IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Gallath Rallage Somalin Nona

2. Gallath Rallage Gunasekera

Both of Pallepelpita, Weragala,
Warakapola.

Plaintiffs

Case No. CA 401/2000(F)

D.C. Kegalle Case No. 2781/L

Vs.

Panapitiya Gamarallage Piyadasa,

Pallepelpita, Weragala,

Warakapola.

Defendant

AND NOW BETWEEN

Panapitiya Gamarallage Piyadasa,

Pallepelpita, Weragala,

Warakapola.

Defendant-Appellant

Vs.

1. Gallath Rallage Somalin Nona

Plaintiff-Respondent

2. Gallath Rallage Gunasekera (Deceased)

2a. Gallath Rallage Sirisena

2b. Gallath Rallage Chandralatha

2c. Gallath Rallage Rohini

2d. Gallath Rallage Abeysinghe

2e. Gallath Rallage Shanthi Renuka

Pall of Pallepelpita, Weragala,
Warakapola.

Substituted Plaintiffs-Respondents

Before: Janak De Silva J.

Counsel:

Thishya Weragoda for Defendant-Appellant

Sudarshani Cooray with A.W. Diana S. Rodrigo for Plaintiff-Respondent and Substituted Plaintiffs-Respondents

Written Submissions tendered on:

Defendant-Appellant on 14.10.2015, 09.03.2016 and 28.11.2018

Plaintiffs-Respondents on 20.09.2013 and 03.03.2016

Argued on: 15.03.2019

Decided on: 21.06.2019

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Kegalle dated 12.07.2000.

The Plaintiffs-Respondents (Respondents) filed the above styled action to obtain a declaration of title to and eviction of the Defendant-Appellant (Appellant) from the land called "Gam Ime Hena" morefully described in the schedule to the plaint.

The Respondents claimed that:

(a) At one time the owner of lots 1 and 2 (Gam Ime Hena) depicted in plan no. 2024 made by C. Kulatunga, licensed surveyor was one Dingiri Menika,
(b) Dingiri Menika died leaving as her heirs Podi Nona, Appuhamy and Mudiyanse,
(c) Instead of their shares in the land in dispute, Appuhamy, Podi Nona and Mudiyanse seized and possessed different lands owned by Dingiri Menika and accordingly Appuhamy entered into possession of the land in dispute and possessed it entirely,
(d) Upon the death of Appuhamy, the Respondents as heirs of Appuhamy possessed the said land for over 10 years and obtained prescriptive rights against the whole world,
(e) The Appellant is in possession of the land in dispute with the leave and license of the Respondents and that the building marked 'A' in plan no. 2024 was put up by the Respondents and that until the Appellant obtained another place to stay the Respondents allowed him to reside at the said house marked 'A' in plan no. 2024 from 1977,
(f) The Appellant is unlawfully taking the produce of the land in dispute from September 1979.

The Respondents prayed for a judgment declaring that they are the owners of lot 1 and 2 of plan no. 2024 dated 24.03.1986, ejectment of the Appellant from the said corpus, for damages and costs.

The position of the Appellant is that:

(a) The land on which the Appellant is residing is not 'Gam Ime Hena' but 'Makuluwamula Hena',
(b) One Jayawardena was residing on the said land and he handed over vacant possession to the Appellant to reside about 12 years ago,
(c) The Respondents were never in possession of the said land.

The Appellant prayed for the dismissal of the Respondents action, judgment that the Appellant in residing in "Makuluwamula Hena", order that the report of the surveyor is incorrect, and that the land in dispute is not "Gam Ime Hena".

The learned Additional District Judge entered judgment as prayed for by the Respondents and hence this appeal.

The learned counsel for the Appellant urged the following grounds in appeal:

(1) The Respondents failed to adduce any documentary proof that Dingiri Menika was the original owner of the land in suit and the learned judge erred in holding issue no. 2 in favour of the Respondents

(2) The learned judge could not have held that the Respondents were the owners of the land in dispute on the basis of a family arrangement without any evidence from the other co-owners of the land in dispute

Title of the Respondents

The learned counsel for the Appellant citing several authorities correctly submitted that this is a *rei vindicatio* action and as such the Respondents must strictly prove their title in order to succeed [*Hameed v. Weerasinghe* (1989) 1 Sri.L.R. 217, *Abeykoon Hamine v. Appuhamy* (52 N.L.R. 49), *Peeris v. Savunhamy* (54 N.L.R. 207), *Silva v. Hendrick Appu* (1 N.L.R. 13), *Wanigaratne v. Juwanis Appuhamy* (65 N.L.R. 167), *Pathirana v. Jayasundara* (58 N.L.R. 169), *Loku Menika v. Gunasekare* (1997) 2 Sri.L.R. 281].

