

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

**SC Appeal 06/2014**

**SC/HCCA/LA No: 136/12**

**SP/HCCA/GA/ 0115/2004/F**

DC Elpitiya Case No. 28/L

In the matter of an Application for leave to Appeal under and in terms of section 5C of the High Court of Provinces (Special Provisions) Act, No.19 of 1990 as amended by Act No. 54 of 2006

Jayasinghe Pathman  
Godamuna Road, Hittahatiya,  
Indipalegoda, Pitigagala

**Plaintiff**

**Vs.**

Korale Kandanamge Somapala  
Naranowita, Porowagama

**Defendant**

**Between**

Korale Kandanamge Somapala  
Naranowita, Porowagama

**Defendant-Appellant**

**Vs.**

Jayasinghe Pathman  
Godamuna Road, Hittahatiya,  
Indipalegoda, Pitigagala

**Plaintiff-Respondent**

**Now**

Jayasinghe Pathman  
Godamuna Road, Hittahatiya,  
Indipalegoda, Pitigagala

**Plaintiff-Respondent- Petitioner**

**Vs.**

Korale Kandanamge Somapala  
Naranowita, Porowagama

**Defendant-Appellant-Respondent**

**And Now**

Jayasinghe Pathman  
Godamuna Road, Hittahatiya,  
Indipalegoda, Pitigagala

**Plaintiff-Respondent-Petitioner**

**Vs.**

Korale Kandanamge Somapala(deceased)  
Naranowita, Porowagama

**Defendant-Appellant Respondent**

1. Korale Kankanamge Lal Pathmasiri  
Naranowita, Porowagama
2. Petikiri Koralalage Pemawathi  
Naranowita, Porowagama

**(Substituted)Defendant-Appellant-  
Respondents**

Before: B.P Aluwihare, PC, J.

L.T.B Dehideniya, J.

S. Thurairaja, PC, J.

Counsels: Lakshman Perera, PC, with Ms. Anjali Amarasinghe for the Plaintiff- Respondent-  
Appellant

Rohan Sahabandu, PC, with Ms. Hasitha Amarasinghe for Substituted Defendant-  
Appellant – Respondents

Argued on: 13.07.2020

Decided on:19.11.2021

**L.T.B. Dehideniya, J.**

Plaintiff – Respondent – Appellant (hereinafter sometime referred to as the Appellant) instituted an action by plaint dated 10<sup>th</sup> September 2001 seeking declaration of title and ejectment of the Defendant- Appellant – Respondent (hereinafter sometimes referred to as the Respondent) from the land called Kahamiyatota Addara Owita, morefully described in the schedule to the Plaint. The Appellant contested that the Respondent was in unlawful and forcible occupation in the said land. The Appellant produced proof of his title to the land in the form of the final decree in the District Court Balapitiya NP/3085 of 1979, whereby Korala Kankanamge Rosalin (Appellant’s Mother) got title to lot 5 in plan No.1946/A. Rosalin thereafter transferred title to the Appellant by Deed No.5103. Respondent denied the rights of the Appellant and claimed prescriptive rights by long, uninterrupted and adverse possession over ten years. Respondent’s position was that he is not a licensee, and that he had been living in the said land with his parents and even after he got married, he lived in the premises with his wife and specifically stated that he has been living in the premises for over 70 years. The District Court of Elpitiya delivered the judgement dated 09.12.2004 in favour of the Appellant holding that the action of Appellant being one of *rei vindicatio*, the Appellant having establish the paper title to the land, it is necessary to assess the rights claimed by the Respondent. Being dissatisfied by the said judgement the Respondent tendered an appeal there from to the High Court of Civil Appeal. Upon hearing the parties, the High Court of Civil Appeal delivered the judgement dated 28.02.2012 in favour of the Respondent, set aside the Judgement of District Court of Elpitiya and dismissed the action of the Appellant holding that the Respondent has proved the adverse possession to the land and established prescriptive rights against the Appellant. It is from the aforesaid judgement that this appeal is preferred.

