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

In the matter of an Appeal to the Court of Appeal of the Democratic Socialist Republic of Sri Lanka.

C.A. No.858/96 (F)

DC Kegalle Case No.21910/P

Weerasinghe Arachchilage Podi Manike
Keenagahadeniya
Hathgampola
Aranayake.

PLAINTIFF-APPELLANT (Deceased)

Matale Rallage Somathilake
Keenagahadeniya
Hathgampola
Aranayake.

SUBSTITUTED-PLAINTIFF-APPELLANT (Deceased)

1. Athauda Ralalage Nandawathie Manike
2. Matale Ralalage Raweendra Nandana Somathilake
3. Matale Ralalage Nadeepa Roshani

4. Matale Ralalage Kosala Nandana Somathilake
All of "Nandana Niwasa"
Bathalegala Road
Hathgampola,
Aranayake.

SUBSTITUTED-PLAINTIFF-APPELLANTS

- **VS. –**

Kodapaluwa Arachchilage Asoka Kumara of Hathgampola
Aranayake.

SUBSTITUTED 18th & 19th DEFENDANT-RESPONDENTS

Before: **Janak De Silva J.**

&

N. Bandula Karunarathna J.

Counsel: Rohan Sahabandu PC with S.L.Senanayake for the Substituted-Plaintiff-Appellant.

K.G. Jinasena with Nihiri Kolambage for the Substituted 18th & 19th Defendant-Respondent.

Written Submissions: By Plaintiff-Appellant on 14.10.2019

By Substituted 18th & 19th Defendant-Respondent 20.11.2019

Argued on: 02/09/2019

Judgment on: **06/07/2020**

N.Bandula Karunatathna J.

The Plaintiff Appellant (hereinafter referred to as the Plaintiff) preferred this Appeal praying inter alia to set aside the judgement dated 15th November 1995 of the District Court of Kegalle and a Judgment be entered in favour of the Plaintiff and 1st to 7th Defendants to a half share, and the 18th and 19th Defendant to balance half share.

On 18th November 1977, the Plaintiff had instituted the above styled partition action bearing No 21910/P in the District Court of Kegalle to partition the land more fully described in the schedule of the plaint.

According to the Plaintiff's evidence, the original owner of the land was one Mudalihami and then one Mudiyanse, Punchi Appuhamy, Ukku Banda, Kapuru Banda and finally the Plaintiff the Plaintiff and 7 others own one third (1/3) of the subject matter. Having completed the pleadings, as directed by the Courts, Preliminary Survey had been carried out by S. Abeysiriwardena, Licensed Surveyor and on 15th May 1980 and he submitted his Preliminary Plan No. 457 and his report which are marked as X.

The trial commenced on 22nd August 1989 and on 16th August 1990 the Plaintiff by adducing her evidence marked Deeds P-1 to P-3. However, by adducing her evidence on 17 March 1993 the Plaintiff stated that her husband was in possession of the corpus and the 18th and 19th Respondent occupied the house even at that time. On 31st January 1994 the 18th Defendant by adducing his evidence marked the Plan No 457(X) and two Deeds and claimed the ownership for the entire corpus.

The Gramasewaka of the area and a Timber Merchant were also called to give evidence in support of the 18th Defendant and 19th Defendant. On 15th November 1995 the Learned District Judge of District Court, Kegalle delivered his judgment dismissing the plaint of the Plaintiff with costs and held that the 18th and 19th Defendants have the prescriptive rights for the land as they are in undisturbed and uninterrupted possession of the said land for a longer period of time. Being aggrieved by the said judgment the Plaintiff preferred this Appeal to the Court of Appeal only against the 18th and the 19th Defendants.

Counsel for the 18th and 19th Defendant Respondents raised a Preliminary Objection regarding the maintainability of this appeal. After considering submissions by both parties, court decided to dismiss this appeal on the 18.06.2014.

The said decision was challenged by the Substituted Plaintiff- Appellant- Petitioner in the Supreme Court and it was decided on the 19.01.2016, to refer the Appeal back to the Court of Appeal to decide it on merit. Accordingly, the Supreme Court vacated the Court of Appeal order dated 18.06.2014.

Thereafter the case was fixed for argument before this court on the 02.09.2019. On that day both parties agreed to disposed of this matter by way of written submissions. Parties were allowed to file written submissions.

