

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

**C. A. 793/96 (F)**  
D. C. Kaluthara, No. 4552/P

Aboosally Marikkar Mohamed  
Faleel

No. 1085, Main Street,  
Kaluthara. (*Deceased*)

**PLAINTIFF**

Mohammed Faleel Mohamed  
Nafaiz

No. 443, Galle Road, Kaluthara  
South.

**SUBSTITUTE- PLAINTIFF**

**VS**

(1) Mohamed Ismail Marikkar  
Mohamed Shakeer  
Main Street, Kaluthara  
**And others.**

**DEFENDANTS**

**AND NOW BETWEEN**

Magdon Ismail Magdon Moorcy

No. 129, Marikkar Street,  
Kaluthara (*Deceased*)

**11<sup>TH</sup> DEFENDANT APPELLANT**

**VS**

Aboosally Marikkar Mohamed  
Faleel

No. 1085, Main Street,  
Kaluthara. (*Deceased*)

**PLAINTIFF-RESPONDENT**

Mohammed Faleel Mohamed  
Nafaiz

No. 443, Galle Road, Kaluthara  
South.

**SUBSTITUTE- PLAINTIFF-  
RESPONDENT**

(1) Mohamed Ismail Marikkar  
Mohamed Shakeer,  
Main Street, Klauthara

**And others.**

**DEFENDANTS-RESPONDENTS**

**BEFORE** : **M. M. A. GAFFOOR, J.**

**COUNSEL** : Ifthikar Hassim with Ashiq Hassim for the 11<sup>th</sup>  
Defendant-Appellant.

Athula Perera for the 6<sup>th</sup> Defendant-Respondent

W. Oshada Rodrigo for the 7(a), 10(a) and 29(a)  
Substituted Defendant-Respondents.

Nadee Gamaarachchige for the 61<sup>st</sup> Defendant-  
Respondent

C. J. Ladduwahatti with L. L. D. Silva for the  
Substituted Plaintiff-Respondent

**WRITTEN SUBMISSIONS  
TENDERED ON** : 21.09.2018 by the 7(a), 10(a) and 29(a)  
Substituted Defendant-Respondents

17.10.2018 by the Substituted Plaintiff-  
Respondent

07.09.2018 by the 11<sup>th</sup> Defendant-Appellant

**DECIDED ON** : **31.01.2019**

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**M. M. A. GAFFOOR, J.**

The Plaintiff-Respondent (hereinafter referred to as the Respondent) above named instituted the aforesaid partition action by a Plaint dated 13.10.1980 to partition the land called “Kahatagawatte” which had been described in the schedule to the said Plaint as having an extent of 2A-3R-0P.

The corpus sought to be partitioned in the above action was depicted in terms of Preliminary Plan No. 2528 dated 01.09.1981 and 04.12.1981 made by U.M. De Silva, Licensed Surveyor produced marked as “X” and the report annexed to the said Plan – had been produced marked as “X1” (page 269 of the appeal brief). In terms of the said Preliminary Plan X, the corpus sought to be partitioned in the action had been depicted as Lots A to F in the said Plan having a total extent of 2A-2R-18.72P.

The 11<sup>th</sup> Defendant-Appellant distinctly filed his Statement of Claim dated 25.05.1992 (vide page 234 of the appeal brief), wherein he sought an exclusion of the premises described in schedules A and B of his Statement of Claim from the corpus sought to be partitioned in this action, on the basis that the said premises were not co-owned, that he and his predecessors in title had independently possessed the said premises as a divided entity from the time it was vested in the Urban Council of Kaluthara for non-payment of rates in terms of the Certificates of Purchase Nos. 11 and 12 (marked as “11V9” and “11V8” respectively) dated 27.05.1932 in respect of premises bearing assessment Nos. 50 and 51 *Jeddah Street*, Kaluthara presently bearing assessment Nos. 129 and 131 *Marikkar Street*, Kaluthara.

In spite of the said Sale to the Municipal Council, the 11<sup>th</sup> Defendant-Appellant in the said Statement of Claim, further pleaded that he and his predecessors in title had possessed the said premises described in the said schedules A and B of his Statement of Claim as separate divided lot independently undisturbed and uninterrupted for over a period of 10 years, therefore, he claimed to have possessed the said land and premises and acquired prescriptive title to the same.

