WIJESUNDERA AND OTHERS

v.

CONSTANTINE DASA AND ANOTHER

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND ABEYWIRA, J.
D.C. KALUTARA 2572/L
C.A. 22/81 (F).
JANUARY 13, 15, 19 AND 20, 1987.

Prescription – 'Paper title' based on certificate of sale under Partition Ordinance – S. 3 of the Prescription Ordinance – Adverse possession.

The plaintiffs are the widow and children of one James Wijesundera who became the owner of the land in suit on a certificate of sale of 1944 (being the purchaser at a sale under the Partition Ordinance). The parents of the defendants and Agida Perera their aunt and Engracia Perera and Lucia Perera also aunts were the defendants in the partition action where the decree for sale was entered. It was admitted that James Wijesundera did not take possession of the land after the sale in 1944 and that Agida Perera and the present defendants continued to live on the land. Agida Perera lived on the land till her death in 1964 and the plaintiffs' position was that she had obtained permission to live on the land from James Wijesundera in 1947. The plaintiffs alleged forcible entry in 1974. Action was filed in 1978. The District Judge upheld the plea of prescription of the defendants. The following documentary and oral evidence was in the case:

(1) The conditions of sale showed that an aunt of the defendants had competed with James Wijesundera at the sale under the Partition Ordinance.

(2) Agida Perera did not comply with a direction by the Village Committee to cut down a jak tree and a coconut tree and the V.C. cut them and recovered Rs. 15 from Agida Perera as expenses.

(3) By lease bond D8 of 28.8.1953 the 1st and 2nd defendants and Agida Perera gave on lease 5 coconut trees for tapping toddy for 2 years from 1.1.1954. The lease included the soil but not the tiled house wherein the lessors lived.

(4) The defendants paid the rates (D10, D11, D12 and D13).

(5) The electoral registers D15 to D21 showed the defendants' residence on the land.

(6) The Grama Sevaka said the 2nd defendant resided on this land in 1970 and 1971.

(7) By deed D7 of 1956 the defendants and their predecessors had transferred the land in suit to one Seeman Singho who in 1965 by Deed D23 reconveyed the land to 1st defendant's wife and the 2nd defendant.

Held–

(1) The evidence as a whole in particular the documentary evidence shows that possession was continuously in the defendants and their predecessors.

(2) As the character of the possession of the defendants and their predecessors was incompatible with the title of the plaintiffs and their predecessors, their possession was adverse. The fact that the defendants knew that James Wijesundera became the new owner after the sale is not a bar to prescriptive title. The possession of the defendants need not be in good faith. Justus titulus or justa causa of the Roman and Roman-Dutch Law is no longer necessary for prescriptive possession. Our Prescription Ordinance is a complete Code and the principles of the common law need not be taken into account. If the possession of the defendants is incompatible with the title of the plaintiffs such possession is adverse within the meaning of s 3 of the Prescription Ordinance.

(3) The District Judge had impliedly rejected plaintiffs' plea of permissive possession.

(4) The defendants could tack on the possession contemplated by D7 and D23 to establish an unbroken chain of title by prescriptive possession under s.3 of the Prescription Ordinance.

Dawood v. Natchiya – (1955) 54CLW3 not followed.

Cases referred to:

(1) *Dawood v. Natchiya – (1955) 54 CLW 3, 4.*

(2) *Tillekaratne v. Bastian – (1918) 21 NLR 12, 15.*

(3) *Cadija Umma v. Don Manis Appu – (1938) 40 NLR 392 (PC).*

(4) *Fernando v. Wijesooriya – (1947) 48 NLR 320, 325.*

(5) *Carolisappu v. Anagihamy – (1949) 51 NLR 355*

APPEAL from judgment of the District Judge of Kalutara.

N. S. A. Goonetilleke with *N. Mahendran* for the plaintiff-appellants.

M. R. N. Daluwatta, P.C. with *Miss K. Gabadage* for defendant-respondents.

Cur. adv. vult.

February 27, 1987.

G. P. S. DE SILVA, J. (President, C/A)

The plaintiffs who are the widow and children of one James Wijesundera brought this action for a declaration of title to the land described in the schedule to the plaint, for ejectment and for damages against the two defendants. The defendants are brothers and it was averred in the plaint that they forcibly entered the land in early 1974. At the trial, the defendants admitted the paper title of the plaintiffs which was based on a certificate of sale under the Partition Ordinance. The certificate of sale (D3) is dated 29th January 1944.

The conditions of sale were marked as P2 and the order confirming the sale as P3. At the sale under the Partition Ordinance, the land was purchased by the said James Wijesundera who was the plaintiff in the partition action. The defendants to the partition action were Maria Perera, the mother of the defendants, Juwan Dasa, the father of the defendants, Agida Perera, an aunt of the defendants, Lucia Perera and Engracia Perera who were also aunts of the defendants. In the partition action, the plaintiff was declared entitled to a half share and the defendants to the balance half share.

