

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

In the matter of an application for Appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 against the Judgment dated 26th July 2021 of the Provincial Civil Appellate High Court of the Western Province (Holden at Gampaha) in Case No. WP/HCCA/GPH/96/2018/F.

Sudath Sugeeshwara Bamunu-Arachchi,
No.28/B,
Napagoda,
Nittambuwa.

**SC APPEAL No. 80/2022
SC HCCA LA No. 274/2021**

Plaintiff

**Gampaha Civil Appellate
Case No.
WP/HCCA/GPH/96/2018/F**

**District Court of Attanagalla
Case No.712/L**

Vs.

Mahinda Dematagolla,
No. 68/10,
Kimbulhenawatta,
Nittambuwa.

Defendant

AND BETWEEN

Mahinda Dematagolla,
No. 68/10,
Kimbulhenawatta,
Nittambuwa.

Defendant-Appellant

Sudath Sugeeshwara Bamunu-
Arachchi,
No. 28/B,
Napagoda,
Nittambuwa.

Plaintiff-Respondent

AND NOW BETWEEN

Sudath Sugeeshwara Bamunu-
Arachchi,
No. 28/B,
Napagoda,
Nittambuwa.

Plaintiff-Respondent-Appellant

Mahinda Dematagolla,
No. 68/10,
Kimbulhenawatta,
Nittambuwa.

Defendant-Appellant-Respondent

Before

:

**P. Padman Surasena, J
Mahinda Samayawardhena, J
K. Priyantha Fernando, J**

Counsel :

Dinesh De Alwis instructed by Janakz Sandakelum for the Plaintiff-Respondent-Appellant.

S. N. Vijithsingh Lakneth Senevirathne for the Defendant-Appellant-Respondent

Argued on : 12.01.2024

Decided on : 01.02.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Appellant (hereinafter referred to as the “plaintiff”), by plaint dated 25.11.2010, instituted action against the Defendant-Appellant-Respondent (hereinafter referred to as the “defendant”) at the District Court of Attanagalla, praying *inter alia*, for a declaration of title to the premises described in the Schedule to the plaint and further for the ejectment of the defendant from the 2.8 perches of the said premises, which he is alleged to have encroached onto and that the possession of the said 2.8 perches be given to the plaintiff.
2. After trial, the learned District Judge pronounced Judgment on 26.11.2018 in favor of the plaintiff. Thereafter, the defendant filed an appeal against the Judgment of the learned District Judge, to the High Court of Civil Appeal of Gampaha, upon which the learned Judges of the High Court by their Judgment dated 26.07.2021, allowed the appeal setting aside the District Court Judgment which was entered in favour of the plaintiff, on the basis that the defendant had prescriptive title.

3. Being aggrieved by the decision of the learned Judges of the High Court of Civil Appeal, the plaintiff preferred the instant appeal, whereby this Court on 27.07.2022, granted leave to appeal on the questions of law set out in paragraph 11(a) and (b) of the petition dated 31.08.2021.

The said questions of law are as follows,

(a) *Did the Judges of the Provincial Civil Appellate High Court of the Western Province err, by determining that the starting point of the adverse possession of the disputed portion, began on the date the Respondent purchased Lot 48, when the Respondent had explicitly stated in his evidence that **he had no intention of possessing any extent more than 40 perches** he had purchased?*

(b) *Did the Judges of the Provincial Civil Appellate High Court of the Western Province err, by determining that the starting point of the adverse possession of the disputed portion, began on the date the Respondent purchased Lot 48, when the Respondent had stated in his evidence, **that even at the time of giving evidence he was not aware** that he was possessing an extent more than the 40 perches he had purchased?*

In addition, further leave was granted on the following question of law raised by the learned Counsel of the defendant,

“Whether a person who possesses land of another without being aware that it belongs to other person may acquire prescriptive rights in respect of that land in terms of Section 3 of the Prescription Ordinance?”

4. The main issues in the instant appeal are the starting point of adverse possession and whether a person

possessing land without knowledge that it belongs to another, or possessing another person's land without having an intention of possessing it as his own, could claim prescriptive title over that piece of land.

