LESLIN JAYASINGHE
VS
ILLANGARATNE

COURT OF APPEAL.
EKANAYAKE J.
W. L. R SILVA J.
CA 895/97 (F).
DC KURUNEGALA 5185/P.
JULY 19, 2005.
OCTOBER 18, 2005.
DECEMBER 1, 2005.

Partition Action-Evidence Ordinance, section 103-Burden of proof-Prescription Ordinance, No. 22 of 1871-section 3-Symbolic Possession-section 31, section 33,–Notaries Ordinance-Due Execution?–Notaries failure to observe

his duties with regard to formalities ?– Registration of Documents Ordinance section 7-Prior Registration-Can it be raised in appeal ?– Mixed question of law and fact ? – Co-owners Rights ?–Ouster vital.

The plaintiff-respondent sought to partition the land in question, and did not give any shares to the 6th defendant-appellant. The 6th defendant-appellant claimed the entirety on a different chain of title. The Trial Judge held with the plaintiff-respondent, and gave the 6th defendant-appellant only a building and rejected his deed 6V6. on Appeal —

HELD:

(1) The onus was on the appellant to prove his pedigree- section 103 Evidence Ordinance, but he had failed to summon any of his predecessors in title or produce any deed or document.

(2) Notary's failure to observe his duties with regard to formalities which are not essential to due execution so far as the parties are concerned does not vitiate a deed.

(3) The various facts and factors that persuaded the trial Judge not to place any reliance on Deed 6V6 are sound.

(4) Whether a particular deed is earlier in time and gets priority over another. deed by prior registration under section 7 of the Registration of Documents Ordinance is a mixed question of fact and law-and cannot be raised for the first time in appeal.

(5) It is only a pure question of law that can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.

Per Ranjith Silva J.

"As the appellant raised issues based on the provisions of section 7-Registration of Documents Ordinance consequent upon such issues the question whether in spite of the fiscal conveyance the judgment debtor continued his possession and thus prescribed to the land would have been an inevitable issue . . . . ."

(6) Even assuming that 6V6 was a valid deed and that it gets priority over the plaintiff's deeds still that will only make the appellant a co-owner.

(7) A co-owner's possession in law is the possession of other co-owners-nothing short of ouster or something equivalent to ouster is necessary to make possession adverse to end co-ownership.

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to :

1. *Weeraratne vs. Ranmenika*-21NLR 287
2. *Hemathilake vs. Allina* - 2003 1 Sri LR 144 at 151
3. *Wijeratne vs. Somawathie* - 2002 1 Sri LR 93 at 98
4. *Seetha vs. Weerakone* - 49 NLR 225
5. *Jayawardana vs. Silva* 76 NLR 427
6. *Leachman Company Ltd., vs. Rangfalli Consolidated Ltd.*-1981 2 Sri LR 37
7. *Candappa vs. Ponnambalampillai* - 13 NLR 326
8. *Muthu Caruppaen vs. Rankira* - 13 NLR 326
9. *Jane Nona vs. Gunewardene* - 49 NLR 522
10. *Emanis vs. Sudappu* – 2 NLR 261
11. *Siman Appu vs. Christian Appu* - 1 NLR 288
12. *Emanis vs. Sadappu* 2 NLR 261
13. *Alwis vs. Perera*-21 NLR 321
14. *Maria Fernando vs. Anthony Fernando* - 1997 2 Sri LR
15. *Seetiya vs. Ukku*-1986 1 Sri LR 225
16. *Thilakaratne vs. Bastian* - 21 NLR 12
17. *Ameresekera vs. Ranmenike*- 3 NLR 137

N. R. M. Daluwatte, PC, with Gamini Silva for 6th defendant-appellant
Bimal Rajapakse for plaintiff-respondent.

cur.adv. vult.

May 26, 2006.
RANJITH SILVA, J.

