DHARMASENA
v.
ALLES AND OTHERS

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND SIVA SELLIAH, J.
C.A. 341/78 (F) – D.C. MATARA 3787/L.
AUGUST 9 AND OCTOBER 12, 1984.

Declaration of title – Defence of title being in person not party to the suit – Prescription – Prescription Ordinance, section 3.

The plaintiff sued the 1st defendant for declaration of title to certain lots of a land partitioned by a final decree of court. While conceding 'paper' title in the plaintiff the 1st defendant's position was that his father had prescribed to the disputed lots. The 1st defendant did not claim title to these lots from his father.

Held –

A party to a suit cannot under s. 3 of the Prescription Ordinance set up the title of a third party who is not his predecessor in title and who has not been joined in the action. The judgment in a case must be declaratory of the right of a party to the suit not of a stranger.

Cases referred to:

(1) *Attorney-General v. Punchirala (1919) 21 NLR 51, 57.*

(2) *Terunnanse v. Menike (1895) 1 NLR 200.*

(3) *Punchirala v. Andris Appuhamy 3 SCR 149.*

(4) *Kirihamy Muhandirama v. Dingiri Appu (1903) 6 NLR 197, 200.*

(5) *Timothy David v. Ibrahim (1910) 13 NLR 318.*

APPEAL from a Judgment of the District Court of Matara.

P. A. D. Samarasekera for 1st defendant-appellant.

N. R. M. Daluwatte with *Mrs. A. Hegoda* for plaintiff-respondent.

Cur. adv. vult.

December 3, 1984.

G. P. S. DE SILVA, J.

The plaintiff instituted this action on 5.9.74 against the 1st defendant for declaration of title to, and ejectment from lots 5B, 6B and 11A depicted in Plan No. 273 of 17.3.75, marked P 7. The plaintiff averred that he owned an undivided 1/6 th share of the land in suit and traced his title to the final decree in partition action D.C. Matara case No. 15350 entered in October 1948 (P 1). The plaintiff further pleaded that the 1st defendant without any right, title or interest unlawfully entered the said lots in November 1973.

The 1st defendant in his answer took up the position that lots 5B, 6B and 11A form part of lot 4 in the final partition plan (P 1A) in the said D.C. Matara Case No. 15350 and that these lots were possessed as part of lot 4 since 1948. The 1st defendant's father was admittedly the owner of lot 4 under the final decree (P 1).

At the trial the issues raised on behalf of the plaintiff read thus :

(1) Is the plaintiff the owner of 1/6th share of the land described in para (2) of the plaint on the title set out therein ?

(2) Is the said land shown as lots 5B, 6B and 11A in Plan No. 273 ?

(3) Is the 1st defendant in unlawful possession of the said lots 5B, 6B and 11A since November 1973 ?

(4) If the said issues are answered in the plaintiff's favour is the plaintiff entitled–

(*a*) To the reliefs prayed for in paragraphs 1, 2 and 3 of the prayer to the amended plaint ?

(*b*) Is the 1st defendant liable to pay damages ?

On behalf of the 1st defendant, the following two issues were raised :–

(5) Have the defendants been in possession of the said lots in Plan No. 273 for a period of over 10 years and thus acquired a prescriptive title thereto ?

(6) If so, should the plaintiff's action be dismissed ?

After trial the District Judge answered issues Nos. (1), (2), (3) and (4) in the affirmative and issue No. (5) in the negative. He accordingly entered judgment for the plaintiff. The 1st defendant has now appealed against this judgment and decree.

At the hearing before us, Mr. Samasekera, Counsel for the 1st defendant-appellant, conceded, (1) that the paper title to the lots in dispute was in the plaintiff, (2) that the 1st defendant has not acquired a prescriptive title. However, counsel submitted that the trial Judge was in error in answering issues 1 and 3 in the plaintiff's favour for the reason that the finding of the court was that the disputed lots were possessed as a part of lot 4 in the final partition plan (P1A) over a long period of time and that the defendant's father had acquired a prescriptive title to these lots. In view of this finding, Mr. Samarasekera contended that the title was neither in the plaintiff nor in the 1st defendant but in the 1st defendant's father. Counsel urged that the court could not have given judgment for the plaintiff since the

1st defendant's father had already acquired title to these lots by prescription. In short, the submission was that once the 1st defendant's father had prescribed to the lots, the plaintiff ceased to be the owner and was not entitled to a declaration in his favour.

