

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

D.G.S. Upul de Silva,  
No. 141/2,  
Wijayananda Mawatha,  
Weliwatta,  
Galle.  
Substituted Defendant-Appellant

**CASE NO: CA/669-670-2000/F**  
**DC GALLE CASE NO: 10503/L**

Vs.

Siththy Rifaya Sulthan Marrikkar,  
No. 80,  
Light House Street,  
Fort-Galle.  
Plaintiff-Respondent

Before:                   A.L. Shiran Gooneratne, J.  
                                  Mahinda Samayawardhena, J.

Counsel:               Luxman Perera, P.C., with Kirthi Sri  
                                  Gunawardena for the Defendant-Appellant in  
                                  CA/670/2000/F.

Rohan Sahabandu, P.C., with Chathurika  
Elvitigala for the Plaintiff-Appellant in  
CA/669/2000/F.

Argued on: 11.10.2019

Decided on: 28.10.2019

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant seeking a declaration of title to the land described as Lots A and B in Plan No. 722 (P1), ejectment of the defendant of some portions of the said land, and damages. The defendant got Plan No. 1199 (V1) prepared with a superimposition of Plan P1 on it. In the answer he claimed prescriptive title to Lots A, D2, D3, E, F and G of Plan V1. After trial, the learned District Judge held with the plaintiff subject to the condition that the defendant has prescribed to the areas of land covered by improvements marked 1, 2, 3, 5 in red in Plan P1. Being dissatisfied with the Judgment, both parties have preferred appeals. Both appeals were taken up together and at the argument the learned President's Counsel for both parties made submissions together.

This is a *rei vindicatio* action. The learned President's Counsel for the defendant admits that the paper title to the land in suit is with the plaintiff. The defendant is claiming prescriptive title to some portions of the said land. If that is the position, there is no further burden on the part of the plaintiff to discharge. The burden lies fairly and squarely on the defendant to prove on what right he is in possession of the plaintiff's land. If the

defendant states that he does so on prescriptive title, he must prove it, and the plaintiff does not need to disprove it.

The submission of the learned President's Counsel for the defendant is that the learned District Judge in his Judgment has not properly analyzed the evidence led at the trial. In that regard, the learned President's Counsel strenuously submits that the learned District Judge has not taken into consideration the admissions made by the plaintiff in cross examination that she never went to the land after she became the owner in 1968 until the action was filed in 1984.

There is no law that the owner must possess the land. Possession is an incidence or an attribute of ownership. The owner can possess his property only if he wants.

Mere possession of the property of another is not tantamount to prescriptive possession. The person claiming prescriptive title shall prove all the ingredients stated in section 3 of the Prescription Ordinance in order to succeed on a claim of prescription. In that regard, he must *inter alia* prove when he started adverse possession.

The evidence of the substituted defendant who gave evidence at the trial was that, after marriage, she came to the house No.141/2 in the land in suit in 1967 and from that day onwards she had been living in the same house whilst enjoying the plantation in the appurtenant land.<sup>1</sup> The fact that she enjoyed the plantation has been disputed by the plaintiff, who has stated

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<sup>1</sup> Page 254 of the Brief.

that coconuts were plucked by her with the aid of another man. The 5 coconut trees were at that time 50/80 years of age. The learned counsel President's Counsel for the defendant stressed that the plaintiff neither gave a name nor called the alleged coconut plucker to give evidence. Both the plaintiff and the substituted defendant are ladies. Then, even the defendant could not have plucked coconuts by herself. But the defendant also did not call the person or persons who plucked coconuts.

It is in evidence that when Wijayananda Mawatha was broadened, a part of this land had also been acquired and the compensation in that regard had successfully been claimed by the plaintiff and not the defendant. That happened in or around 1980<sup>2</sup> and the plaintiff filed this action in 1984.

All the extracts of Electoral Registers marked at the trial by the defendant relates to the house No. 141/2. The Assessment Rate Receipts are also relevant to 141/1 and 141/2. According to the Title Deed of the defendant marked V25, the defendant has become entitled to houses bearing Assessment Nos. 141, 141/1 and 141/2 along Hirimbure Road also known as Olcott Mawatha. The extracts of Electoral Registers and the Assessment Rate Receipts refer to Hirimbure Road and not Wijayananda Mawatha. The reference to Wijayananda Mawatha in the address of the defendant in the plaint cannot make a difference.

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<sup>2</sup> Vide pages 142-145 of the Brief.

The plaintiff does not claim houses bearing Assessment Nos. 141/1, 141/2 along Hirimbure Road. The learned President's Counsel for the defendant states that house bearing Assessment No. 141/2 is in the land in dispute. I am unable to accept it. This is made clear by looking at Plan P1, which shows the land claimed by the plaintiff. At the argument, the learned President's Counsel for the defendant did not, with reference to Plan P1 or any other Plan, specifically point out to the buildings bearing numbers 141, 141/1 and 141/2, except to make a general statement that they fall into the land in dispute. It seems to me that 141/1 and 141/2 buildings lie immediately to the east of Lot 1 and 2 marked in red in Plan P1, and the dispute relates not to the main buildings but to the extensions or new additions made to those buildings by the defendant thereby encroaching upon the plaintiff's land.

At this point, I must make it clear that, it is not the case of the defendant that some parts of his land (including 141, 141/1 and 141/2) are shown in Plan P1—the land claimed by the plaintiff as the rightful owner by way of paper title. The defendant's position is that, she has prescribed to some parts of the plaintiff's land.

I cannot accept the argument of the learned President's Counsel for the defendant that the learned District Judge has not properly analyzed the evidence led at the trial in the Judgment.

In the facts and circumstances of this case, it is my view that the learned District Judge has come to the correct conclusion.

Appeals of both parties are dismissed without costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal