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 Gampaha Case No. 23142/L

1. Danny Kadinappuli Piyasiri Manawasinghe of No. 43, Walpola Road, Kirindiwela.

2. Robert Kadinappuli Manawasinghe of No. 43, Walpola Road, Kirindiwela.

3. Muthugal Pedige Premadasa of 'Sri Kanthi Saloon', Nittambuwa Road, Kirindiwela.

Plaintiffs

C. A. 381/2000(F)
D. C. Pugoda Case No. 81/L

Vs.

1. Senarathna Mudiyanselage Subatheris Appuhamy alias Subaneris Senaratne (Deceased) of Paddawala, Kirindiwela.

1a. Senarathna Mudiyanselage Rosalin Nona of Paddawela, Kirindiwela.

2. Sambandapperuma Mohotti Appuhamylage Don James Wijayawardene Jayasekera Bandara (Deceased)

2a. Sambandapperuma Mohotti Appuhamylage Berty Jayasekera of Obawatta Walawwa, Radawana.

Defendants

AND NOW IN THIS APPEAL BETWEEN

1a. Senarathna Mudiyanselage Rosalin Nona (Deceased) of Paddawela, Kirindiwela.

1a Defendant-Appellant

1b. Kalidasa Kanchana Dilruksha Wijewardene of No. 225/01, Bogahawatta, Kirindiwela.

1b Defendant-Appellant

Vs.

1. Danny Kadinappuli Piyasiri Manawasinghe of No. 43, Walpola Road, Kirindiwela.

2. Robert Kadinappuli Manawasinghe (Deceased) of No. 43, Walpola Road, Kirindiwela.

2a. Wijitha Surendra Manawasinghe of No. 43/2, Ihalagama, Kirindiwela.

3. Muthugal Pedige Premadasa of 'Sri Kanthi Saloon', Nittambuwa Road, Kirindiwela.

Plaintiff-Respondents

2a. Sambandapperuma Mohotti Appuhamylage Berty Jayasekera (Deceased) of Obawatta Walawwa, Radawana.

2b. Anura Wijesinghe Kannara

2c. Sambandapperuma Mohotti Appuhamylage Pathma Ranjani of No. 150A, Kirindiwela Road, Radawana.

2d. Sambandapperuma Mohotti Appuhamylage Leelakanthi Wijesinghe Jayasekera

2e. Sambandapperuma Mohotti Appuhamylage Ramani Wijesinghe Jayasekera

2f. Sambandapperuma Mohottilage Vijayanthimala Wijewardena Jayasekare

All of Obawatta Walawwa, Radawana.

2b, 2c, 2d, 2e and 2f Substituted Defendant-Respondents

Before: Janak De Silva, J.

Counsel:

Dr. Sunil Cooray with Malika Ranasinghe for 1b Defendant-Appellant

Romesh Samarakkody for the 1st, 2(a) and 3(a) Plaintiffs-Respondents

Written Submissions tendered on:

1b Defendant-Appellant on 30.01.2019 and 09.05.2019

1st, 2(a) and 3(a) Plaintiffs-Respondents on 30.01.2019 and 13.03.2019

Decided on: 31.01.2020

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Pugoda dated 31.03.2000.

The Plaintiffs originally instituted the case bearing no. 23142/L in the District Court of Gampaha seeking *inter alia* a declaration of title to the land called Lot E of Kahatagahawatta alias Delowita more fully described in the schedule to the plaint dated 04.12.1980 [Page 75 of the Appeal Brief].

The Plaintiffs averred in their plaint that –

1. The 2nd Defendant became entitled to the said land under and by virtue of Deed of Partition No. 3965 dated 02.05.1928 attested by D. Lorage, Notary Public (පැ3);
2. He transferred it to the Plaintiffs by Deed of Transfer No. 1974 dated 04.01.1980 attested by D. E. N. Abhayasinghe, Notary Public for valuable consideration (පැ4);
3. The 1st Defendant is possessing the said land unlawfully and wrongfully and causing damages amounting to Rs. 200/- per month.