Facts in Brief:

5. On 01.06.2001 the plaintiff became the owner of lot No. 57 of Plan No. 1971 [marked as 'V1'] dated 19.07.1980, by Licensed Surveyor S. Welagedara, described in the schedule to the plaint by Deed No. 322 marked as ['P3'] at the trial, which as alleged by the plaintiff was a 40 perches land which he had brought from his predecessor who had purchased the said land from a land auction.
6. In the year 2009, the plaintiff required a loan from a bank, and for this reason, he had to resurvey the premises. After completion of the resurvey, it was discovered that the extent of the land lot No.57 was only 37.2 perches, 2.8 perches less than that it should be. It is alleged that the 2.8 perches had been encroached on by the defendant, who is the owner of Lot No.48 in the same Plan No. 1971 [marked as 'V1']. Both Lot No.48 and Lot No.57 are situated adjacent to each other. The land of the defendant is situated towards the North of the plaintiff's land.
7. The plaintiff alleges that the defendant has encroached into his land and therefore, instituted action at the District Court of Attanagalla to eject the defendant from the 2.78 perches portion of the plaintiff's land.
8. Upon issuing a commission by the learned District Judge the Court Commissioner upon surveying the land had discovered that the extent of encroachment is 1.70 perches. The Commissioner K.N.A.W.Suriyaarachchi's

plan No. 5121/e dated 15.11.2011 was marked as [‘P10’] at the trial.

9. The defendant takes the position that he did not encroach into the plaintiff’s land and that he had been using the land in the same manner since the day he had purchased it. The defendant purchased Lot No.48 from a land auction before the plaintiff bought his Lot No.57, with specific boundaries that had been shown by the vendor, and believed that his land contained 40 perches in extent as per the survey plan No. 1971 [marked as ‘V1’]. According to plan No.1971 [marked as ‘V1’], the extent of Lot No. 48 is 1 rood (40 perches).
10. The defendant contends that he had prescriptive rights over the said encroached 1.70 perches. The learned District Judge held that the defendant was not entitled to prescriptive title. However, the learned Judges of the High Court held that the defendant had prescriptive rights for the reason that he had been occupying the land for a time period above the 10 years stipulated by the Prescription Ordinance and that adverse possession had begun from the day he had purchased his land.

Answering to the questions of law:

11. Having heard learned Counsel for both parties at the hearing, and at the perusal of the petition of appeal, the written submissions, and the proceedings in the District Court, I shall now resort to answering the questions of law before this Court. Leave has been granted on three questions of law. As all the questions are interconnected, I will be addressing them simultaneously.

12. The learned Counsel for the plaintiff submitted that the learned High Court Judges were wrong when they held that the defendant was entitled to prescriptive title on the basis that adverse possession commenced from the date the defendant purchased his land.
13. The law on prescription is now governed by the **Prescription Ordinance No.22 of 1871 (as amended)**. This had been recognized by his Lordship, former Chief Justice Basnayake in the case of **Perera v. Ranatunge** **66 NLR 337 at p.339** where he held that,

“It is common ground that the Roman-Dutch Law of acquisitive prescription ceased to be in force after Regulation 13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole governing the acquisition of rights by virtue of adverse possession, and that the common law of adverse prescription is no longer in force except as respects the Crown.”

14. **Section 3 of the Prescription Ordinance No. 22 of 1871 (as amended)** provides,

“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...for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs..”

15. Pursuant to section 3, any person claiming prescriptive title must prove adverse possession for a period of ten years before the action was initiated.

16. Section 3 has further elaborated on the phrase “title adverse to or independent of possession” where it reads as follows,

“...(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 acknowledgement of a right existing in another person would fairly and naturally be inferred).