Issue no. 2 was whether the land in dispute was at one time owned by Dingiri Menika. The case pleaded by the Respondents were two-fold: Firstly, it was claimed that Dingiri Menika was the original owner of the land in dispute and the Respondents as the heirs of Appuhamy became owners thereto in the circumstances pleaded in the plaint. Secondly, they submitted that Appuhamy and upon his death the Respondents as heirs of Appuhamy possessed the said land for over 10 years and obtained prescriptive rights against the whole world (Issue no. 4).

I am inclined to agree with the submission made by the learned counsel for the Appellant that Respondents failed to adduce any proof that Dingiri Menika was the original owner of the land in suit and the learned judge erred in holding issue no. 2 in favour of the Respondents.

However, I hold that the Respondents have proved that they have acquired prescriptive rights to the land in dispute. Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property the burden of proof rests fairly and squarely on him to establish the starting point for his or her acquisition of prescriptive rights [Gratiaen J. in *Chelliah v. Wijenathan* 54 N.L.R. 337 at 342]. The husband of the 1st Respondent Punchi Singho testified that Appuhamy and his heirs possessed the land from 1961 to 1977.

The principles of burden of proof and mode of proof where a party claims prescriptive title was succinctly stated by the Supreme Court in *Sirajudeen and two others v. Abbas* [(1994) 2 Sri.L.R. 365] as follows:

> "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.
>
> 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. The occupation of the premises must be of such character as is incompatible with the title of the owner."

I hold that the Respondents fulfilled this burden during the trial. The evidence of Punchi Singho and the then Grama Seva Niladhari Abeyratne establish the possession of the Respondents and their predecessor in title of the land in dispute including the construction of a house thereon. This is an important piece of evidence establishing prescription against the Appellant. In *Siriyawathie v. Alwis et al* [(2002) 2 Sri.L.R. 384] this court considered building extensions to a house as circumstances giving rise to the presumption of ouster. Both the witnesses testified to a complaint made by Punchi Singho to Abeyratne (P3/V1) that the Appellant had cut down trees in 1979 as well as to the fact that the Appellant is in forcible possession of the land in dispute.

Abeyratne further stated that the Appellant had agreed to vacate the land in dispute [Appeal Brief page 126].

Furthermore, the evidence of the surveyor C. Kurukulasuriya was to the effect that the Respondents claimed the rubber plantation which was about 20-25 years whereas the Appellant claimed the rubber plantation which is about 8 to 10 years old. This action was filed in 1983.

Co-ownership

The learned counsel for the Appellant submitted that the evidence shows that the Respondents were only co-owners of the land in dispute and as such not entitled to maintain this action as they were seeking a declaration of title to the entire land in suit while admitting that there was only an amicable partitioning based on an oral agreement.

Reliance was placed on *Githohamy v. Karanagoda* (56 N.L.R. 250 at 253) where it was held that when a land is amicably partitioned among co-owners it is usual to execute cross deeds among themselves or at least that all co-owners should sign the plan of partition.

Reliance was further placed on *Hariette v. Pathmasiri* [(1996) 1 Sri.L.R. 358 at 362-3] where it was held that when a co-owner claims that he is possessing a portion of the land in lieu of his undivided share and seeks ejectment he cannot stop at adducing evidence of paper title to an undivided share and the burden was on him to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land.

The learned counsel for the Respondents reply was two-fold. Firstly, it was submitted that this is not an issue raised at the trial and is a mixed question of fact and law and as such cannot be taken up for the first time in appeal. Secondly, it was submitted that in any event, the Supreme Court held in *Attanayake v. Ramyawathie* [(2003) 1 Sri.L.R. 401 at 409] that a co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises and that the fact that he asked for a greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to. However, in such situation, there is a burden on such person who makes the claim, to adduce evidence of ownership to the allotment of land.

I am of the view that there is merit in the submission that this issue is for the first time raised in appeal. However, as explained above, as correctly submitted by the learned counsel for the Appellant the Respondents have failed to adduce any evidence to show that land in dispute was at one time owned by Dingiri Menika. But the Respondents have established that Appuhamy and upon his death the Respondents as the two children of Appuhamy possessed the said land for over 10 years and obtained prescriptive rights against the whole world (Issue no. 4). In these circumstances, the Respondents are entitled to maintain this action, as the co-owners to the whole land in dispute, for a declaration of title and ejectment of the Appellant from thereon as a trespasser [*Attanayake v. Ramyawathie* (supra)].

For all the foregoing reasons and subject to my conclusions on the ownership of Dingiri Menika to the land in dispute, I see no reason to interfere with the judgment of the learned Additional District Judge of Kegalle dated 12.07.2000.

The appeal is dismissed with costs.

Judge of the Court of Appeal