The case for the defendants was that James Wijesundera did not take possession of the land after the sale under the Partition Ordinance and Agida Perera (3rd defendant in the partition action) and the defendants to the present action continued to live on the land for well over the prescriptive period and had acquired a prescriptive title. Agida Perera lived on the land until her death in 1964, the 1st defendant till 1966 and the 2nd defendant till 1975 when their residing house collapsed. After trial, the District Judge held with the defendants and dismissed the plaintiff's action. Hence this appeal lodged by the plaintiffs.

At the hearing before us, it was common ground that the only matter for decision was whether the defendants had acquired a prescriptive title to the land in suit. It was not disputed before us that James Wijesundera did not take possession of the land after the sale in 1944 and that the defendants and their predecessors in title continued to remain in physical occupation. But the 1st plaintiff in her evidence claimed that Agida Perera remained on the land having obtained permission to do so from James Wijesundera in 1947.

Mr. Goonetilleka, counsel for the plaintiffs-appellants, submitted at the outset that the defendants and their predecessors in title could not have acquired a prescriptive title for they knew that after the sale in 1944 the new owner was James Wijesundera and that they had lost their previous title to the land. In other words, their possession was clearly with the knowledge that the land belonged to another. In support of his proposition Mr. Goonetilleka relied on the following passage in the judgment of Basnayake, C.J. in *Dawood v. Natchiya* (1):

> "To acquire title to immovable property by possession for the period prescribed by law for the acquisition of a prescriptive title, it is necessary that the possessor must honestly believe that he had a

just cause of possession, and must have been ignorant that what he possessed did belong to another ..... In other words possession will not enable the possessor to acquire a prescriptive title after the effluxion of the period fixed by law unless the possession is in good faith ....."

No decision was cited before us where this view of the law of prescription was subsequently followed in our courts. The expression of opinion of Basnayake, C.J. appears to import the elements of the Roman and Roman-Dutch law relating to prescription into our law governing prescription. No previous decision of the Supreme Court which has taken this view was cited before us. On the other hand, Bertram, C.J. in *Tillekaratne v. Bastian* (2), referring to the principles of the Roman and Roman-Dutch law observed:

"They are, however, only of historical interest, as it is recognised that our Prescription Ordinance constitutes a complete code; and though no doubt we have to consider any statutory enactments in the light of the principles of the common law it will be seen that the terms of our own Ordinance are so positive that the principles of the Common Law do not require to be taken into account. Let us therefore consider the terms of our own Ordinance."

This was a view taken by the Supreme Court as far back as 1918. In *Cadija Umma v. Don Manis Appu* (3), an argument was advanced by counsel for the appellant that section 3 of the Prescription Ordinance should be construed as introducing the requirement known to the Roman law as "justus titulus" or "justa causa" The Privy Council rejected this contention, observing that–

"Learned counsel had however to admit that the law of Ceylon recognised no such doctrine at the date of the passing of the Ordinance and their Lordships find it impossible to interpret the section as introducing it."

This view was reiterated by Canekeratne, J. in *Fernando v. Wijesooriya* (4).

As at present advised, I am not inclined to follow the opinion of Basnayake, C.J. in *Dawood's case (supra)* (1) since it does not appear to be in accord with the interpretation placed by our courts on the provisions of section 3 of the Prescription Ordinance. I accordingly hold that the fact that the defendants knew that the new owner after

the sale was the 1st plaintiff's husband is not a bar to the defendants' claim to a prescriptive title, but rather tends to strengthen their claim, having regard to all the facts and circumstances of the instant case.

Mr. Goonetilleka next contended that there was no evidence of "adverse possession". With this submission I find myself unable to agree. After the issue of the certificate of sale (D3) in 1944 a new title was created and the old title the predecessors in title of the defendants had was wiped out. But it is conceded that the predecessors in title of the defendants continued to remain in physical occupation of the land. The conditions of sale P2 show that the person who competed with James Wijesundera to purchase the land at the sale was the 6th defendant in the partition action and an aunt of the defendants to the present action. By a lease bond dated 28th August 1953 (D8) the 1st and 2nd defendants and Agida Perera referred to above, gave on lease 5 coconut trees for the purpose of toddy tapping for a period of two years from 1st January 1954. D8 further provides that "the lease shall also be in respect of the soil exclusive of the tiled house wherein the lessors reside.....". It is also to be noted that D8 is a registered document.

There is also documentary evidence, (D1, D6 and D9) which show that the Village Committee of the area had asked Agida Perera to cut down a coconut tree and a jak tree standing on this land which were in a dangerous state; that the Village Committee had ultimately cut down the tree and that the Village Committee had in August 1962 recovered a sum of Rs. 15 from Agida Perera for the expenses incurred. Besides, there is evidence of payment of rates by the defendants (D10, D11, D12 and D13). The 1st plaintiff in her evidence stated that no one resided on the land from 1965 to 1973 and that the house was closed after 1965. This was proved to be false by the production of the extracts of the electoral registers D15 to D21. The Grama Sevaka too in his evidence stated that the 2nd defendant was residing on this land in 1970 and 1971.