17. The learned Counsel for the plaintiff draws attention of the Court to the case of ***Jayasinghe Pathman v. Korale Kandanamge Somapala, SC Appeal 06/2014 SC Minute dated 19.11.2021*** to show the distinction between occupation and possession. The learned Counsel contends that the defendant was occupying the 1.70 perches of the land but he was not aware that he was in possession of that same piece of land. Hence, Counsel takes the view that without having intention of ousting the plaintiff, prescription does not start. During the hearing of this case, the learned Counsel for the plaintiff contended that mere possession of one’s land does not amount to adverse possession.

18. His Lordship Justice Canekeratne in the case of ***Fernando v. Wijesooriya [1947] 48 NLR 320*** pointed out on the issue of “adverse possession” that,

“It is the intention to claim the title which makes the possession of the holder of the land adverse; if it be clear that there is no such intention, there can be no pretence of an adverse possession”

His Lordship further elaborated that,

“There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner”

19. Therefore, upon considering the case of *Fernando v. Wijesooriya* (supra) it could be established that for the defendant to prove “adverse” possession, there should have been an intention by him to claim title to the land against its owner. The time period for adverse possession will only commence from the moment, the defendant intends to possess the land of the plaintiff as if he were the owner of it.
20. From the above case law authorities, it could be inferred that where there was possession by the defendant, though there is physical possession, but it had not been with the intention to hold it adverse to the owner, then prescription cannot take place.
21. The learned Counsel for the defendant submitted the case of *Ayanhamy v. Silva* 17 NLR 123 to show that a person who possesses a land of another without knowledge that it is not theirs can claim prescriptive title to that land.
22. The learned Counsel for the plaintiff draws the attention of the Court to the case of ***Prasanth and another v. Devarajan and Another, SC Appeal 163/2019, SC Minute dated 22.03.2021*** where his Lordship Mahinda Samayawardhena J. takes the position that prescription commences from the point adverse possession commences and not from the date the defendant came into possession.

His Lordship stated that,

“...The Defendants must establish a clear starting point known to the owner in order for the former to claim prescriptive possession against the latter. The prescriptive period of ten years begins to run only from that point and not from the date the Defendants came into possession.”

His Lordship further held that,

“...the proof of mere possession of the property for over ten years does not satisfy the requirements under section 3 of the Prescription Ordinance. The possession shall be “by a title adverse to or independent of that of the claimant or Plaintiff in the action.”

23. The learned Counsel for the plaintiff draws attention of the Court to the proceedings of the defendant's evidence dated 18.07.2018, found in page 157 of the Brief to show that the defendant has denied encroachment by saying that he was not aware that he was possessing a part of the plaintiff's land. The proceedings read as follows:

උ: මම දැන්නේ නෑ ඇත්ත වගයෙන්ම මගේ ඉඩමේ වැඩියෙන් තියෙනවා කියලා. මොකද පර්වස් 40 කොටස් තමයි කැඳුවේ. එනකොට මම දැන්නේ නෑ මගේ ඉඩමේ වැඩියෙන් තියෙනවාද කියලා.

පු: ඒ කියන්නෙන තමුන්ගේ ඉඩම පර්වස් 40 කට වඩා වැඩි ප්‍රමාණයක් තියෙනව කියලා තමුන් දැන්නේ නෑ?

උ: තවම දැන්නේ නෑ.

It could be observed that the defendant had no knowledge that he was in possession of the plaintiff's land which indicated that he had no intention of possessing the plaintiff's part of the land as an owner, therefore he cannot claim prescriptive title.

24. For the clear reasons stated above, it could be observed that the learned High Court Judges were wrong when they stated that adverse possession begins from the date the defendant purchased the land. In the instant case, it is clear that the defendant had not been aware that he was in possession of a portion of the plaintiff's land which as mentioned above indicates that he lacked the necessary intention to prove adverse possession. Thereby, the defendant shall not be entitled to prescriptive rights under the circumstances of this case. Therefore, the first two questions of law are answered in the affirmative. The question of law raised by the defendant is answered in the negative.
25. Hence, for the foregoing reasons, the judgment of the District Court is affirmed and the judgment of the High Court is set aside. The appellant is entitled to costs.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MAHINDA SAMAYAWARDHENA.

I agree

JUDGE OF THE SUPREME COURT