This Court granted leave to appeal on the following questions of law;

- 1) Has the High Court of Civil Appeal failed to consider that once paper title became undisputed that the right to possess is presumed?
- 2) Has the High Court of Civil Appeal failed to distinguish between occupation and possession of the Defendant- Respondent?
- 3) Has the High Court of Civil Appeal misconstrued the principle laid down in [2002] 1 Sri L.R 148?

The Appellant's case is based on the ground that the Respondent was in occupation of the land in suit which the Appellant has the paper title, with the leave and licence given by the Appellant. In the original action, firstly the Learned District Judge examined the Appellant's title to the land and decided in respect of the evidence tendered by the parties that the Appellant has established the paper title to the land in suit. Appellant's mother 'Rosalin' acquired the title to the land on the final decree of the partition case in the District Court Balapitiya NP/3085 of 1979 marked as ௪௩.1. Accordingly, the said title rights have been conveyed to the Plaintiff by Deed No.5103 marked as ௪௩.2. Further, when the cross-examination was conducted Appellant's title to the land was admitted by the Respondent as well.

As per the aforesaid context, it is a settled law that in a *rei vindicatio* action, the defendant has no burden to prove anything until the plaintiff proves his title to the land. Once the paper title has proven, burden shifts to the defendant to prove that the defendant has obtain a title adverse and independent to the paper title of the plaintiff. The above legal principle has been discussed and accepted in a range of case law. As per the submissions of the Appellant, the learned High Court Judge has failed to consider the legal principal set out in *Leisa v. Simon* [2002] 1 Sri L.R 148

*Leisa v Simon* [2002] 1 Sri L.R 148 at p. 151 per Wigneswaran J.

*“Once the paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them. In fact,*

*the following dictum of Gratian, J. in Pathirana v. Jayasundera [58 NLR 169] at 177 became applicable”*

at p. 153

*“Their possession was presumed on proving paper title. The burden was cast on the defendants to prove that by virtue of an adverse possession they had obtained a title adverse to and independent of the paper title of the plaintiffs”*

A similar view was expressed in the case of *D.A Wanigaratne Vs Juwanis Appuhamy* 65 NLR 167

*D.A Wanigaratne Vs Juwanis Appuhamy* 65 NLR 167 at p.168 per Herat J.

*“It has been laid down by this court that in an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court prove that title against the Defendant in the action. The Defendant in a rei vindicatio action need not prove anything, still less his own title. The Plaintiff cannot ask for a declaration of title in his favour merely on the strength that the Defendant’s title is poor or not established. The plaintiff must prove and establish his title.”*

In light of the above legal principle, when considering the legal context of the present application, it is clear that the Learned District Judge correctly decided that the Appellant has established the paper title to the land. Further, when examining the Respondent’s evidence it appears that the Respondent has not claimed any title rights in the District Court Balapitiya partition action No. 3085, nor had he made any claim before the surveyor. The said evidence clearly demonstrates that the Respondent has accepted the Appellant’s title and has failed to adduce any clear evidence in contending Appellant’s title to the land.

The Respondent challenges the Appellant's paper title to the land and claimed prescriptive rights against the Appellant by long, uninterrupted and adverse possession. The Respondent's position is that as the Learned District Judge observed, the Appellant has failed to prove that the Respondent has reside in the said premises with the leave and license of the Appellant, in itself proves the uninterrupted, adverse possession. The Respondent contests that he had been living there with his parents, and even after he got married, he lived in the premises, with his wife and specifically stated that, he had been living in the premises for over 70 years and the premises has never been occupied by the Appellant and claimed all the improvements. The Respondent gave evidence himself and also produced the certified extracts of the electoral registers for the years from 1978.

