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

CA/0135/99(F)
DC Colombo
Case No.15866/L

1. Mrs.Gajalakshmi Paramasivam
2. Mr. Subramaniam Paramasivam
(Husband and Wife)
Both presently of No.6/58
Carr Street
Googee
N.S.W. 2034
Australia.

PLAINTIFFS

Vs

1. Hewa Gedarage Piyadasa
No.28, Nawala Road
Narahenpita
Colombo 5.

2. Induruwa Gamage Somie Nona
No.11, Aramaya Road
Dematagoda
Colombo 9.

DEFENDANTS

AND NOW

1. Mrs.Gajalakshmi Paramasivam
2. Mr. Subramaniam Paramasivam
(Husband and Wife)
Both presently of No.906/56
Carr Street, Coogee
N.S.W. 2034
Australia.

PLAINTIFFS- APPELLANTS

Vs

1. Hewa Gedarage Piyadasa
No.28, Nawala Road
Narahenpita
Colombo 5.

2. Induruwa Gamage Somie Nona
No.11, Aramaya Road
Dematagoda
Colombo 9.

DEFENDANT RESPONDENTS

2A. Yaggaha Hewage Gamini
Wiamsiri Wickremasinghe

2B. Vernon Ken Wickramasinghe

2C. Hiruki Isanka Wickramasinghe

All of 110/2 Lake Drive, Colombo 8.

SUBSTITUTED-DEFENDANTS-RESPONDENTS

Before:	**Janak De Silva J.**
	&
	N. Bandula Karunarathna J.
Counsel:	Harsha Fernando instructed by K. Kaneshayogan and Umali Rajapakse for the Plaintiff-Appellants.
	Faiza Musthapha, PC for 2(a), 2 (b) and 2 (c) Substituted Defendant– Respondent.
Written Submissions:	Plaintiff Appellant filed on 29.11.2019
	Defendant – Respondent filed on 29.11.2019.
Argued on:	29/06/2019.
Judgment on:	**13/07/2020**

N. Bandula Karunarathna J.

This is an appeal from the judgment of the Learned Additional District Judge of Colombo dated 22.01.1999. The Learned Trial Judge had dismissed the case of the Plaintiff-Appellants (herein after sometimes referred to as the Plaintiffs) seeking a declaration of title and a permanent injunction against the Defendant-Respondents (herein after sometimes referred to as the Defendants) preventing them from entering upon the said land and from infringing the Plaintiffs rights.

The Plaintiffs have pleaded a partition decree, entered in the year 1971 in District Court Case No.12462/P in Colombo, as the source of the 1st Plaintiff's title. In terms of this partition decree the corpus which is referred to in the paragraph 1 of the schedule and presently bears Assessment No.163/7, Nawala Road, Narahenpita, was allotted to the 6th Defendant in that Partition case, namely one Benedict. There was no dispute regarding the corpus.

By Deed No.1017 dated 29th November 1978, attested by T.R. Pullayanayagam N.P, the 6th Defendant Benedict sold the said land to the 1st Plaintiff, in the present case. The Plaintiff states that the 1st Defendant was claiming the property since April 1992 and then the 2nd Defendant, namely I.G. Somi Nona was claiming title to the said property upon deed number 528 dated 12.03.1992 attested by D.S. Kirindawella N.P. upon purchase from the 1st Defendant. Thereafter 2nd Defendant died intestate on 21.04,2000 and the executor of the said intestate heirs executed deed of conveyance no. 243 dated 20.06.2001 transferring the property to the intestate heirs who in turn transferred the property to V..J.Wickramasinghe on 30.11.2001.

After some time V.J.Wickramasinghe died intestate and by administrators conveyance the property in suit was transferred again to the substituted 2nd Defendant Respondents.

The present case was filed in the DC- Colombo, by the Plaintiffs on 01.06.1992 and the Judgement was delivered on the 22.01.1999. This Appeal was pending in the Court of Appeal for 20 years. Finally, all parties agreed to disposed off this matter by way of written submissions.