The 1A Substituted Defendant filed her answer on 28.05.1982 disputing the corpus and claiming prescriptive title to the lands morefully described in the schedules to the answer [Page 78 of the Appeal Brief]. Her contention is that the land depicted in plan no. 2294/ඉ (පැ1) includes Lots 4 and 5 in final plan no. 3627 and the said Lot 5 was allotted to the 1st Defendant by the final decree in District Court of Gampaha case no. 18404/P. Further, it was stated that the balance portion of the land depicted in plan no. 2294/ඉ is Lot D of Kahatagahawatta which also belonged to the 1st Defendant by inheritance and prescription and later conveyed to the 1A Substituted Defendant by Deed of Gift No. 3405 dated 15.05.1969 attested by D. L. S. Wickramasinghe, Notary Public (පැ8).

A commission was executed to survey and properly identify the land in dispute. Accordingly, S. H. P. Kottegoda, Licensed Surveyor prepared the plan no. ග-1075 dated 14.02.1983 (X) after superimposing the said plans no. 3627 and no. 2294/ඉ. According to the surveyor's report Lot ඊ thereof is claimed by the Defendant and Lot 5 thereof is Lot 5 in final plan no. 3627.

After a lengthy trial, the learned District Judge of Gampaha, by judgment dated 15.07.1985, declared that the Plaintiffs are the owners of the land depicted in plan no. 2294/ඉ.

Being aggrieved, the 1A Substituted Defendant preferred an appeal to this Court in case bearing no. 330/1985(F). The judgment was delivered on 22.11.1994 [Page 70 of the Appeal Brief] where it was held that the learned District Judge of Gampaha erred in declaring that the Plaintiffs are the owners of the land depicted in plan no. 2294/ඉ which includes Lot 5 in final plan no. 3627 as per the surveyor's report of plan no. ග-1075. The case was remitted back for re-trial.

The case was heard before the Additional District Judge of Pugoda (case no. 81/L). The land in dispute was identified as Lot ඊ in plan no. ග-1075 and it was admitted that Lot 5 therein belonged to the 1st Defendant. The contention of the 1A Substituted Defendant was that Lots ඊ and 5 of plan no. ග-1075 was possessed by the 1st Defendant (and then by her) as one land for several decades and claimed prescriptive title.

By the judgment dated 31.03.2000 [Page 233 of the Appeal Brief], the learned Additional District Judge of Pugoda rejected the position taken up by the 1A Substituted Defendant and granted a declaration of title in favour of the Plaintiff. Hence this appeal by the 1A Substituted Defendant.

The Plaintiffs assert ownership to Lot ඊ in plan no. ග-1075 and contend that the 1A Substituted Defendant is in unlawful and wrongful occupation of it. The Plaintiffs seek for a declaration of title. Clearly, the Plaintiffs' action is an *actio rei vindicatio*.

It is an established principle that ownership of the property claimed in a rei vindicatio action is a fundamental condition to its maintainability [*De Silva v. Goonetileke* (32 N.L.R. 217), *Pathirana v. Jayasundara* (58 N.L.R. 169), *Mansil v. Devaya* (1985) 2 Sri.L.R. 46, *Latheef v. Mansoor* (2010) 3 Sri.L.R. 333] and the burden is on the Plaintiff to establish the title pleaded and relied on by him [*Dharmadasa v. Jayasena* (1997) 3 Sri.L.R. 327].

In *Karunadasa v. Abdul Hameed* (60 N.L.R. 352) Sansoni, J. observed –

> *"In a rei vindicatio action, it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties."*

The Plaintiffs rely on 'පැ3' and 'පැ4' in establishing their title which were marked during the trial without any objections. The 2nd Defendant gave evidence on behalf of the Plaintiffs and stated that the 1st Defendant remained on the disputed land as his licensee [Pages 127 and 135 of the Appeal Brief].