The present law governing the term of prescription for immovable property is contained in Section 3 of the Prescription Ordinance No.22 of 1871. This provision declares the fundamental requirements of undisturbed, uninterrupted and adverse possession that must be met, where a party invokes the provision of Section 3 in order to defeat the title rights of the owner of the property.

### **Section 3**

*“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 favour 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 favour with costs..”*

Accordingly, when considering whether the Respondent has proved the prescriptive rights against the paper title of the Appellant, the Respondent contends that when the Learned District Judge decided that the Respondent was not in possession as a licensee, that itself proves Respondent’s adverse possession. The Learned High Court Judge agreed with the contention of the Respondent and held the same in the High Court Judgement dated 28.02.2012 marked as X-1. Nature of the essential qualification of adverse possession has been discussed in the case law jurisprudence. Thus, in the cases of ***Maduanwala Vs Ekneligoda*** (3 NLR 213) and ***Thillekaratne Vs Bastian*** (21 NLR 12) it has been held that for the purpose of these prescription cases the word " adverse " must, in its application to any particular case, be interpreted as occupation of land to which another person has title with the intention of possessing it as one's own.

***Maduwanwala Vs Ekneligoda*** (3 NLR 213) at p. 213, Bonser CJ, *held that a person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation. Bonser CJ further stated: “Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as the owner.”*

***Thillakeratne Vs Bastian*** (21 NLR 12) at p. 19-20 per Bertram CJ,

*“..The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession. The burden he must assume is, in fact, both definite and heavy, and the authorities have been accustomed to emphasize its severe nature.”*

In ***J.S.K Chelliah Vs M. Wijenathan*** (54 NLR 337) at p.342 per Gratien J,

*“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.”*

When observing the evidence in the present application, it clearly shows that Respondent and the Appellant's mother Rosalin was brother and sister and they were all living as one family in the said premises in the suit and the Respondent has continued possession merely as a family member, before and after the partition decree of 1979. The Respondent has tendered certified extracts from the electoral register from 1978 and called the retired Grama Niladhari to provide evidence to confirm that the Respondent has resided in the premises from 1963 to date, in order to prove his uninterrupted, undisturbed long possession for over 70 years. However, when carefully examining the aforesaid extracts from the electoral register, it appears that, the Respondent has become the “head of the household” in 1982, only after the death of his father, Korale Kankanmge Simon. Thus, it is clear to this court that, the Respondent is in an attempt to contend that, as the learned District Judge decided, the Appellant has failed to prove that the Respondent has reside in the said premises with the leave and license of the Appellant, in itself

proves the uninterrupted, adverse possession. However, when considering all the evidence presented in the case, it reveals that the premises in suit is the Respondent's ancestral home and he has been living in the said premises for over 70 years as a descendent.

A person who bases his title on adverse possession must show clear and incontrovertible evidence that his possession was hostile to the true owner of the property, where the property belongs to a family member, the presumption will be that it is "***permissive possession***" which is not in denial of the title of the family member who is the true owner of the property and is consequently not adverse to him/her. This presumption represents the interference that may be drawn in the context of the relationship of the parties. This principal of law is laid down in the case of ***de Silva Vs Commissioner General of Inland Revenue*** (1978) 80 NLR 292 In relation to the subject matter of the present application, it is clear to this court that Respondent's mere occupation of the ancestral home for decades as a descendent of the family does not prove adverse possession hostile to the true owner of the land in suit. Further, when considering the relationship between the parties, it appears that the Respondent being the brother of Rosalin, who was the original owner of the said property (Rosalin thereafter transferred title to the Appellant by Deed No.5103 and Respondent is the uncle of the Appellant) is in "permissive possession" which is not denial of the title of the sister and is not adverse to her.