It is evident that on the 25th of April 1992, T. Balakrishnan, the Plaintiff's Power of Attorney holder, had proceeded to the land along with a surveyor and they were prevented from entering the land by few persons who claimed that the 1st Defendant Piyadasa had title for the same land.

When the case was taken up for arguments, the main point raised by the Defendant Respondents was, that the Appeal Court should not interfere with the finding of facts, made by a Trial Court unless a finding is totally unsupported by the evidence, as demonstrated in the case of De Silva and others v. Seneviratne (1981) 2 SLR 07

However, the Plaintiff Appellants state that it is abundantly clear that the finding of the Learned Additional District Judge is so erroneous and is totally unsupported by evidence. Therefore, to prevent a grave miscarriage of justice, the Plaintiffs request for intervention of this court by exercising its Appellate jurisdiction.

The Plaintiffs argue that even under the threshold conditions in the decided case of *De Silva and others Vs. Seneviratne* (supra) as cited by the Respondent, the findings of facts made by the Trial Court is totally unsupported by evidence and therefore justice requires intervention of this Appellate Court. The attention of court is also invited to Nicholas vs Macan Markar Limited 1985(1) SLR 130 wherein this court has, at Page 139, held that "... when hearing an appeal, the Court should be concerned with the merits of the decision in appeal".

When considering the above authority, it is important to look into the merits of this case.

The Defendant Respondents have stated as follows;

a) The 1st Defendant doesn't dispute the rights of the Plaintiff and pleaded that the 1st Defendant had acquired title by long adverse and uninterrupted possession for a period of well over 10 years and had obtained a declaration of title from the District Court of Colombo in case bearing No.5218/ZL

b) The 1st Defendant had thereafter sold the said premises to the 2nd Defendant on 12.03.1992 by deed No.528 attested by Mrs.D.S. Kirindawella N.P.

It was held in Sirajudeen Vs Abbas 1994 (2) SLR 365, that in a Rei Vindicatio action, the burden of proof rests fairly and squarely on the person, if he is claiming prescription and has to be proved with specific facts and not mere statements. 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. In the present case it had never happened.

It was further held that 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. Furthermore, it was stated 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.

It was decided in Chelliah Vs. Wijenathan 54 NLR 337, 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 acquisition of prescriptive rights. I cannot see that Piyadasa has established such a starting point through his witnesses or by his evidence, before the District Court.

The Plaintiff Appellants argument was that the Defendant Respondents had failed to discharge those fundamental requirements because the evidence clearly points out a fraud perpetrated by the Respondents. The Plaintiff Appellant on the other hand has very clearly established lawful purchase and title. There is no need for a lawful owner to prove possession unless and until a person claiming prescription establishes that he, in fact had uninterrupted, undisturbed, and adverse possession for more than 10 years for the property, which is properly identified.

In his evidence the 1st Defendant, Piyadasa states that he was in possession of this land for which he claims prescription since 1962. He also states that since 1962 – 1992 no one interfered with his possession. Then he goes on to allege that he made a plan in 1968, and therefore the corpus for which he is claiming prescription has to be the corpus he came into occupation in 1968. However, there has been a partition decree delivered in 1973 in DC Case No.12462/P in the District Court of Colombo for a larger land of the same property. That Partition decree divided the said larger land called "Ramsay Gardens" into 06 lots and lot 1B, containing perches 17.3 is the subject matter and corpus of this present Appeal.

It appears that the Corpus that the respondent Piyadasa, stated that he was in occupation since 1962, has to be a part of the same Corpus, prior to partition in the year 1973. According to the deed of declaration that Piyadasa wrote on the 04.05.1988, the Corpus that is described in the deed is not the 1962 land, but one of the lots after Partition. Therefore, the assertion that there was no dispute as to the Corpus, has to be rejected.

