela v. Ekneligoda,*[4] *Orloff v. Grepe,*[5] *Lebbe Marikkar v. Sainu.*[6]

In the case of *Alwis v. Perera*[7] following *Tilakaratne v. Bastian*[8] where a person transferred his lands to certain family connections, but continued in possession till date of action (sixty years), the Supreme Court held, (in the circumstances) that the possession was not permissive, but that it should be presumed to have become adverse.

Therefore, I am of the view that in the circumstances, the 9th defendant-appellant, by an overt act or by a series of overt acts coupled with her long, undisturbed and uninterrupted possession which amounted to adverse possession as against the plaintiff-respondent, his predecessor in title Engaltina Perera and the other defendant-

respondents, has acquired prescriptive title by adverse possession of the corpus.

Therefore, it would appear that the learned District Judge misdirected herself in her judgment when she rejected the 9th defendant-appellant's evidence.

I am not unmindful of the principle that an appellate Court should be slow to disturb the finding of a fact by a trial judge who had the benefit of observing the witness herself. However, if according to an analysis of the facts, it is seen that the trial judge has not deligently 160
addressed her mind to the evidence before her as in this case, then this Court is duty bound to reverse such a finding (*vide* the decision in *De Silva and Others v. Seneviratne and Another.*[9])

For the above reasons the judgment of the learned District Judge cannot be allowed to stand.

Therefore, I set aside the judgment and interlocutory decree entered on 23. 04. 1992.

The appeal is allowed with costs.

WEERASURIYA, J. – I agree.

Appeal allowed.