The Plaintiff claims that in this partition action, the contest was between the Plaintiff and the 18th and 19th Defendant Respondents. The name of the land is Keenagahahena and it is shown in Plan 457 dated 01.05.1980 as lots 1 and 2. According to the pedigree submitted by the Plaintiff the original owner was Mudalihamy. The Plaintiff produced large number of deeds to show the devolution of title. The Plaintiff states that the land is called as Palleakeenagaha hena shown in plan 457, whereas the 18-19 Defendants position was that, the corpus is called Borellawatta. According to the Plaintiff the original owner was Mudalihamy and title has flown from him.

The Plaintiff pleaded that, one Mudalihamy was that owner of the land shown in Plan 457T as opposed to the 18th and 19th Defendants who claimed that the original owner was Kapuru Banda and on his death property devolved on 8, 11-17 Defendants.

In this case, it is necessary to analyze whether the 18th and 19th Defendants have the prescriptive rights for the land as they claim to be in undisturbed and uninterrupted possession of the said land for a longer period of time.

In **Maduanwala** Vs Ekneligoda 3 NLR 213; the term possession and occupation was distinguished, a person may occupy without possession, and a person may possess without occupation.

It was decided in De Mel Vs Amarasinghe 40 NLR 455; an action for use an occupation does not lie against a person who was given possession of a land in pursuance of an agreement to purchase the land which not completed, though no default on his part.

The characteristic of "possession" as distinguished from "occupation" was that the former implied the element of holding or tenure Ut dominus. The Fact in the case was that the owner's sister was allowed to live in his house as an act of charity, she was provided with clothing and shelter, but she did not gain possession and most of the house was utilized by the owner and he also used for his official work. It was held that the prescriptive title has not been established. A person who is let into occupation of property as a licensee must be deemed to continue to occupy on the same footing. Therefore, in order to prove possession there must be some overt act which manifest his intention to occupying.

The concept of Adverse Title or Independent Title in terms of Section 3 of the Prescription Ordinance is that the possession on which the prescriptive title is based on must be 'by a title adverse to or independent of that of the claimant or plaintiff in such action'.

In Cooray Vs. Perera 45 NLR 455; the concept of adverse possession was explained;
"Where a person obtains a transfer of the entirety of a property from a co-owner, his possession is that of a co-owner, and it does not become adverse without proof of ouster or something equivalent to ouster. There must be a corporeal occupation of land attended with a manifest intention to hold & continue it. It is the intention to claim title against all other persons which makes the possession of the holder of the land adverse."

Therefore, there is a necessity to assess whether adverse possession is prevalent in order to establish prescription. The Defendants claim that they prescribed the said land and have led the evidence of one Ekanayake, a Grama Niladhari to support their claim. The 18th and 19th Defendants state that having called a 70 years old Timber Merchant, who had sold timber for his house, which was constructed in the year 1960 and having called the aforesaid Gramasewaka, they had proved his prescriptive title since 1960s for the land.

According to the Plaintiff, the Grama Sewaka stated that he was the Waga Niladhari, during the period 1978 – 1989 but was not able to produce any documentary proof regarding payment of Acreage Taxes. The Plaintiff claims that if the witness is an official witness his evidence must be corroborated by official letters or Receipts, given in respect of the corpus. Furthermore, when his evidence is challenged and contested, one expects the official witness, to produce documentary evidence, to assist what he states. In this situation, there was no such evidence.

The Plaintiff questions the credibility of the next witness as well. He was one Karunarathne who stated that in 1960, that Defendant purchased Timber from him seeking to show that, the house was built with the timber purchased by him. The Plaintiff submitted that there is no proof to say that, the timber purchased was for this particular House. In his Evidence, he had stated that, he does not know the extent of the corpus. Incidentally he was giving Evidence of a purchase, which happened 25 years ago.

In Theivandaran vs Ramananda Chettiar 1986 (2) SLR 219; Supreme Court held that, when the legal title to the premises is proved to be in the Plaintiff, the burden of proof is on the Defendant to show that he is in lawful possession. Therefore, in the instant case, the burden of proof is on the Defendants to establish that they are in lawful possession.

In this case it has been clearly established that the house is in the possessions of the 18th and 19th Defendants and they reside in the corpus since 1960s. The evidence given by the 18th Defendant was confirmed by the Gramasevaka of the area and the Timber Merchant who supplied timber for their house construction. The Gramasevaka in his evidence has clearly stated that no one else was in the possession of the house other than the Defendants.

Since the 18th Defendant had proved that the house was in their possession since 1960's, it could be considered that the 18th Defendant had established his undisturbed and uninterrupted possession for a long period. But they have not proved the possession of the plantation, which they claimed before the Surveyor, on the 10th and 11th August 1979. Merely claiming before the Surveyor is not enough to prove that the 17th, 18th, and 19th Defendants were enjoying the disputed plantation. There should be some independent evidence to confirm that situation.