As per the evidence by the 1st Defendant Piyadasa, he had no knowledge of the legal title holder what so ever. It reflects that there was no adverse possession. It can be called as "reserved" title and there was no adverse claim by the Defendant, against the Plaintiff to have the Prescriptive title for the disputed property. It is evident that the 1st Defendant Piyadasa's adverse and Prescriptive possession was a "secret" one. When the 1st Defendant was not having any knowledge about the legal title holder of the disputed land, how can he claim adversity for the Prescriptive title ?

It was held in the case of Gunawardena Vs. Samarakoon 60 NLR 481 that, by Secret occupation of the land or possession by encroacher or a trespasser cannot be considered as adverse possession.

When the evidence of the Plaintiff is taken into consideration, it appears that the Plaintiff has the paper title to the property in suit. The Defendants never contested the Plaintiffs rights to the disputed land. In that case the burden of proof, was with the Defendants to prove on a balance of probability, that the 1st Defendant Piyadasa was in undisturbed and uninterrupted possession, adverse to all the other title holders of this land, to acquire Prescriptive title for him. It was not done.

The Plaintiffs argue that the disputed property came into existence through the final decree awarded in Partition Case No. 12462/P, which was finalized on 07.11.1973 in the District Court of Colombo. Although the 1st Defendant claimed that he occupied the disputed property from 1962 to 1992, I believe that it cannot be true as the final decree was entered in the said Partition action was, in November 1973. Piyadasa never participated in that Partition action. The decree in partition case 12462/P was no doubt, a decree in rem. Therefore, even if he was having the possession as a scoter or as an encroacher or as a trespasser, on the disputed land, it should have been ended after the final decree is entered by the District Court in the

Partition action. There was no evidence to prove that Piyadasa was having any adverse possession on the disputed land, even after 1973.

In the case of Seeman Vs. David 2000 (3) SLR 23, it was held that the proof of adverse possession is a condition precedent to claim prescriptive rights.

It is important to note that the 1st Defendant claimed that, he achieved to retain possession, despite efforts by two persons to oust him in 1987 and 1988 period. One person was OIC Narahenpita Police station, Inspector Fabian Mitchell and the other one was named Periyasamy. It is interesting to note that Defendant Piyadasa declared ownership by Prescriptive title on 04.05.1988 by Deed of Declaration bearing number 334 attested by A.H.T. Dayananda N.P. The plan included in this deed was the Partition Plan No. 2332 in the previous Partition case 12462/P of 1971, drawn by S.R. Yapa Licensed Surveyor. It reflects that Piyadasa was having a knowledge about the Partition action. Virtually speaking 1st Defendant Piyadasa could have claimed prescription after completing 10 years from 04.05.1988. As the present DC case was instituted on 01.06.1992, Piyadasa is unable to claim prescription against the Plaintiff during that 4-year period.

The court further observes that, after Piyadasa was threatened by those 2 persons in 1988/1989, he has given evidence to say that he was not living in that disputed land as his life was in danger. This also confirms that he was not having uninterrupted possession on the land in question.

Thereafter Piyadasa filed an action 5812/ZL, against those 2 persons, namely Fabian Mitchell and Periyasamy in the D.C. Cololmbo. This case went ex-parte against both of them and Piyadasa had used this ex-parte Judgment to confirm his Prescriptive title for the next transaction. Periyasamy's address is given as No. 163/7, Nawala Road, Narahenpita which is the address of the same disputed property in the present action. If Periyasamy was residing in that same property, then Piyadasa would have definetely been residing in some other place. Appeal brief confirms that, Piyadasa has used his residential address as No.28, Nawala Road, Colombo 5, for the DC case No. 5812/ZL. This clearly proves that even at that time he was not living on the disputed land.

The Defendant states that as per the evidence given by the 1st Defendant Respondent Piyadasa, he claims to have had uninterrupted possession of the property from 1962 until the

land was sold to the 2nd Defendant Respondent by Deed of Transfer bearing No.528 in 1992. According to his evidence he used to grow Plantains, Kankun and Keera on the said property. Those evidence were never supported by any other independent witnesses. Therefore, in my openion those evidence cannot believe as true because, Piyadasa cannot be considered as a reliable and a genuine witness.