The Plaintiff-Respondent who shall hereinafter be referred to as the Respondent filed plaint dated 11.11.1973 bearing number 5185-P in the District Court of Kurunegala seeking *inter alia* a partition of the land called Thalagahayaya Modarawatte *alias* Ambalanpitiye Watte (which shall hereinafter be referred to as the Land) containing in extent Acres O. Roods 2. Perches 21 depicted in plan marked "x". The report to the plan is marked as "X1".

The respondent pleaded title from Perris Perera and Soyza Hamine who according to the Respondent and the 1st - 5th Defendant-Respondents were the original owners of the Land. It was the case for the Respondent that according to the chain of title and the series of deeds as mentioned in the Plaint title to the land devolved on the Respondent and the 1-5th Defendant-Respondents who became entitled to undivided shares of the Land as pleaded in the Plaint and the statements of 1-5 Defendant-Respondents.

At the trial in the District Court of Kurunegala the 6th Defendant who shall hereinafter be referred to as "the Appellant" claimed the entirety of the Land on a different chain of title. He pleaded *inter alia* that Charles Perera and Edward Abeyrathna were the original owners of the Land and that on a decree entered against the said Edward Abeyratne in case No. 14131 a fiscal sale took place on 07.03.1930 consequent to which the fiscal conveyance marked as 6v4 was granted in favour of one Karuppana Chettiar who by deed No. 3742 of 23.12.1939 (marked 6v5) transferred the same to Natchiappa Chettiar who died leaving his son Sangrapille who transferred the Land by Deed No. 6984 of 13.08.1968 (marked as 6v6), to the Appellant and the Appellant thus became-entitled to the entire land which is depicted in the plan marked "X".

According to section 103 of the Evidence Ordinance which reads as follows :-

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person".

The onus was on the Appellant to prove his pedigree. But the Appellant failed to summon any of his predecessors in title or produce any document or any other proof in order to prove that Sangarapille was indeed a son of Natchiappa Chettiar. What's more the wife of the Appellant has candidly admitted that she did not know and was not aware as to where Sangarapille or Natchiappa Chettiar was residing. At page 342 of the typed brief she has mentioned that Sangarapille was the adopted son of Natchiappa Chettiar although it is mistakenly recorded in the proceedings that the Appellant was adopted by Nachiappa Chettiar. It should read as Sangarapille

was adopted by Natchiappa Chettiar. To read otherwise will be meaningless in the context.

None of the parties disputed the identity of the corpus. The identity of the subject matter was never in issue. The appellant claimed title to the Land on the strength of the deed marked 6v6. In addition to that the Appellant claimed prescriptive rights to the entire Land and the buildings including the building marked (ð) in plan X, as well. After trial the learned District Judge rejected the Appellant's claim based on 6v6 stating that he would not place any reliance on deed 6v6, that he was not prepared to act on 6v6, that no title passed to the Appellant on 6v6 and rejected the claim of prescriptive rights put forward by the Appellant holding that the Appellant had only succeeded in proving that he has prescribed to the building marked (ð) shown in Plan X.

Aggrieved by the said judgment of the learned District Judge of Kurunegala dated 22.10.1997 the Appellant has preferred this appeal to this Court praying *inter alia* for reversal of the judgment for the reasons set out in the Petition of Appeal and the oral and written submissions tendered on his behalf.

On a perusal of the pleadings and the judgment of the learned District Judge it appears to this court that this court is called upon to answer two issues namely–

(1) Whether deed 6D4 gets priority over deed P2 and thus 6D6 on which the Appellant claims title gets priority by registration over deed P2, according to section 7 of the Registration of Documents Ordinance.

(2) Whether the learned District Judge was wrong in rejecting the claim of the Appellant that the Appellant acquired prescriptive title to the entire Land by prescriptive possession based on section 3 of the Prescription Ordinance No. 22 of 1871 as amended thereafter.

The Appellant, citing *Weerarathna vs Ranmenika* [1] where it was held I quote " . . . It is well settled that a notary's failure to observe his-duties with regard to formalities which are not essential to due execution so far

as the parties are concerned, does not vitiate a deed. For instance, the absence of the attestation clause does not render a deed invalid. If the absence of an attestation clause does not render a deed invalid, similarly I think the failure on the part of the notary to have a deed executed in duplicate does not affect its operation as a deed". Argued, that by the same token, any other error or slipperiness as observed by the learned District Judge in the instant case couldn't invalidate a deed. The same argument was cited with approval by Somawansa, J., in *Hemathilake vs Allina* [2] at 151 where *Somawansa, J.* observed "In any event if in fact the notary has failed to comply with any provision in section 31 of the Notary's Ordinance it's well settled law that the validity of the deed is not thereby affected in view of section 33 of the Notary's Ordinance. The Appellant has also cited *Wijeratne vs. Somawathie* [3] where it was held by Udalagama, *J.* I quote" It is my view that the essential elements of due execution is to comply with the provisions of section 2 of the Prevention of Frauds Ordinance. There is no evidence that section 2 has been violated and that section enacts that it shall be –

(1) in writing

(2) signed by the Party making the same

(3) in the presence of a Licensed Notary Public

(4) and two or more witnesses

(5) present at the same time and

(6) the deed is duly attested by the Notary and the witnesses."

Therefore it was argued on behalf of the Appellant that 6V6 showed that all those requirements have been complied with and that there was no vitiating fact or factor in respect of deed 6v6. The Appellant further contended that the learned District Judges's finding to the effect that the 6th Defendant (Appellant) had not proved that he obtained rights under the said deed 6v6 was erroneous as the learned District Judge arrived at that finding mainly influenced by the following facts :–

(1) By considering the discrepancies between the evidence of the witnesses and the contents of the attestation clause in 6V6.

(2) The attestation clause does not reveal that the two attesting witnesses either knew or did not know the executants ?

(3) The evidence of the Appellants as to the mode of payment of the consideration was contradictory to what is stated by the Notary in the attestation clause to the deed, namely that the 6th Defendant stated in his evidence that he paid Rs. 500 by cheque and the balance in ten 100 rupee notes whereas according to the attestation clause it is stated that Rs. 250 was paid in cash, Rs. 500 by cheque and Rs. 750 on a promissory note.

Although I agree with the law cited I find that the contentions of the Appellant on the facts are not sound. The question of due execution was not the only issue even though it is inextricably mixed with the other facts. The Appellant has failed or deliberately refrained from stating in his submissions the other various facts or factors that persuaded the learned District Judge not to place any reliance on 6v6. Some of them amongst others are :

(1) The fact that 6v6 was executed in a hurry on 13.08.1968 long after the dispute arose between the parties and that too was after the dispute was referred to the Conciliation Board. The instant case was instituted on 11.11.1973.

(2) The fact that there is no proof to say that Sangarapille was the son of Natchiappa Chettiar although it's so stated in 6v6. Even the Notary has not mentioned that the executant was known to him.

(3) The fact that the deed 6v6 does not state that Sangarapille or any of his predecessors were in possession of the Land at any time.

(4) That the evidence of the Appellant or his witnesses did not disclose that Sangarapille or any of his predecessors in title was in possession of the Land at any time.

(5) The fact that the evidence given on behalf of the Appellant disclosed that the Appellant had together with Paulis Perera the husband of the 7th Defendant constructed a boutique on this Land.

(6) The fact that by 1953 long before the execution of 6v6, the Appellant was in possession of the boutique marked (ð) in plan X and had received a part of the rent paid in respect of the same having leased out the same to one Jayathissa (Vide 6v1) even prior to the execution of 6v6.

(7) The fact that although the Appellant was in possession of building (ð) long before the execution of 6v6 he failed or refrained from indicating to court on what right he happened to come into possession of the said building as his initial possession of this building was certainly not on the strength of 6v6 since that deed was not even in existence when he first came into possession/ occupation of the boutique marked (ð).

(8) The fact that there were suspicious circumstances surrounding the hurried execution of 6v6 which appeared to the learned District Judge as a self serving deed.

In all the circumstances adumbrated above it's my considered view that the learned District Judge cannot be faulted for deciding not to place any reliance on 6v6.