Having analyzed the evidence adduced by the Plaintiff, the Learned Judge has come to the conclusion that the 18th and 19th Defendants were in possession and they had a longer possession at the time she received the deed No. 931, attested by A.T.R. Goonarathne, Notary Public, from her farther Ukku Banda.

On perusal of cases and authorities on prescription of land, in Leisa and Another v. Simon and Another 2002(1) SLR 148; the Court of Appeal has quoted from Principles of South African Law written by Wille as follows:

> *Wille in his book "Principles of South African Law" (3rd edition) at page 190 states as follows:*
> *"Paper title plus prescription must have been proved when the absolute owner at the thing has the following rights in the things":*
> *(1) to possess it;*
> *(2) to use and enjoy it;*
> *(3) to destroy; it*
> *(4) to alienate it."*

In Subramaniyam V. Sivaraja 46 NLR 540; it was held if one enters and takes the profit exclusively and continuously for a very long period under circumstances which indicate a denial of a right in any other co-tenant to receive them as by not accounting with the acquiesces of the other co-tenant, as ouster may be proved. In Karunawathie & two others V Gunadasa, 1996 (2) SLR 406, it was held that in considering whether or not a presumption of ouster should be drawn by reason of

long continued possession alone of the property owned in common, it is relevant to consider,

The income derived from the property;
The value of the property;
The relationship of the co-owners and where they reside in relation to the situation of the corpus.

In D.R. Kiriamma V.J.A. Podibanda and 8 others (unreported case) our Supreme Court has held that:

a) proof of undisturbed and uninterrupted possession by a Defendant-Respondent to any action or by those under whom he claimed such land or immovable property by a title adverse and independent to that of the Claimant or Plaintiff for 10 years previous to bringing of the action is entitled to a decree in his favour.

b) Possession therefore need to be unaccompanied by payment of rent or performance of service or duty or by any other act by the possessor for which acknowledgment of a right excising in another person would fairly and naturally be inferred.

c) *Omus Probendi* or the burden of proving possession is on the party calming prescriptive possession. Importantly prescription is a question of fact. Physical possession is a *Factum Probandum.* Considerable circumspection is necessary to recognize prescriptive title as undoubtedly it deprives the ownership of the party having paper title. Title by prescription is an illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by a title adverse to an independent, that of a Claimant or Plaintiff.

In Lesin V Karunaratne 61 NLR 38; it was held that where a person donates immovable property reserving to himself a life interest prescription does not begin to run against the done until the death of the donor. In such a case, the done, as remainder-man, is entitled to the benefit of the proviso to section 3 of the Prescription Ordinance and adverse possession against the donor cannot be counted against the donee.

However, it is pertinent to note that although the Defendants in fact possessed the land and thereby prescribed to the same, the Defendant did not lead Evidence as to how they

possessed the entire land. The Plaintiff submits that possessing and occupying a house on the land would not entitle a Defendant to say, that, he has prescribed to the entire land when that extent is over one Acre.

Moreover, it is also important to note that the position of the Defendant is that he has prescribed to land. When considering Plan 457 **X**, it is a land in extent of A. 1-R. 2-P. 92, even among that the Defendants were prescribed to the House. Therefore, the question arises as to whether there is any Evidence to prove that, the Defendant however prescribed to the entire extent of the land. How did he possess the entire land? This question does not seem to be sufficiently answered by the 18th and 19th Defendants.

I further note that even if there is cogent evidence to support that the Defendants had possessed the house, there is no proof that he possessed the entire Land. It is my observation that the witness summoned also refer only to the house as opposed to the entire extent of the land.

The 18th defendant under cross examination on 31st January 1984 had stated.

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ප්‍ර- මැණික්රාලගේ පුතා මිදුයන්සේ නේද?

උ- ඔව්

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උ-ඔව්.

Thus the 18th defendant conceded a half share of the land to the plaintiff and the 1 to 7 defendants.

In view of the law and the facts stated above, the 18th and 19th Defendants had proved prescriptive possession to a certain extent. However, possessing and occupying a house on the land would not entitle a Defendant to say, that, he has prescribed to the entire land.

Therefore, considering the aforementioned law and facts, the appeal shall be allowed.

I decide that the said land should be owned in the following proportions;

(a) ½ share of the land to be allocated to the Plaintiff and 1st to 7th Defendants
(b) the balance ½ share should be allocated to the 18th and 19th Defendants.

For the reasons stated in this judgement, I set aside the judgement of the learned District Judge of Kegalle, dated 15.11.1995 and allow this appeal. The Plaintiff is entitled for cost in the District Court as well as in the Court of Appeal.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal