

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

In the matter of an appeal against the judgment of the
Court of Appeal in CA Appeal No. 1063/98(F) dated 27.9.2012

Nuwarapakshage Neelakanthi alias Baby
Wanduradeniya, Damunupla

Plaintiff

SC Appeal 129/2013
SC/SPL/LA/247/2012
CA 1063/98 (F)
DC Kegalle 4629/L

Vs

Nuwarapakshage Balasuriya
Wanduradeniya, Damunupla

Defendant

AND
Nuwarapakshage Balasuriya
Wanduradeniya, Damunupla

Defendant-Appellant

Vs
Nuwarapakshage Neelakanthi alias Baby
Wanduradeniya, Damunupla

Plaintiff-Respondent

And Now Between

Nuwarapakshage Balasuriya
Wanduradeniya, Damunupla

Defendant-Appellant-Petitioner-Appellant

Vs
Nuwarapakshage Neelakanthi alias Baby
Plaintiff-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
Priyantha Jayawardena PC J
Nalin Perera J

Counsel : Gamini Hettiarachi for the Defendant-Appellant-Petitioner-Appellant
Priyantha Alagiyawanna with Isuru Weerasuriya for the
Plaintiff-Respondent-Respondent-Respondent

Argued on : 8.3.2017

Written Submission

tendered on : By the Appellant on 27.3.2014
By the Respondent on 8.1.2014

Decided on : 30.6.2017

Sisira J De Abrew

This is an appeal filed by the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) against the judgment of the Court of Appeal wherein it affirmed the judgment of the learned District Judge who held in favour of the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent). This court by its order dated 20.9.2013 granted leave to appeal on the following questions of law.

1. Whether the Judge of the Court of Appeal and the learned trial Judge have failed to properly evaluate the legal principle that in a rei vindicatio action the burden is on the Plaintiff to prove his title?
2. Whether the Judge of the Court of Appeal and the learned trial Judge have failed to properly analyze the fact that and thereby erred in law as the Petitioner (the Defendant-Appellant) has proved his prescriptive possession and title by cogent and independent evidence?
3. Is the Plaintiff-Respondent who had proved for declaration of title to the entire property entitled to a declaration of title to eject a trespasser on admission of the fact that he is entitled to 5/6 of the property?

The 1st and the 2nd question of law were raised by the Defendant-Appellant whilst the 3rd question of law by the Plaintiff-Respondent.

The Defendant-Appellant, in his evidence, claimed prescriptive title. One of the important questions that must be decided in this case is whether the Defendant-Appellant acquired prescriptive title to the property described in the plaint or not. I now advert to this question. It is an undisputed fact that the original owner of the property was Baalaya. The Defendant-Appellant admitted in evidence that his father Siriya came to occupy the property in 1970 with leave and licence of Baalaya; that he too came to this property with his father; and that after his father's death in 1974 he continued to possess the land and constructed a house in the land. If his evidence is accepted, it has to be presumed that act of continuation of possession of the property by him and construction of the house was on the basis of earlier permission granted to his father by Baalaya. Learned counsel for the Defendant-Appellant admitted at the hearing before us that Baalaya, the original owner, died in 1987. The Defendant-Appellant claims that after the death of his

father he continued his occupation in the property. His evidence shows that he continued to occupy the property on the permission granted to his father by Baalaya (pages 129 and 132 of the brief). Thus when the above evidence is considered, it can be concluded that the Defendant-Appellant continued his occupation in the property with leave and license of the original owner Baalaya. Baalaya leased the property to the Plaintiff-Respondent for a period commencing from 14.10.1971 to 11.10.1978 (vide P11 and P11a).

Baalaya's children by deed No.5017 dated 27.10.1990 attested by Chandra Aryaratne sold 5/6th share of the property to the Plaintiff-Respondent. The case was filed in the District Court in March 1991. Thus even if his evidence is considered to be true, his possession in the property (after the Plaintiff-Respondent became the owner) is only for a period of 1 ½ years. Learned counsel for the Defendant-Appellant contended that leasing out of property by Baalaya to the Plaintiff-Respondent could be considered as commencement of adverse possession by the Defendant-Appellant against Baalaya and the Plaintiff-Respondent. When Baalaya leased out the land he was the owner. Even at this time the Defendant-Appellant was a licensee of Baalaya. Thus how could the Defendant-Appellant commence adverse possession against Baalaya. In my view there is no merit to be considered in the above contention.

In the present case, the Defendant-Appellant and his father had commenced possession of the property with leave and license of the original owner. Now he claims prescription. If a person commenced his possession in a property with leave and licence of the owner can he claim prescriptive title against the owner and/or his children? In finding an answer to this question I would like to consider certain judicial decisions.

In the case of De Soysa Vs Fonseka 58 NLR 501 this court held as follows.

“When a user of immovable property commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.”

In the case of Siyaneris Vs Jayasinghe Udenis de Silva 52 NLR 289 Privy Council held as follows. “If a person gets 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.”

