

**MITRAPALA AND ANOTHER
VS
TIKONIS SINGHO**

COURT OF APPEAL,
DISSANAYAKE J. AND
SOMAWANSA J.,
C.A 461/94
D. C KALUTARA 6023/P
JULY 24, AND OCTOBER 28, 2003

Partition action - Prescriptive rights - Transfer by a minor - Assisted contract - Void or voidable? - Repudiation by minor - Transfer to third party after attaining majority - Validity - Prescription Ordinance, sections 3 and 10-Usufructuary mortgage - Can he claim prescriptive rights? - Burden of proof

The plaintiff respondent instituted action to partition the land in question. The 2nd, 3rd defendant appellants prayed for dismissal of the action and the 3rd defendant appellant based his claim on having acquired prescriptive title to the corpus, having entered possession of the land as a usufructuary mortgage of S and D who figure in the chain of title of the plaintiff respondent. The defendant appellant further contended that when deed P2, (deed of the plaintiff) was executed the transferor 'L' was a minor and subsequently he had transferred the land to the 3rd defendant appellant and further contended that his deed will prevail over P 2 the deed of the plaintiff. The learned District Judge accepted the pedigree of the plaintiff respondent and entered judgment accordingly.

Held :

(1) Dealings by a minor with his property are not *ipso jure* void, but only voidable at his instance.

(2) A minor is entitled to repudiate a contract affecting his rights only to the extent of his interests in the subject matter of the contract. Repudiation may be either by the guardian during minority, or by the minor during or after minority.

(3) If the minor decides to seek court intervention he must do so within three years of attaining majority.

(4) Minor L has received consideration in respect of Deed P2. His father who is his natural guardian too joined him in the deed. He had the assistance of the natural guardian. It was an assisted contract.

(5) Minor L had not taken any steps to repudiate the contract on account of his alleged minority. No rights flow on the second deed.

(6) A Usufructuary mortgagee when he enters the land as a usufructuary mortgagee possesses the land as a licensee under the mortgagor. The usufructory mortgagee cannot claim prescriptive title as against his mortgagee who had put him in possession.

(7) Mere possession is not prescriptive title. He must prove that he had possessed the property in the manner and for the period set out in section 3 of the Prescription Ordinance.

(8) Where a party invokes the provisions of section 3 in order to defeat the ownership of the adverse claimant to immovable property the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.

APPEAL from the judgment of the District Court of Kalutara

Cases referred to :

1. *Silva vs Mohamadu* - 19 NLR 426
2. *Braytenback vs Frankel* - South African Law Reports - 1913 App. Div. 390
3. *Wickremasinghe vs Josephine Silva* - 63 NLR 569
4. 41 C. L. W. 51
5. *Belagas Kaduwa vs Ukku Banda* - 43 NLR 281 at 282
6. CA 418/2002 - D. C. Kuliyaipitiya 11335/P
7. *Sirajudeen and others vs Abbas* - 1995 - 1 Sri LR 365
8. *Chelliah vs Wijanathan* - 54 NLR 337, 342

Ranjan Mendis with *Chamath Dahanayake* for 2nd and 3rd defendant appellants

V. P. Tilakaratna for plaintiff respondent

Cur. adv. vult.

January 30, 2004

DISSANAYAKE, J.

The plaintiff - respondent instituted this action seeking a partition of the land called "*Galpoththahena*" lot No.3 morefully described in the schedule to the plaint and depicted as lot 1 in plan bearing No. 159 of Commissioner K. D. L. Wijenayake (X)

The contesting 2nd and 3rd defendants - appellants by their joint statement of claim, whilst denying the averments in the plaint prayed for dismissal of the action. Further the 3rd defendant - appellant based his claim on having acquired prescriptive title to the corpus from 18. 07. 1957 having entered possession of the land as usufructuary mortgagee of K. P. Appu Singho and K. D. Dharmasena, who figure in the chain of title of the plaintiff - respondent.