It is evident that, Piyadasa had prepared a Deed of declaration bearing No.334 attested by A.H.T.Dayananda Notary Public dated 04th May 1988, which he relied on to establish ownership over the property. The said deed of declaration relied on Plan No.2332 surveyed by S.R. Yapa to demarcate the boundaries dated 24th October 1971. The said Plan No.2332 refers to Lot No.1B which was only demarcated and partitioned by Partition action bearing case No.12462/P which took place in 1973. The Plan No.2332 was prepared for the purpose of the said Partition action. The Plaintiff Appellant states that the 1st Defendant Respondent in his evidence however does not refer to the said Partition action or survey conducted by Mr.S.R. Yapa. He only refers to a plan that was drafted by one Mr.Abeygunawardena in 1968. But subsequently the Defendant Piyadasa, heavily relied on Survey Plan No.2332 to prepare the Deed of Declaration and to institute DC Case No.5812/ZL, in which he obtained an ex-parte order in his favor.

Thus, the 1st Defendant Respondent could not have been aware of the said Partition and the Survey of the land by Surveyor S.R.Yapa, if he was in actual possession of the property, especially as the same was referred to in the instruments registered in the Land Registry.

It is important to be noted that the Piyadasa's deed of declaration was registered in the land registry on 06.05.1988 and it was long after the Plaintiff's deed of transfer was registered on the 30.11.1979. The Plaintiff is having the priority over the Defendants deed under section 24 of the Registration of Documents Ordinance.

After I perused the said evidence it is of much significance to observe that Piyadasa never had an opportunity for undisturbed and uninterrupted possession adverse to the Plaintiff on this land, to acquire Prescriptive title. According to the available evidence it is my view that, Piyadasa couldn't prove his uninterrupted, undisturbed, and adverse possession for 10 years.

Taking in to consideration the disability clause, 13(e) of the Prescription Ordinance this court cannot be unmindful of the important statutory provisions as such.

Section 13 of the Prescription Ordinance provides as follows;

"Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say-

(a) infancy,
(b) idiocy,
(c) unsoundness of mind,
(d) lunacy, or
(e) absence beyond the seas,

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person ;

Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant."

The Plaintiffs have gone abroad in 1982 and there was no evidence to say that they were living in Sri Lanka during that current period. Therefore, section 13 (e) will have a direct impact against Piyadasa, when he was claiming Prescriptive title against the Plaintiff. While they were in abroad the 1st Plaintiff has given authority to her Power of Attorney holder, Balakrishnan to construct a building on the disputed land. It is evident that a complaint was lodged by said Balakrishnan after he went to the disputed land in 1992 with a Surveyor, when he was threatened and disturbed, not to enter the land by a group of people connected to Piyadasa.

The Appellant explains how possession was exercised by her and her power of Attorney holder Balakrishnan. The Appellant states that as a legal owner, living overseas for some time during the relevant period, she was exercised sufficient care and diligence in "possessing" an

empty land. In fact, since the Appellants take up the position that the Respondent never lived on this land and there was no need for the Appellant to do or take any further or additional steps or actions with regard to "possessing" the empty land she legally owns. Similarly, the Respondents appear to base their claim on what they see as two physical characteristics of the land which the Plaintiff Appellant couldn't describe.

Subsequent to a thorough analysis of the facts of the case, it has come to my notice that the 1st Defendant had not claimed prescription and that prescriptive title was only claimed by the 2nd Defendant on behalf of the 1st Defendant in his answer. This is a desperate argument based on total misconception of the pleadings. It would be seen that the 1st Defendant asserted prescription by him and had pleaded the subsequent sale to the 2nd Defendant. It is important to note that paragraph 11 of the answer of the 1st Defendant, specifically stated that the property had been sold to the 2nd Defendant and sought a dismissal of the action.