According to above contentions, in the District Court, the 11<sup>th</sup> Defendant-Appellant prayed for the issue of a commission to depict the lands described as A and B in the Schedule to the said Statement of Claim in terms of Plan, to exclude the said land from the corpus sought to be partitioned in the action, and dismissal of Plaintiff-Respondent's action.

Thereafter, the District Court on the above application of the 11<sup>th</sup> Defendant-Appellant issued commission to depict in terms of a Plan the lands that had been described in schedules A and B of the 11<sup>th</sup> Defendant-Appellant's Statement of Claim. The Commissioner (B. K. P. W.Gunawardena) had executed his commission by submitting to Court Plan No. 468 dated 06.08.1992 (marked as "**11V4**" at page 280 of the appeal brief) and the report annexed to the said Plan (marked as "**11V5**" at page 292) wherein he had depicted the said separate land as Lot **E2** in his Plan by superimposing the premises depicted in Plan No. 451. It is seen from the record that the said Lot **E2** of Plan No. 451 dated 07.08.1958 made by Stanly N. D. Silva, Licensed Surveyor and in Plan No. 786 dated 30.01.1968 made by U. M. De Silva, Licensed Surveyor and described in the schedules to Deed No. 1009 (11V15), Deed No. 2976 (11V19) and Deed No. 3441 (11V20).

When this matter came up for trial, the 11<sup>th</sup> Defendant-Appellant did not accept the corpus sought to be partitioned in this action as depicted in Preliminary Plan No. 2528 – X made by U. M. De Silva, Licensed Surveyor.

The contention of the 7<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> Defendant-Respondents were filed Statement of Claim dated 22.09.1983 and averred that they were entitled to half of the interest of the land and premises in suit.

After conclusion of the trial the learned Additional District Judge delivered his judgment on 03.10.1996 with the Plaintiff-Appellant. Being aggrieved by the judgment dated 03.10.1996, this appeal preferred by the 11<sup>th</sup> Defendant-Appellant (hereinafter referred to as the 'Appellant') to set aside the said judgment of the learned District judge, and direct that Lot **E2** in Plan No. 468-11V4 be excluded from the corpus sought to be partitioned in this action and for costs.

Having heard the parties in this case, it is clear that the Appellant has claimed his rights mainly by way of prescription. It is well known accustomed rule that the prescriptive title can be claimed only in respect of well-defined definite boundaries. Therefore, it was the main contention of the Plaintiff-Respondent that at the time of the Preliminary Plan X was made, there were no boundaries demarcating what the Appellant claimed.

After careful perusal of the Certificates of Sale Nos. 11 (11V9) and 12 (11V8) dated 27.05.1932, it is clear that the schedules of these certificates have not been identified in Plan 11V4 which was made by the Court Commissioner on the application of the Appellant by direction of the Court.

Further, it is seen from the records, the said Surveyor, B. K. P. W. Gunawardena in his evidence admitted that the Northern, Eastern and Southern boundaries of Lot E2 had not been clearly identified (vide page 375 of the appeal brief). Therefore, the learned Additional District Judge correctly has taken the position that according to above said evidence he cannot exclude E2 depicted in Plan 11V4 from the corpus of the land sought to be partitioned.

In **DE SILVA vs. COMMISSIONER GENERAL OF INLAND REVENUE** [80 NLR 292], Sharvananda, J. clearly and deeply observed that,

*“The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession...” (Emphasized added).*

In **SIRAJUDEEN AND TWO OTHERS vs. ABBAS** [(1994) 2 SLR 365], G. P. S. De Silva, C. J. held that,

*“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.”*

Therefore, in the above mentioned lacunas in the claims of the appellant, I hold that the prescriptive title of the Appellant cannot be stand.

The learned Additional District Judge in his judgment had analyzed the evidence of the parties and correctly held that Lot **E2** cannot be excluded from the corpus sought to be partitioned in this action.

In these circumstances, I see no reason to interfere with the judgment. Hence, I dismiss this appeal with costs.

***Appeal dismissed.***

**JUDGE OF THE COURT OF APPEAL**