In Reginald Fernando Vs Pabalinhamy and Others [2005] 1SLR 31 this court observed the following facts.

“The plaintiff-appellant (“the plaintiff”) instituted action against the original defendant (“the defendant”) for ejectment from a cadjan shed where the defendant and his father had resided for four decades. The evidence proved that the defendant’s father J was the carter under the plaintiff’s father. After the death of J the defendant continued to reside in the shed as a licensee. On 22.03.1981 the plaintiff had the land surveyed by a surveyor; and on 06.01.1987 sent a letter to the defendant through an attorney-at-law calling upon the defendant to hand over the vacant possession of the shed which as per the said letter the defendant had been occupying as a licensee. The defendant failed to reply that letter without good reason for the default. The defendant also falsely claimed not to have been aware of the survey of the land. In the meantime the

plaintiff had been regularly collecting the produce of the land. The defendant claimed prescriptive title to the land. The District Judge gave judgment for the plaintiff. This was reversed by the Court of Appeal.”

This Court held as follows.

“Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land. ‘The Court of Appeal erred in holding that the District Court had entered judgment in favour of the plaintiff in the absence of sufficient evidence to prove that the plaintiff was either the owner or that the defendant, was his licensee”

Applying the principles laid down in the above judicial decisions, I hold that when a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property. If such a person (licensee) wants to claim prescription, he must place clear and unmistakable evidence regarding the commencement of an adverse possession against the owner or his heirs. The period that he occupied as a licensee cannot be considered to prove his alleged prescription. The above principle applies to the heirs of the licensee too. For the above reasons, I hold that the Defendant-Appellant in this case is not entitled to claim prescriptive title. For the above reasons, I answer the 2nd question of law in the negative.

Learned counsel for the Defendant-Appellant submitted that the Plaintiff-Respondent by Deed No.5017 attested by Chandra Aryaratne on 27.10.1990 had purchased 5/6th share of the property from the children of Baalaya and that

therefore the Plaintiff-Respondent is not the owner of the entire property. He therefore contended that the Plaintiff-Respondent cannot ask for a declaration of title to the entire property. I now advert to this contention. In finding an answer to the above question, I would like to consider a passage of the judgment of Dr.Justice Bandaranayake in Attanayake Vs Ramyawathi [2003] 1SLR 401 which reads as follows.

"I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for a lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief."

In Premaratne Menike Vs Indra Irangani Kumari SC Appeal131/2009-decided on 12.7.2011 Justice Thilakawardene held as follows.

"The fact that the appellant has asked for greater relief than he is entitled to should not prevent him from getting the lesser relief which he is entitled to especially as he has discharged his burden of proving co-ownership of the allotment of land."

In my view when a plaintiff who has asked for a bigger share proves by evidence that is entitled only to a lesser share the court should make an order allocating the lesser share to him. His claim for a bigger share should not operate as a bar for him to get a lesser share because he has, by evidence, proved his entitlement to the lesser share. In the present case, according to the evidence led at the trial, the Plaintiff-Respondent is only entitled to 5/6th share of the land but has asked for declaration of title to the entire land. For the above reasons, I hold that

the Plaintiff-Respondent is entitled to get a declaration for 5/6th share of the land. For the above reasons, I reject the above contention of learned counsel for the Defendant-Appellant.

Now I consider the 3rd question of law which reads as follows.

“Is the Plaintiff-Respondent who had proved for declaration of title to the entire property entitled to a declaration of title to eject a trespasser on admission of the fact that he is entitled to 5/6 of the property?”

I have earlier held that the Plaintiff-Respondent is entitled to get a declaration for 5/6th share of the land thus it is clear that the Plaintiff-Respondent is a co-owner of this land. Earlier I have held that the Defendant-Appellant was not entitled to the prescriptive title. The Defendant-Appellant who occupies the land has challenged the title of the Plaintiff-Respondent. When Defendant-Appellant who is not entitled to prescriptive title challenges the title of the Plaintiff-Respondent, he becomes an unauthorized occupier of the land and gains the status of a trespasser. Now the question that must be considered is whether a co-owner is entitled to eject a trespasser. In finding an answer to this question I would like to consider the judgment of this court in *Harriette Vs Pathmasiri [1996] 1SLR 258* wherein this court held as follows.

“Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejection of the trespasser from the whole land because the owner of an undivided share has an interest in every part and portion of the entire land.”

It is a commonsense principle that a co-owner has an interest in every part of the entire land. Thus, when a trespasser enjoys the fruits of the property the co-owner’s rights are affected and he becomes entitled to eject the trespasser.

When I consider the above legal literature, I hold that a co-owner of a land is entitled to eject a trespasser from the land. For the above reasons, I answer the 3rd question of law as follows. The Plaintiff-Respondent who had prayed for a declaration of title to the entire property is entitled to a declaration to eject a trespasser on admission of the fact that he is entitled to 5/6th share of the property.

In view of the conclusion reached above, the 1st question of law does not arise for consideration.

For the above reasons I affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court

Nalin Perera J

I agree.

Judge of the Supreme Court