Thus, when the evidence is fairly read as a whole, in particular the documentary evidence, it seems clear that possession by the predecessors in title of the defendants and by defendants themselves is "adverse" in the sense that their possession is incompatible with the

title of the plaintiffs and of their predecessor James Wijesundera. As expressed by Canekeratne, J. in *Fernando v. Wijesooriya (supra)* (4) at 325–

> "It is necessary to inquire in what manner the person who had been in possession during the time held it; if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant's title–his possession may be on behalf of the claimant or may be the possession of the claimant.....".

The 1st plaintiff in her evidence tried to make out that Agida Perera obtained her husband's permission to live on the land in 1947. This story of "permissive possession" does not bear scrutiny in view of the documentary evidence. It is true, as submitted by Mr. Goonetilleka, the District Judge has not expressly reached a finding on this point but when the judgment is read as a whole it would appear that the story of the alleged permission given in 1947 has not been accepted.

The burden of Mr. Goonetilleka's submission was that this case should be remitted to the District Court for a fresh trial, since the District Judge has failed to make a proper assessment of the evidence and, what is more, he had failed to appreciate the fact that the burden of proving prescriptive possession is entirely on the defendants since the paper title is admittedly in the plaintiffs. For this submission counsel relied on the following passage in the judgment which reads thus (as translated):

> "The main question for decision is whether James Wijesundera after his purchase of the land got vacant possession from the defendants or whether one or more of the defendants continued to reside on the land after the sale in the same manner as they did before the sale."

It seems to me that there is here no misdirection on the burden of proof when read in its proper context and in the light of the pleadings and the evidence. In paragraph 4 of the plaint it is averred that it was in 1974 that the defendants forcibly entered the land. The implication is that the plaintiffs were in possession till 1974. Indeed at one stage in her evidence the 1st plaintiff claimed that her husband James Wijesundera visited the land during his lifetime and thereafter she was

a frequent visitor to the land. On the other hand, in paragraph 2 of the answer the defendants specifically pleaded that the purchaser at the auction sale never obtained possession and the defendants to the partition action and the defendants to the present action continued to remain in possession as they did before the partition action. The 1st defendant's oral evidence was to the same effect. It would therefore appear that the District Judge was not in error in considering who was in actual physical occupation of the land after the purchase by James Wijesundera in 1944.

While it is true that the judgment could have been more comprehensive and the findings explicitly stated yet this infirmity does not, in the circumstances of this case, justify a re-trial, which invariably entails much inconvenience and considerable expense to the parties. The central issue in the case was the defendant's claim to a prescriptive title and the material placed before the court by the defendants clearly justifies the finding in their favour.

Finally (and as an alternative submission) Mr. Goonetilleka contended that the issue on prescription could not have been answered in favour of the defendants in view of D7 and D23. D7 of 1956 was a deed of transfer of the land in suit by the defendants and their predecessors in title to one Thomas Seeman. D7 recites title by prescription. Mr. Goonetilleka submitted that by D7 the defendants and their predecessors had parted with their title. By D23 of 1965 there was a reconveyance of the title to the land but that was not to the 1st defendant but to his wife and the 2nd defendant. Mr. Goonetilleka proceeded to refer to paragraph 3 of the answer which made specific reference to D7 and D23 and submitted that no issue with reference to the paper title pleaded in the answer was raised by the defendants. In short Mr. Goonetilleka urged that the defendant's case of continuous prescriptive possession from 1944 to date of action (1978) fails in view of D7 and D23.

On the other hand, Mr. Daluwatte for the defendants-respondents maintained that the reference to D7 and D23 in the answer was not intended to set up a paper title in the defendants for, in any event, the so called paper title of the defendants would be of no avail, as against the conclusive title conferred on the plaintiffs by the certificate of sale under the Partition Ordinance (D3). It was counsel's submission that D7 and D23 were relevant for another purpose, namely to "tack on" the possession of the predecessors in title of the defendants in order

to establish their claim to a prescriptive title. To establish a title by prescription section 3 of the Prescription Ordinance requires proof of possession of the character set out in the section for the requisite period by the plaintiff, defendant or intervenient (as the case may be) or *by those under whom he claims*. Mr. Daluwatte relied on the case of *Carolis Appu v. Anagihamy* (5). It seems to me that this submission is well founded. It may not be irrelevant to add that at the trial D7 and D23 were assailed by the plaintiffs on the basis that they were documents made out to bolster up a false claim to prescriptive possession.

For these reasons, the appeal fails and is dismissed with costs fixed at Rs. 157/50.

ABEYWIRA, J.—I agree.

Appeal dismissed.