***de Silva Vs Commissioner General of Inland Revenue*** (1978) 80 NLR 292 at p.295-296 per Sharvananda J.

*"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.”*

In regard to the Respondent's claim of prescriptive rights, mode of entry of the Respondent's into the subject matter is quite clear. The Respondent has started residing in the said premises as a descendent of the family and with the consent of then owners and his sister (after getting title to lot 5 in plan No.1946/A in the final decree in the District Court Balapitiya NP/3085 of 1979). It is well established legal principal that when a person enters into occupation, he is precluded from setting up title by prescription without establishing a change of character in which he began his occupation and an overt act or something similar indicating the intention to possess adversely to the owner. This principle of law was laid down in the case of **Naguda Marikkar Vs Mohammadu** (7 NLR 91) and **Orloff vs Grebe** (10 NLR 183). The Respondent states that Rosalin, the sister moved out when she got married in 1963 and he has been in the occupation in the premises since then. However, it is clear to this court that, a sibling leaving the ancestral home based on the factor of marriage is not at all sufficient proof to establish a

change of character in which the Respondent began his occupation and an overt act or something similar indicating the intention of adverse possession.

With the perusal of the factual evidence and case laws pertaining to the present application, it is clear that, the Respondent has been residing in the premises as a mere occupant and a close relative of the Appellant. Law draws a distinction between possession and occupation. Mere occupation of another's property is not by itself construed as "possession" in the eyes of law. For an occupation of another's property to amount to possession in the eyes of law is occupation with the intention of holding the land as the owner. Therefore, the Respondent has not satisfied Court that he in fact had adverse possession in the land in suit.

In ***Sirajudeen and others Vs. Abbas*** [1994] 2 Sri L.R 365 at p.371 per G.P.S de Silva CJ,

*"..Mr. Kanag-lsvaran for the plaintiff respondent relevantly cited the following passage 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 ***Hassan Vs. Romanishamy*** 66 C.L.W 112, it was held that;

*"Mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and also vegetable", are not sufficient to entitle him to a decree under Section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purpose of this section"*

When considering whether the High Court of Civil Appeal failed to consider that once paper title became undisputed that the right to possess is presumed, it is clear to this court that as per the legal principles laid down by a range of case law jurisprudence, the Appellant's possession was presumed on proving his paper title. Consequently, the burden was cast on the Respondent to prove that by virtue of an adverse possession that the Respondent had obtained a title adverse to and independent of the paper title of the Appellant. However, when examining all the factual and legal evidence in the present application, it is quite clear that the Respondent has failed to prove his adverse possession hostile to the Appellant. Therefore, the Respondent's mere long possession and cultivation of Appellant's property has no legal validity upon claiming Prescriptive rights.

Further, the learned High Court judge's conclusion that, when the Learned District Court Judge decided that Respondent was not there as a licensee, that itself prove his adverse possession is questionable. As discussed earlier, when deciding one's Prescriptive rights against another's paper title the court must be aware of the distinction between 'Occupation' and 'Possession'. Mere occupation of a premises for a long time does not establish a true possession. Occupation with the intention of holding the property as owner is considered as true possession. In regarding to the present application, it is obvious that, the Respondent living in his ancestral home as a descendent of the family, with the consent of his sister for over 70 years does not make him the true owner of the property, but a '*Permissive Possessor*'. Thus, the Respondent is not entitled to claim possessory rights against the Appellant.

In my view in the present application, there is a significant absence in clear and specific evidence on such acts of possession as would entitle the Respondent to a decree in favour in terms of Section 3 of the Prescription Ordinance. The Learned district Judge has very clearly held in his judgement that mere long occupation and cultivation of the land does not establish Prescriptive title to the land in suit.

I answer the questions of law as follows;

- 1) Yes
- 2) Yes
- 3) Yes

I allow the Appeal and set aside the judgement of the High Court and affirm the Judgement of the District Court. The Appellant is entitled for costs of this court as well the courts below.

**Judge of the Supreme Court**

**B.P Aluwihare, PC, J.**

**Judge of the Supreme Court**

**S. Thurairaja, PC, J.**

**Judge of the Supreme Court**