Furthermore, the Plaintiffs have marked the plaint dated 16.06.1975 in District Court of Gampaha case no. 18404/P as 'පැ6'. It is admitted that the 1st Defendant became entitled to Lot 5 in plan no. ග-1075 (i.e. Lot 5 in final plan no. 3627) by virtue of the final decree entered in case no. 18404/P. A careful perusal of the schedule of 'පැ6' shows that the land sought to be partitioned in case no. 18404/P is Lot D of Kahatagahawatta which is bounded on the east by Lot E of the same land. An alternative description of the said Lot D [Pages 308 – 309 of the Appeal Brief] states that the east boundary of Lot D of Kahatagahawatta is the land owned by Randawane Gammuladani. Thus, an inference can be gathered that Lot E of Kahatagahawatta belonged to Randawane Gammuladani in 1975. The evidence led in case no. 81/L shows that Randawane Gammuladani is the 2nd Defendant of the same action. The document marked 'පැ7' also supports the said premise.

By the documents marked 'පැ11' and 'පැ12', the 1st Defendant has signed and accepted the ownership and/or title of the 2nd Defendant. When the 1A Substituted Defendant was cross-examined regarding the said documents and the signature of the 1st Defendant, the learned District Judge has noted that she was reluctant to answer the questions put to her [Page 180 of the Appeal Brief].

In view of the above, I hold that the learned Additional District Judge was correct in holding that the paper title of the disputed land is with the Plaintiffs.

This leaves the question of prescriptive title pleaded by the 1A Substituted Defendant. She stated that she and her predecessors were in possession of the disputed land for several decades prior to the date of the plaint.

In an action for declaration of title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant. If a person goes into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal [*Siyaneris v. Jayasinghe Udenis De Silva* (52 N.L.R. 289)].

It is clear by the evidence of the 2nd Defendant that the 1st Defendant was in the possession of the disputed land prior his demise.

However, as I observed earlier, the 1st Defendant has signed and accepted the ownership and/or title of the 2nd Defendant by 'පැ11' and 'පැ12'. Therefore, if the 1st Defendant prescribed to the disputed land, he should have done it after the signing of these documents in 1967.

In *Juliana Hamine v. Don Thomas* (59 N.L.R. 546 at page 548), L. W. De Silva, A. J. held –

> *"The paper title being in the 2nd and 3rd Defendants, the burden of proving a title by prescription was on the Plaintiff. That burden he has failed to discharge. Apart from the use of the word possess, the witnesses called by the Plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram C. J. in the Full Bench Case of Alwis v. Perera [1 (1919) 21 NLR at 326]:*
>
> > *"I wish very much that District Judges – I speak not particularly, but generally – when a witness says 'I possessed' or 'We possessed' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."*

In determining the question of prescriptive title, it is also important to bear in mind that it is a means of defeating the paper title a party holds and in this context as Udalagama J. held in *D. R. Kiriamma v. J. A. Podibanda and 8 Others* [(2005) BLJ 9 at page 11] –

> *"Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that 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 title adverse to an independent to that of a claimant or plaintiff."*

However, the evidence of the 1A Substituted Defendant doesn't reveal any "overt act" by which her predecessor (i.e. the 1st Defendant) started holding the disputed land adversely to his principal (i.e. the 2nd Defendant) after 1967.

In this context it is also important to bar in mind that the 1st and 2nd Defendants were cousins and that the 2nd Defendant transferred the corpus to the Plaintiffs in 1980. Thus from 1967 to 1980 the question of prescription is between cousins. In *De Silva v. Commissioner General of Inland Revenue* (80 N.L.R. 292 at 295) Sharvananda J. (as he was then) stated 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. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. **Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible.** Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Such permissive possession is not in denial of the title of the mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession. **Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the permitter's title.** In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse

possession. **Where the parties were not at arm's length, strong evidence of a positive character is necessary to establish the change of character.**" (emphasis added)

Accordingly, I hold that the learned Additional District Judge has correctly evaluated the evidence and concluded that the 1A Substituted Defendant has not fulfilled the burden of proof on her in establishing prescriptive title. The facts relied on by the learned Additional District Judge indeed establish that the 1A Substituted Defendant did not have undisturbed and uninterrupted possession for more than ten years of the land claimed by her by title adverse to that of the Plaintiffs and their predecessors.

For all the foregoing reasons, I see no reason to interfere with the judgment of the Additional District Judge of Pugoda dated 31.03.2000.

The appeal is dismissed with costs.

Judge of the Court of Appeal