Whether 6D4 which is earlier in time and one of the deeds in the chain of title through which the Appellant is said to have acquired title which is claimed to be a preclude to 6D6 gets priority over P2 by prior registration under section 7 of the Registration of Documents Ordinance is a mixed question of law and fact and is raised for the first time in this court by the Appellant.

Section 7(1) of the Registration of Documents Ordinance reads thus "An instrument executed or made on or after the 1st day of January, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this chapter or, if the Land has come within the operation of the Land Registration Ordinance . . . be void as against all parties claiming an adverse interest there to on valuable consideration by virtue of any subsequent instrument which is duly registered under this chapter, if the land has come within the operation . . . ."

7(2) "But fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming there under."

7(3) . . . .

7(4) Registration of an instrument under this chapter shall not cure any defect in the instrument or confer upon it any effect or validity which it would not otherwise have except the priority conferred on it by this section.

The learned District Judge in deciding this case had no occasion to try any issue based on section 7 and the subsections as the parties did not plead or raise a single issue on the subject of prior registration.

I find that a substantial part of the written submissions of the Appellant has been devoted to the issue of 'prior registration'. This is not a subject the parties have contemplated, pleaded or put in issue at the trial in the District Court. It's now too late in the day for the Appellant to raise such issues for the 1st time in appeal, having failed to agitate the same in the District Court, as it is not a pure question of law that could be agitated for the 1st time in appeal.

In *Seetha vs Weerakoon* [4] it was held that a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point or the question is one of law and nothing more.

In *Jayawickrema vs Silva* [5] it was held that a pure question of law can be raised in appeal for the first time, but if it's a mixed question of fact and law it cannot be done.

In *Leachmen Company Ltd vs Rangfalle Consolidated Ltd.* [6] it was held that a pure question of law which does not require the ascertainment of new facts can be raised for the first time in appeal.

In *Candappa vs Ponnambalampillai* [7], it was held that a party cannot be permitted to present in appeal a case different from that presented in

the trial court where matters of fact involved which were not in issue at the trial, such case not being one which raises a pure question of law.

The question of prior registration of 6v4 over P2 (P2 is one of the deeds that links the chain of the devolution of title of the Respondent) is a question of mixed fact and law. If the parties had raised an issue on prior registration inevitably the District Court would have gone in to or would have been compelled to go in to the following several connected issues among others such as,

(a) Whether the deeds P2 and 6D4 emanate from the same source.

(b) Whether 6D4 was executed for valuable consideration.

(c) Whether 6D4 was registered in the correct folio.

Whether 6D4 was executed fraudulently or with collusion etc. . .

None of these issues were raised at the trial.

On the other hand whether the judgment debtor, against whom it is alleged that a decree was entered in case No. 14131 and thereafter the fiscal conveyance No. 10892 dated 31.05.1934 (6V4) was granted in favour of Karuppan Chettiar, continued to remain in possession of the Land in spite of the fact that a fiscal conveyance was executed depriving him of his Land, is also a question of fact that would have been raised as a consequential issue if the above mentioned issues were raised by the Appellant.

Assuming without conceding that the Chettiyars owned the subject matter on the strength of V3-V5 the evidence disclosed that they only had paper title and no physical possession even for a day. The Appellant has not led any evidence to give the slightest indication let alone proof that his predecessors had even a day's possession of the Land.

6V6 was executed in 1968. The relevant fiscal conveyance 6V4 was executed on 31.05.1934. From 1934 up to 1968 the Respondents their predecessors and even the Appellant were in possession of this Land. The possession of this land by the appellant during this period was not on title based on 6V6. The Respondents and their predecessors possessed

this Land and are in possession of this Land in their rights. What matters is that the Respondents are in possession of the Land to date in their own rights irrespective of the fact whether at a given point of time one of the predecessors in title who had an undivided share of the Land lost his rights to his undivided share of the land or not.

It was held in *Muttu Caruppen vs. Rankira* [8] where the question arose as to whether a judgment debtor who has been in possession of the Land for more than 10 years after fiscal's sale can claim prescriptive title. Hutchinson C. J. decided that there is nothing in sections 289 and 291 of the Civil Procedure Code which debars a judgment-debtor from claiming title for such Land by prescription.

In *Jane Nona vs. Gunewardena*[9] Basnayake, J. decided that a judgment debtor who continues in adverse possession after a sale in execution can acquire title by prescription. The symbolical possession by a purchaser at a court sale is not an interruption of such possession. There must be an interruption of actual physical possession (*vide Emanis vs. Sudappu* [9a]),Muttu Caruppen vs. Rankira (supra) Simon Appu vs. Chrishan Appu (supra),

Therefore it is seen that had the Appellant raised issues based on the provisions of section 7 of the Registration of Documents Ordinance consequent upon such issues the question whether in spite of the fiscal conveyance 6v4 the judgment debtor continued his possession and thus prescribed to the Land would have been an inevitable issue. If there had been an issue to that effect the District Judge would have certainly answered that issue in the affirmative in all the circumstances of this case.

The Counsel for the Appellant at the stage of arguments in this Court conveyed on behalf of the Appellant that the Appellant did not have title to the entire Land and confined his claim only to a 1/4th share of the Land. This was on the basis that his predecessor in title, Edward Abeyratne only had an undivided 1/4 share of the corpus. This shows a clear recognition or an admission on the part of the Appellant that the Respondents were also co-owners of the Land. If that stance is correct then the rights of the Respondent have not been wiped out by 6v6, if at all would only limit their rights. But in fairness to the appellant it must be stated that the deed 6V6 is not in respect of undivided shares but the entirety of the land.

Assuming without conceding that 6V6 was a valid deed and that it gets priority over P2 still that will only make the Appellant a co-owner.

A co-owner's possession is in law the possession of other co owners. Every co owner is presumed to be in possession in his capacity as co owner. A co-owner cannot put an end to his possession as co owner by a secret intention formed in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. (Vide *Alvis vs Perera*) [13]

Judgment in *Maria Fernando vs. Anthony Fernando* [14]. is applicable to the facts of this case. It was held in that long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse party, a party, preparing plans and building houses on the land and renting it, are not enough to establish prescription among co owners in the absence of an overt act of ouster.

It was held in *Seetiya vs Ukku* [15] that nothing short of an ouster or something equivalent to ouster is necessary to make possession adverse to end co ownership. Although it is open to a court from long lapse of time in conjunction with other circumstances of a case to presume that possession originally that of a co-owner had later became adverse, the fact of co owners possessing different lots, fencing them and planting them with a plantation of coconut trees which is a common plantation in the area cannot make such possession adverse.

In *Thilakaratne vs. Bastian* [16] at page 12 it was held I quote; "It is a question of fact, wherever long continued possession by one cowner is proved to have existed, whether it is not just and equitable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than 10 years before action was brought.

In *Amerasekera vs Ranmenika* [17] it was held that among co owners the strongest evidence of adverse possession should be given. In this case there is none.

For this reason my view is that the Respondent need not necessarily prove prescriptive title in addition to the paper title they relied on at the trial

to succeed in the case. On the other hand the Appellant having claimed title to the entire Land and later limited his claim to 1/4th share of the land on 6V6 ð also claimed prescriptive rights to the entire Land including building. This was the conclusion drawn by the learned District Judge. Therefore the learned District Judge has held that the Appellant was entitled only to building (B) and the land covered by the building namely an area of 20 square feet in extent. In all the circumstances of this case I cannot see any fault in the reasoning or the findings of the learned District Judge with regard to the issue of prescription.

For all the reasons I have enumerated I find no justification to interfere with any of the findings of the learned District Judge. I find no merit in this appeal and the same is hereby dismissed with costs fixed at Rs. 7500 to be paid to the Plaintiff Respondent (Respondent) by the 6th Defendant-Appellant (Appellant).

EKANAYAKE J. – *I agree.*

Appeal dismissed.

Editor's Note : The Supreme Court in SC sp La 172/06 on 13.09.2006 refused special leave to the Supreme Court.