

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

Kambulumulla Gamaralalage
Senaratne,
Meegastenna,
Yatiantota.
2nd Defendant-Appellant

CASE NO: CA/307/2000/F

DC AVISSAWELLA CASE NO: 551/P

Vs.

Hapuarachchige Wijeratne,
Meegastenna,
Yatiantota.
Plaintiff-Respondent
And Several Others

Before: Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandarathne, P.C., for the 2nd
Defendant-Appellant.

Sudharshani Cooray for the Plaintiff-Respondent.

Udaya Bandara for the 3rd-6th Defendant-
Respondents.

Decided on: 01.02.2019

Samayawardhena, J.

The plaintiff filed this action seeking to partition the land depicted in the Preliminary Plan according to the pedigree set out in the plaint. After trial the learned District Judge entered Judgment dated 22.05.2000. The 2nd defendant who has not been given any soil rights in the corpus has filed this appeal.

The position of the 2nd defendant taken up at the trial as crystallized in issues was that Siriwardena became the owner of the entire land to be partitioned by prescription, and thereafter that right devolved on the 1st and 2nd defendants and Siriwardena's children. In other words, it is the position of the 2nd defendant that Siriwardena was the sole owner of the land.

According to the pedigree of the plaintiff, Siriwardena was one of the three children of Dingiri Appu and the other two children being Punchi Appuhamy and John Singho. The 2nd defendant in cross examination has admitted that Siriwardena, Punchi Appuhamy and John Singho were siblings.¹ Punchi Appuhamy has transferred his undivided 1/3 share by Deed marked P1 executed in 1968 to Somaratne, and Somaratne has in turn transferred that share to the plaintiff by Deed P2. The learned District Judge has accepted that position. That finding is entirely in consonance with the evidence led at the trial.

Although the 2nd defendant states that Siriwardena was the owner of the entire land by prescription, he does not know how Siriwardena acquired prescriptive rights to the entire land. Siriwardena could not have acquired prescriptive rights to the entire land in the air. There should have been a true owner or

¹ Vide page 118 of the Brief.

owners against whom Siriwardena maintained adverse possession if he were to acquire prescriptive rights to the land. As held in *Sirajudeen v. Abbas* [1994] 2 Sri LR 365 “A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.” The 2nd defendant pretends to be unaware of any such owner or owners. The 2nd defendant’s evidence on the question of prescription, as the learned District Judge has correctly pointed out, is plainly unacceptable.

As seen from the Birth Certificate 2V3, the 2nd defendant is not a child of Siriwardena. The 2nd defendant was born after the death of Siriwardena as a child to the widow of Siriwardena. This finding of the learned District Judge² is not disputed before this Court. The 2nd defendant does not claim any rights by inheritance.

According to the evidence led, the conclusion of the learned District Judge that the 2nd defendant possessed an undefined portion of the land with the leave and licence of the co-owners of the land is justifiable. To put differently, the 2nd defendant had been in possession of an undivided portion of the land (vide Preliminary Plan) without any objection from the other co-owners.

Long permissive possession is not prescriptive possession. Permissive possession to become adverse possession to claim prescriptive possession, there shall be compelling cogent evidence. In that setting, firstly, the 2nd defendant must establish a starting point by an overt act of ouster (as opposed to a secret intention in mind) for his acquisition of prescriptive

² Vide page 135 of the Brief.

rights. As held in *Chelliah v. Wijenathan* (1951) 54 NLR 337 at 342 “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 squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.” Vide also *Sirajudeen v. Abbas* [1994] 2 Sri LR 365, *Reginald Fernando v. Pabilinahamy* [2005] 1 Sri LR 31 at 37, *Chelliah Vs. Wijenathan* (1951) 54 NLR 337 at 342, *Mitrapala v. Tikonis Singho* [2005] 1 Sri LR 206 at 211-212, *Seeman v. David* [2000] 3 Sri LR 23 at 26.

When the relationship between the parties is close such as in the instant action, the overt act manifesting the commencement of adverse possession and strong affirmative evidence of continuation of such adverse possession are all the more important. Vide *De Silva v. Commissioner of Inland Revenue* (1978) 80 NLR 292, *Podihamy v. Elaris* [1988] 2 Sri LR 129.

The defendant in this case has failed to prove any of these things except long possession, which is not sufficient to claim prescriptive possession against the true owners of the land.

I see no reason to interfere with the Judgment of the District Court.

Appeal is dismissed without costs.

Judge of the Court of Appeal