EDIRISURIYA
v.
JAYAWARDENE AND ANOTHER

COURT OF APPEAL.
WEERASEKERA J.,
GRERO J.,
C.A. 243/79 (F)
D.C. HAMBANTOTA 473/L
MAY 10, 1994 AND JULY 12, 1994

Possessory Action – Possession for a Year and a Day – Ouster – Predecessor's possession – Tack on – Evaluation of evidence.

The plaintiff Appellant instituted possessory action against the Defendant – Respondents. The Defendants denied that they were in unlawful possession. The Learned District Judge dismissed the plaintiff's action, on the basis that, the plaintiffs possession was one of 'rare possession' or 'occasional possession' and not undisturbed possession.

Held:

(i) The plaintiff need not himself have been in possession for the whole of the period of one year, and one day, he can be permitted to "tack on" [i.e.to tag] his predecessors possession to the period of his own possession.

(ii) In the circumstances of this case, the possession of the plaintiffs father accrues to the benefit of the plaintiff Appellant, therefore his father's possession can also be added to his possession of the subject matter.

(iii) There was no proper evaluation of the Evidence led.

Appeal from the Judgement of the District Court of Hambantota.

Cases referred to:

1. *Silva v. Appuhamy* – 15 NLR 297
2. *Raymond v. Wijewardane* – 40 NLR 307

A. A. de Silva for Appellant
Defendants-Respondents absent and unrepresented.

Cur. adv. vult.

October 31, 1994.
DR. ANANDA GRERO J.,

The plaintiff-appellant instituted a possessory action against the 1st and the 2nd defendant-respondents and claimed the reliefs prayed in the plaint. The subject matter of this action is a land called Palugahawatta Lot No.445, which is morefully described in the schedule to the plaint. According to the plaint, the defendant-respondents are in unlawful possession of the said subject matter since 1.12.1975.

The defendant-respondents denied that they were in unlawful possession of this subject matter and prayed that the plaintiff-appellant's action be dismissed.

After trial the Learned District Judge by his judgment dated 21.5.79 dismissed the plaintiff-appellant's action with costs. This appeal is preferred to this Court against the aforesaid judgment.

When this matter was taken up for argument, the defendant-respondents were absent and unrepresented, although they were noticed of the hearing of the appeal.

A perusal of the judgment of the Learned District Judge reveals that he was satisfied with the title of the plaintiff-appellant to the land in question; but was not satisfied with his possession of the land as required in a possessory action. After considering the evidence led before him he comes to the finding that the plaintiff-appellant's possession was one of "rare possession" or "occasional possession" and not undisturbed possession. Having held so, he dismissed the plaintiff-appellant's action.

An examination of the judgment of the Learned District Judge reveals, that this action being a "possessory action" he anticipated the plaintiff-appellant to establish possession for a year and a day before ouster. According to his findings he has failed to establish so, and therefore he decided to dismiss the plaintiff-appellant's action.

The Learned Counsel for the plaintiff-appellant contended that the Learned District Judge has failed to evaluate properly the evidence placed before him regarding the possession of the plaintiff- appellant. According to him, there is sufficient evidence to show that the plaintiff-appellant possessed the subject matter for more than the requisite period, and the fact that his father possessed it up to his death in the year 1974, further strengthened the plaintiff's case.

He further contended that the Learned District Judge's finding that the possession of the plaintiff-appellant was "now and then" was due to the reasons that he was not living on the land, his visits to the land were infrequent, he plucked coconuts occasionally, the defendants cultivated maize, and outsiders plucked coconuts could not be justified in view of the possession of the plaintiff-appellant up to 1.12.75, when for the 1st time the defendant-respondents cut the boundary fence and claimed title to it.

It appears that the Learned District Judge has placed much reliance on witness Saranasinghe Edirisuriya, who gave evidence on behalf of the plaintiff-appellant to come to the finding that the latter did not possess the land; but it was the defendants who possessed the land by cultivating maize. A careful scrutiny of Saranasinghe's evidence reveals,that till 1974, the plaintiff's father one Edirisuriya had possessed the subject matter, and it was he who plucked coconuts.

There were altogether 10 or 11 coconut trees on the land and he (witness) had used his cart to take the nuts to the plaintiff's father's house. His evidence also disclosed that after the death of Edirisuriya, the plaintiff plucked the nuts. His evidence further revealed that this land is used as a threashing floor (කමතක) and it was in the possession of the plaintiff-appellant. Even this witness had used it with the plaintiff's permission. There is evidence to show that other cultivators too used this threashing floor with the permission of the plaintiff.

Witness Saranasinghe's evidence further disclosed that those who used the threashing floor and even thieves used to pluck coconuts.It was also revealed that the defendants cultivated maize during the years 1971, 1972 or 1973. He had specifically stated that this could have been done with the permission of plaintiff's farther Edirisuriya. It is to be noted that Edirisuriya was living at that time and he was taking the produce of the land.

I am of the view that if the Learned District Judge had a proper evaluation of the evidence of witness Saranasinghe he could not have come to the finding that his evidence established that the defendants were in possession of this land, and not the plaintiff - appellant. On the contrary his evidence supports the plaintiff's case. The fact that thieves and those who used the threashing floor plucked coconuts at times would not in anyway affect the plaintiff's possession. It is to be noted that he was not living on this land; but living half a mile away from it, and in such circumstances, occasional plucking of nuts by others without his permission does not affect his possession.

Professor G. L. Pieris in his book Law of Property, Volume I, at page 288 states as follows:

"In terms of the development of the law , it is necessary to note for the sake of completeness that even the decisions which consider possession for a period of a year and a day essential, make the concession that the plaintiff need not himself have been in possession for the whole of this period, but that he can be permitted to "tack on"[i.e. to tag] his predecessor's possession to the period of his own possession." This principle was unhesitatingly applied by

Lascelles C.J. and Wood Renton J in *Silva v. Appuhamy*[1] and by Abrahams C.J. and Fernando J in *Raymond v. Wijewardane.*[2]

Thus based on the aforesaid decisions the possession of the plaintiff's father till 1974, accrues to the benefit of the plaintiff-appellant, in that his father's possession can also be added to his possession of the subject matter of this action.

It appears that the Learned District Judge has not placed much reliance on witness David, who gave evidence on behalf of the plaintiff-appellant. The reason is that he was the tenant cultivator of the plaintiff-appellant. The mere fact that he was the plaintiff's tenant cultivator does not by itself pave the way not to place much reliance on him, unless his evidence was so unsatisfactory. A perusal of the evidence of witness David reveals that satisfactory evidence has been given by him which corroborates the evidence of the plaintiff to a greater degree.

According to the plaintiff's evidence the dispute arose with the cutting of the boundary fence on the eastern boundary by the defendant-respondents. This according to him had taken place on or about 1st December 1975. He had made a complaint to the Grama Sevaka of the area on 28.12.75. He had visited the land and a statement was recorded from the 2nd defendant-respondent who had admitted that they cut the fence which was put up by them. He had seen some Sooriya stumps that were part of the fence being burnt.The complaint made by the plaintiff to the Grama Sevaka, P3, reveals that the eastern boundary fence has been cut by the defendants and the land in question has been encroached by them to their land which is on the eastern side of the subject matter.

The evidence of Grama Sevaka clearly reveals that there was an old fence on the eastern boundary of the land in question and that has been cut recently. There had been a few manioc plants 2 to 3 months old. The Learned District Judge referring to the evidence of Grama Sevaka regarding the aforesaid manioc plants states, that this evidence corroborates the evidence of the 1st defendant who also said that he raised a manioc plantation after clearing this land.

Even assuming that he had raised the said plantation three months prior to 28.12.75, yet the plaintiff's possession is more than an year and a day when the possession of his father is added to his possession. The Learned District Judge has failed to take into account the plaintiff's father's possession of the land up to 1974.

It appears from the evidence of the 1st defendant that this land has been purchased by them on 4.3.75 from one Charlie Edirisuriya. It is after this purchase they have cut the eastern boundary fence of the land and tagged on to their land which is situated towards the eastern boundary of the subject matter. The Learned District Judge has come to a finding that the defendant's deed does not pass any title to this land although it is not necessary to go into the question of title in a possessory action.

There is overwhelming evidence that this land is used as a threashing floor and there are only a few coconut trees. As and when the plaintiff desired to pluck nuts, he had done so. Though he was not living on this land he had not given up possession. There is evidence that this threashing floor was in his possession and farmers with his permission used it during the harvesting seasons. Although he had not visited this land daily, occasionally he did so and when the defendants cut the boundary fence, he had made a complaint to the Grama Sevaka of the area, and further this action was instituted on 24.6.76 within one year of his ouster.

I am of the view that when a proper evaluation of the entire evidence is made, the finding that one could arrive at is that on a balance of probability the plaintiff-appellant has proved his case. If such an evaluation was done, I am of the view that the Learned District Judge would have arrived at the finding that the plaintiff-appellant is entitled to succeed in his action.

For the aforesaid reasons, I set aside the judgment of the Learned District Judge dated 21.5.79 and enter Judgment in favour of the plaintiff-appellant as prayed for in the plaint.

WEERASEKERA, J. – I agree.

Appeal allowed.