Moreover, section 3 of the Prescription Ordinance, states as follows;

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favor with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favor with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

In terms of section 3 of the Prescription Ordinance the requirements for positive prescription of land are "undisturbed and uninterrupted possession...by a title adverse to or independent of that of the claimant...for ten years previous to the bringing of such action..." The critical factor of adverse possession is specifically elaborated on, in a much-discussed part of the section.

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.

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.

Sharvananda, J. in Theivandran v. Ramanathan Chettiar 1986(2)SLR 219 at 222 stated as follows:

"In a vindicatory action the claimant needs merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entities him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence, when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is having lawful possession".

In the instant case the 1st Defendant could not establish that he is having a prescriptive title with uninterrupted and adverse possession against the Plaintiffs.

There is another relevant aspect of the plea of prescriptive title which was overlooked by the present trial Judge. That principle is best stated in the words of Gratiaen, J. in Chelliah v. Wijenathan 54 NLR 337, 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 acquisition of prescriptive rights."

The Defendant has failed to prove, when he started his adverse possession against the Plaintiffs.

It is important to quote from Walter Pereira's Laws of Ceylon, 2nd Edition, page 396. "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".

In the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the 1st Defendant to a decree in his favor in terms of section 3 of the Prescription Ordinance.

In any event therefore, it is important to note that mere possession, in the absence of requirements of section 3 of the Prescription Ordinance would not suffice to acquire prescriptive title. The Plaintiff Appellant on the other hand has very clearly established lawful purchase and title and there is no need for a lawful owner to prove possession unless and until a person claiming prescription establishes that he in fact had uninterrupted, undisturbed, and adverse possession for more than 10 years of a property. In fact, in paragraph 2 in page 14 of the Judgment (page 279 of Appeal Brief) the Learned Trial Judge has acknowledged that the ownership of the property is not challenged by the 1st and 2nd Defendant Respondents.

would be protected by Orders and Judgements of Court and the rights of lawful owners of properties would not be protected by Courts.

It is pertinent to consider observation made by Sansoni J. in the case of M. Kanapathipillai Vs. M.Meerasaibo 58 NLR 41 at page 43 wherein His Lordship observed as follows;

"There is a well-established rule that the law will presume in favor of honesty and against fraud"

The learned trial Judge, before making the impugned Judgment in this case, should have been mindful of the above observation made by His Lordship Sansoni J. in the said case.

When I consider all the aforementioned matters I reject the contention of learned Counsel for the Defendant Respondents and I hold that the learned Additional District Judge was wrong when he dismissed the Plaintiff's case.

For the foregoing reasons the claim of prescription made by the 1st Defendant Piyadasa and the 2nd defendant Somie Nona appears to me as absolutely frivolous. Taking into consideration the matters urged by the Appellants, I find that the material placed before the original court, does not establish the Prescriptive title of the 1st Defendant or the 2nd Defendant and the Judgment of the learned Additional District Judge dated 22.01.1999 is here by set aside.

Appeal allowed. Plaintiffs are entitled for cost in this courts as well as in the District Court.

Judge of the Court of Appeal

Janak De Silva J.

I have had the benefit of reading in draft the judgment of my learned brother. I agree with his conclusion that the appeal must be allowed.

However, I respectfully take a different view on two of the issues dealt with therein.

In this case, the 1st Defendant has failed to establish a starting point for his acquisition of prescriptive rights as required by law [*Chelliah v. Wijenathan* (54 N.L.R. 337)]. In these circumstances, section 13 of the Prescription Ordinance is not engaged as the time when the right of the Plaintiff to sue for the recovery of the immovable property has not been determined.

Furthermore, it is true that the 1st Defendant has not claimed prescriptive title in the answer. However, issue no. 7 raises the question of prescriptive title of the 1st Defendant. The trial proceeds on the issues and the pleadings recede to the background [*Hanaffi v. Nallamma* (1998) 1 Sri.L.R. 73].

Subject to the above, the appeal is allowed. The Plaintiffs are entitled to the costs in both Courts.

Judge of the Court of Appeal