It is right to state here that Mr. Samarasekera conceded that on the facts and circumstances of this case the *1st defendant was not a person claiming under his father.* In other words, the 1st defendant's father was not a predecessor in title of the 1st defendant. By 1 D 4 of 1969, the 1st defendant's father gifted to the 1st defendant and his brothers lot 4 in the final partition plan, P 1 A. The schedule to 1 D 4 clearly and unequivocally describes the said lot 4 and nothing more. In other words, no portion of the lots in dispute was conveyed on 1 D 4. The present action having been filed in 1974, the 1st defendant could not possibly have acquired a prescriptive title as he has been in possession only for 5 years. As stated earlier, this was conceded by Mr. Samarasekera.

I find myself unable to agree with Mr. Samarasekera's submission that the court could not have given a decree in the plaintiff's favour for the reason that the plaintiff has lost title to the 1st defendant's father who had prescribed to the lots. There are two considerations which, in my view, militate against the acceptance of this submission. Firstly, no issue was raised at the trial on this point, and secondly, the 1st defendant's father (who was alive at the time of trial) was never a party to the action.

Relying on the dicta of de Sampayo, J. in *Attorney-General v. Punchirala* (1), Mr. Samarasekera contended that it was the duty of the District Judge to have raised the issue even at the stage of judgment. Counsel suggested that the relevant issue that ought to have been raised by the Court itself was: "Has the plaintiff lost title to the defendant's father ?" It will be observed at once that this is an issue which involves primarily questions of fact and if the trial Judge were to have raised such an issue at the stage of judgment, there is little doubt that it would have gravely prejudiced the plaintiff. On the other hand, the issue which de Sampayo J. stated in *Punchirala's Case (supra)* should have been framed by the Court before delivery of judgment was *a pure issue of law.* "The issue said to be necessary would have reference merely to the construction of an Ordinance, and no court should refuse to apply statute law, even though there be no formal issue stated on the point", per de Sampayo J. Thus this case is

not of assistance to the 1st defendant in the appeal before us. In the absence of an issue, the finding that the 1st defendant's father had prescribed to the lots is not warranted.

As regards the second point, namely, the failure to join the 1st defendant's father as a party to the action, the case of *Terunnanse v. Menike* (2) is of relevance. In that case, Bonser, C.J. cited with approval the case of *Punchirala v. Andris Appuhamy*, (3) wherein it was held that "it is not competent for a plaintiff or defendant to set up a third person's title under section 3 of Ordinance No. 22 of 1871, but that the possession to be proved must be that of a party to the suit or of his predecessor in title, and that the judgment to be given under that section must be declaratory of the right of a party to the action, not of a stranger". The same view was expressed by Moncreiff, J. in *Kirihamy Muhandirama v. Dingiri Appu*, (4) "It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance No. 22 of 1871 –

(1) . . . . .

(2) Possession required by the section must be shown on the part of the party litigating or by those under whom he claims.

(3) The possession of those under whom the party claims means possession by his predecessors in title.

(4) Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action."

Seven years later Wood Renton, J. in *Timothy David v. Ibrahim*, (5) upheld the same view. That was a case where the plaintiff who had paper title to the land sued the defendant, a Muhammadan, for declaration of title and ejectment. The defendant pleaded a prescriptive title on the part of his wife and claimed that he was in possession on behalf of his wife. However, he did not move to have his wife added as a party to the action. Wood Renton J. held that it was for the defendant to have got his wife added as a party to the action if he wanted to set up her prescriptive title.

On a consideration of the principles set out in these decisions, I am of the opinion that the submission, that the plaintiff has no right to a declaration in his favour as he has lost title to the 1st defendant's father who has prescribed to the lots in dispute, is not well founded.

Before I conclude it is right to add that Mr. Daluwatta, Counsel for the plaintiff-respondent, submitted that our law provides only for limitation of action and not for extinguishing the title of the true owner or for acquisition of title by adverse possession. Counsel maintained that under our law (which is different from the Roman Dutch Law) a party relying on adverse possession is only entitled to a decree under section 3 of the Prescription Ordinance. On the other hand, Mr. Samarasekera, strongly urged that the concept of acquisition of title by prescription has been recognised as a part of our law for well over a century. He pointed out that there is not a single rei vindicatio action in which a plaintiff does not refer to his having acquired a prescriptive title too. Similarly, the plaintiff in every partition action having set out the title of the parties, proceeds to state that the parties have also acquired a title to the property by prescription. Mr. Samarasekera submitted that title is so recited because under our law acquisition of title by prescription has always been recognised and that it is too late in the day to contend the contrary. However, having regard to the view I have taken, it is not necessary to decide this larger question.

For these reasons, the appeal fails and is dismissed with costs fixed at Rs. 315.

SIVA SELLIAH, J. – I agree.

Appeal dismissed.