

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

In the matter of an appeal from the
final judgment in the District Court of
Kegalle in Case No. 2251/L.

CASE NO: CA/DFC/813/97

D.C. Kegalle No. 2251/L

1. Maparalalge Chandrakeerthi
Banda
2. Maparalalge Jayasumana
3. Maparalalge Jayathilake
4. Maparalalge Dingiri Banda
5. Maparalalge Hemachandra
6. Maparalalge Neville
Bandarathilake
7. Maparalalge Upali
Bandarathilake
8. Maparalalge Gamini
Bandarathilake
9. Maparalalge Rohini
Badarathilake

All of Thunthota.

PLAINTIFFS

VS.

Dureinge Simon of Thunthota

DEFENDANT

NOW BETWEEN

1. Dureinge Simon of
Thunthota **(Decesased)**

DEFENDANT-APPELALANT

- 1a. Dedigama Dureyange
Sopinna of Dedigama,
Thunthota

SUBSTITUTED DEFENDANT
APPEALLANT

VS.

1. Maparalalge Chandrakeerthi
Banda
2. Maparalalge Jayasumana
3. Maparalalge Jayathilake
4. Maparalalge Dingiri Banda
5. Maparalalge Hemachandra
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Bandarathilake
7. Maparalalge Upali
Bandarathilake
8. Maparalalge Gamini
Bandarathilake
9. Maparalalge Rohini
Badarathilake

All of Thunthota.

PLAINTIFF-RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. &
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: Dr. Sunil Coorey with Amila Kiripitige for the Substituted
Defendant-Appellant.

H. Withanarachchi with Sahantha Karunadhara for the
Plaintiff-Respondents.

Written Submissions on: 24.08.2020 (by the Defendant-Appellant)
02.03.2021 (by the Plaintiff-Respondent)

Decided on: 26.03.2021

MOHAMMED LAFFAR, J.

This is an appeal from the judgment of the learned District Judge of
Kegalle dated 20.02.1997.

The Plaintiff-Respondent (hereinafter referred to as the 'Plaintiff')
instituted action against the Defendant-Appellant (hereinafter referred to
as the 'Defendant') seeking, *inter-alia*, for a declaration of title to the
premises morefully described in the schedule to the amended plaint and
the ejectment of the Defendant therefrom¹. The Defendant in his answer,
moved for a dismissal of the Plaintiff's action on the footing that he is the
owner of the subject matter as set out in his answer. After trial, the
learned District Judge delivered the impugned judgment in favour of the
Plaintiff as prayed for in the prayers to the plaint. Being aggrieved by the
judgment the instant appeal has been preferred by the Defendant.

When this matter was taken up for argument on 03.02.2021, both
Counsel consented to dispose the matter by way of written submissions.

The grounds of appeal advanced by the Defendant to challenge the
impugned judgment are set out below:

¹ Vide page 55-57 of the Appeal brief

1. The title of the Plaintiff to the subject matter was not established.
2. The contention of the Plaintiff that the Defendant is in possession of the subject matter as a licensee was not established.

I shall now deal with the question of title of the Plaintiff to the subject matter.

There are abundant authorities that a person claiming a declaration of title must have title himself. According to the existing authorities, the Plaintiff must show title to the corpus in dispute and that, if he cannot, the action will not lie.

In ***Wanigaratne vs. Juvanis Appuhamy***², it was held that, in a *re vindicatio* action the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established.

In the case of ***Dharmadasa vs. Jayasena***³ it was observed that "*in a rei vindicatio action the burden is on the plaintiff to establish the title pleaded and relied on by him. The defendant need not prove anything.*"

In ***Peiris vs. Savunhamy***⁴ it was held that, "*where in an action for declaration of title to land, the defendant is in possession of the land in dispute, the burden is on the plaintiff to prove that he has dominium.*"

In accordance with the evidence adduced by the Plaintiff, one Siyalis Appuhamy was the original owner of the corpus. The said Siyalis Appuhamy, by Deed bearing No. 2057 dated 16.05.1935 marked P3 conveyed his rights to the 4th Plaintiff, Dingiri Banda (1/5), Kiri Banda (1/5), Bandara Thilake (1/5), Punchi Banda (1/5) and Podi Ralahamy (1/5). Upon the demise of the said Kiri Banda, his rights devolved on the aforesaid 4th Plaintiff, Dingiri Banda, Kiri Banda, Bandara Thilake, Punchi Banda and Podi Ralahamy. On the demise of Bandara Thilake his rights

² 65 NLR 167

³ [1997] 3 SLR 327

⁴ 54 NLR 207

devolved on the 6th, 7th, 8th and 9th Plaintiffs. On the demise of the said the Punchi Banda, his rights devolved on the 1st, 2nd and 3rd Plaintiffs. The said Podi Ralahamy transferred his undivided rights to the 5th Plaintiff by deed bearing No. 1530 dated 24.02.1976 attested by Siyambalapitiya, Notary Public marked P4. Accordingly, the Plaintiffs became the owner of the subject matter [*Vide Trial proceedings dated 23.09.1992, pg 78-81 of the Appeal brief*].

It is pertinent to note that the title of the Plaintiffs has been well established with cogent oral and documentary evidence. Hence, the 1st ground of appeal put forward by the Defendant is devoid of merits.

In a *re vindicatio* action, once the title is established by the plaintiff, the burden of proof shifts to the defendant to establish that he has a right to possession or occupation of the property.

In ***Siyanemis vs. Jayasinghe Udenis de Silva***⁵, the plaintiff proved that he had legal title to the property in dispute, but the land was in the possession of the defendant, who asserted a legal right to possess. The Privy Council held that the burden of proof in regard to the right of possession was on the defendant.

In ***Don Namaratne vs. Don David***⁶, S. N. Silva, CJ, (agreeing with Bandaranayake, J. and Yapa, J.) held that,

*“The learned President’s counsel for the Defendant submits that the plaintiff is defective since the date on which wrongful possession on the part of the Defendant commenced is not set out. We cannot agree with this submission. **The owner is entitled to possession of his property at all times. The rights of others are subject to the right of ownership.** Once the title of the Plaintiff is admitted or proved, the burden shifts to the Defendant to prove his right to possess the property. If the Defendant fails to prove the right*

⁵ 52 NLR 289

⁶ SC Appeal No. 54/2002, SC Minutes of 17.2.2003.

[Tenancy, licensee superior title] judgment to be entered in favour of the Plaintiff. In the re-vindicatio action, if the title of the Plaintiff is admitted by the Defendant, the Defendant should begin the case.”

In **Sirinivasam Prasanth vs. Nadaraja Devaraja**⁷, recently the Supreme Court has reiterated the above position as follows:

per Mahinda Samayawardena, J.

“In a vindicatory action, the initial burden is on the Plaintiff to prove title to the property. If he fails to prove title, the Plaintiff’s action shall fail no matter how weak the case of the Defendant is. However, once the paper title to the property is accepted by the Defendant or proved by the Plaintiff, the burden shifts to the Defendant to prove on what right he is in possession of the property.

Let me add this for clarity. The right to possession and the right to recover possession are essential attributes of ownership of immovable property. The owner is entitled to these as of right. The law does not require that the owner must possess his property. That is his choice. He can either possess it or leave it as it is. In simple terms, merely because the owner does not possess the property, he does not lose ownership of the property.”⁸

Having framed the issues No. 16 and 17, the Defendant took up the position that one Palihenage Mudiyanse had obtained a prescriptive title to the subject matter, and thereupon by Deed bearing No. 15 dated 24.11.1975 attested by D.H. Seniviratne, Notary Public marked V1, the said Palihenage Mudiyanse conveyed his rights to the Defendant.

Therefore, there is a burden cast upon the Defendant to establish the purported prescriptive title of his predecessor in title, namely Palihenage Mudiyanse, with strong and cogent evidence as required in Section 3 of the Prescription Ordinance. It is pertinent to note that the Defendant

⁷ SC Appeal No. 163/2019, SC Minutes of 22.03.2021.

⁸ See pg. 6-7

failed to adduce acceptable oral or documentary evidence to prove the said prescriptive title. Thus, the learned trial Judge has rightly declined to accept the bare oral statement of the Defendant in proof of the said purported prescriptive title to the subject matter.

In **C. Abeykoon vs. P.N.A. Peries and Others**⁹, Prasanna Jayawardena, PC, J. (agreeing with Malalgoda, PC, J. and Dehideniya, J.) observed that,

*“It is a well-established principle of law that, so long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some “overt act” which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give (or deemed to give) notice to the owner that his erstwhile licensee or agent is no longer holding the property in the capacity of a licensee or agent and is, from that time onwards, claiming to possess property adverse to or independent of the owner. The overt act makes the owner aware (or is deemed to make him aware) that he runs the risk of losing title to the property if the licensee or agent complete ten years of such adverse or independent possession and acquires prescriptive title to the property.”*¹⁰

In **Jayaneris vs. Somawathi**¹¹, Weeramantry, J. observed that, “clear and cogent evidence and a high order of proof is required to establish adverse possession where an agent or a licensee claims prescriptive title against the owner who placed him in possession of the property.”

⁹ SC. Appeal No. 54A/2008, SC Minutes of 02.10.2018.

¹⁰ Vide page at 9

¹¹ 76 NLR 206

In the case of **Sirajudeen vs. Abbas**¹², the Supreme Court held that,

“Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.

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.

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.

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.”

Having scrutinized the evidence adduced by the Defendant, it is well established that the Defendant in this case totally failed to prove the purported prescriptive title of his predecessor in title. Therefore, the Defendant cannot claim title by deed marked V1.

¹² [1994] 2 SLR 365

Moreover, though the Defendant took up the position that his predecessor in title, namely Palihenage Mudiyanse obtained title by way of prescription, in terms of his purported title deed marked V1, the latter obtained title by way of paternal inheritance. Hence, it appears to this Court that the title pleaded by the Defendant is defective.

As the Defendant failed to establish any acceptable legal grounds to possess the subject matter in suit, he is liable to be ejected from the same and the Plaintiffs are entitled for a judgment as prayed for in the prayers to the plaint as enunciated by the Supreme Court in *Namaratne's* case¹³.

In the circumstances, the 2nd ground of appeal advanced by the Defendant is also devoid of merits.

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge of Kegalle dated 20.02.1997.

Accordingly, the appeal is dismissed with costs fixed at Rs. 50,000/- and the impugned judgment is affirmed.

The Registrar of this Court is directed to dispatch a copy of this Judgment along with the original case record to the District Court of Kegalle.

Appeal dismissed.

Judge of the Court of Appeal

K. K. A. V. SWARNADHIPATHI, J.

I agree.

Judge of the Court of Appeal

¹³ Supre 6