The case proceeded to trial on 11 points of contest and at the conclusion of the trial the learned District Judge entered judgment ordering interlocutory decree to be entered allotting 1/2 share each of the corpus to the plaintiff - respondent and the 1st defendant respondent and allotting the plantations and improvements to the 3rd defendant - appellant.

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

The following matters were recorded as admissions at the commencement of the trial.

(1) There was no corpus dispute. It was agreed by the parties that the land to be partitioned is depicted in plan No. 159 of licensed surveyor K. D. L. Wijenayake dated 07 and 14.05.1992.

(2) That the said land was allotted to Pothupitiyage Podinona in District Court of Kalutara case No. 13737 Partition.

(3) That the said rights of Pothupitiyage Podinona vested on Lawrence Leelasena by virtue of deed No. 1605 dated 29. 05. 1945.

Podinona who thus became the owner of the land in suit married Kottagodage Appu Singho. The said Pothupitiyage Podinona died leaving as her heirs, Appu Singho the husband and a son Dharmasena.

Appu Singho and Dharmasena by deed No. 1605 dated 29. 05. 1945 (P1) gifted the corpus to K. Don Lawrence Leelasena.

Don Lawrence Leelasena and his father Dharmasena by deed No. 101 of 08. 05. 1962 (P2) sold the land in suit to S. A. Kotagoda the 1st defendant - respondent.

The 1st defendant - respondent S. A. Kottagoda by deed No. 1067 of 06.02.1971 (land registry extract P3) transferred same to the plaintiff-respondent.

It was the position taken by the contesting 2nd and 3rd defendants - appellants that at the time deed No. 101 (P2) was executed Lawrence Leelasena was a minor. Therefore the said sale on deed 101 (p2) to S. A. Kottagoda, the 1st defendant - respondent is null and void on account of the minority of Lawrence Leelasena. It was the position of the 2nd and 3rd defendants appellants that Lawrence Leelasena by deed No. 1435 dated 19. 11. 1965 had sold and transferred the corpus to the 3rd defendant-appellant (Land registry extract P3).

It was the position of the contesting 2nd and 3rd defendants appellants that despite deed No. 101 (p2) being registered in the land registry, (extract P3) prior to the subsequent deed bearing No. 143 of Lawrence Leelasena, however that since deed No. 101 (P2) was null and void on account of the minority of Lawrence Leelasena, that his subsequent deed bearing No. 1435 will prevail and on that deed the corpus shall vest on the 3rd defendant - appellant.

I shall examine the validity of the aforesaid contention of the contesting 2nd and 3rd defendants - appellants presently.

Professor Weeramantry in his book *The Law of Contracts* Volume I, 1967 edition section 416 at page 422 states:

- “ This view prevailed till 1916 in which year the Supreme Court in *Silva vs Mohamedu* ⁽¹⁾ followed the ruling in the South African case of *Braytenbach vs Frankel*, ⁽²⁾ a case decided in South Africa by a bench of five judges including Lord De Villiers and Chief Justice Maadorp.

This case decided that a dealing by a minor with his property was not *ipso jure* void but only voidable at his instance. Later Ceylon cases have taken the same view “Vide *Wickramasinghe vs Josephine Silva* ⁽³⁾”

Lawrence Leelasena has received consideration in respect of deed No. 101. He had failed to bring to the notice of the 1st defendant respondent that he was a minor. Don Lawrence Leelasena did not execute deed No. 101 (P2) all by himself. His father who is his natural guardian Dharmasena too joined him in this deed. In other words Leelasena had the assistance of his natural guardian, his father Dharmasena to this contract. It cannot be said that it was an unassisted contract. The sale had the ratification of his father Dharmasena who had also signed deed No. 101 (P2).

Dealing with repudiation of a contract by a minor C. G. Weeramantry states at page 417 of his book. *The Law of Contracts* Vol I, 1967 edition." "A minor is entitled to repudiate a contract affecting his rights only to the extent of his interests in the subject matter of the contract." Repudiation may be either by the guardian during minority or by the minor during or after minority⁽⁴⁾.

"In cases where the minor decides to seek Court intervention he must do so within three years of attaining majority (*Silva Vs Mohamadu (Supra)* (*Belagaskatuwa Vs Ukkubanda*⁽⁵⁾)

The Prescription Ordinance No. 20 of 1871 provides that no action shall be maintainable in respect of any cause of action not expressly provided for in the Ordinance, unless the same shall be commenced within three years from the time when the cause of action shall have accrued. (Section 10) An action by a minor for restitution is not among those matters specifically provided for by the Ordinance and therefore is governed by this general section."

Leelasena had not taken any steps to repudiate the contract on account of his alleged minority.

Therefore no rights flow on Leelasena's deed bearing No. 1435 (land registry extract P3) to the 3rd defendant appellant as deed No. 1435 is registered subsequent to Leelasena's earlier deed No. 101 (p2) in the book of registration of the land registry.

Now I propose to deal with the alleged prescriptive possession of the corpus by the contesting 3rd defendant - appellant.

The plaintiff - respondent testified to the fact that the land was not possessed by anyone. He stated that the plantation of rubber, godapora, milla and other plantation have grown in the wilderness. He was emphatic

that no one systematically engaged in plantation of the corpus. However he conceded that a well has been sunk by the 3rd defendant - appellant about 3 years ago.

On the contrary the 3rd defendant - appellant was emphatic that he obtained an usufructuary mortgage from Appu Singho and Dharmasena by deed No. 4630 on 18. 02. 1957 (3 V19) and entered into possession as a usufructuary mortgagee and since then possessed the land and had acquired a prescriptive title to the land in suit.

It is to be observed that a usufructuary mortgagee when he enters the land as a usufructuary mortgagee, he possess the land as a licensee under the mortgagor. The usufructuary mortgagee cannot claim prescriptive title as against his mortgagor who had put him in possession.

Therefore the possession of the 3rd defendant - appellant if at all of the corpus should have been *qua* usufructuary mortgagee and not as owner. Therefore the 3rd defendant - appellant as an usufructuary mortgagee cannot claim adverse possession as against his mortgagors, Appu Singho and his son Dharmasena.

It is pertinent to refer to a decision of an unreported case of this Court in this regard. In the Court of Appeal No. 418/2002⁽⁶⁾ judgement it has been held "But mere possession is not prescriptive title. A person in possession who claims title by virtue of prescription must prove that he had possessed the property in the manner and for the period set out in section 3 of the Prescription Ordinance".

Section 3 of the Prescription Ordinance reads as follows: -

3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by title adverse to or independent of that of the claimant or plaintiff in such action (*that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred*) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action or any third party shall intervene in any action for the purpose of being quitted in his possession of lands or other immovable property or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such

undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient or by those under whom be claims shall entitle such plaintiff or intervenient to a decree in his favour with costs. (emphasis added)

It is relevant to refer to the observations of His Lordship G. P. S. de Sliva, C. J. at page 370 in *Sirajudeen and 2 others Vs Abbas*⁽⁷⁾

He observed:- "But what needs to be stressed is that the fact of occupation alone would not suffice to satisfy the provisions of section 3 of the Prescription Ordinance. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession" by a title adverse to or independent of that of the claimant or plaintiff

There is another relevant aspect of the plea of prescription title which was overlooked by the trial judge. That principle is best stated in the words of Gratiaen J., In *Chelliah Vs Wijenathan* "where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovabel property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights."

To claim prescriptive possession successfully by undisturbed and uninterrupted possession by the defendant has to be under the principles of law discussed as above.

The possession of the 3rd defendant - appellant in the capacity of an usufructuary mortgagee will not give him any rights to claim prescriptive possession as he possess the land not as an independent possessor but as a licensee of the mortgagor.

Having examined the pleadings: the evidence and the judgment of the learned District Judge, I find that there is no basis for this Court to interfere with the judgement of the learned District Judge.

I dismiss the appeal of the 2nd and 3rd defendants - appellants with costs fixd at Rs. 5000.

SOMAWANSA, J.— I agree.

Appeal dismissed