

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

In the matter of an appeal

SC. Appeal No. 194/2012

SC. HC. CA. LA. No. 535/2011

(deceased) 1. Paththinikuttige Anthony Nonis
No. 162, Seththappaduwa,
Pamunugama.

Appeal No.
WP/HCCA/GPH/102/01 (F)

DC. Negombo Case
No. 3329/L

1a. Paththinikuttige Mary Bernadette
Fernando

1b. Baddeliyanage Don Ruphus

Both of No. 149, Seththappaduwa,
Pamunugama.

(deceased) 2. Paththinikuttige Bridget Nonis
No. 162, Seththappaduwa,
Pamunugama.

Plaintiffs

Vs.

1. Ranaweera Arachchige Dona Rita
Resiya

2. Hettiarachchige Don Ignatius Glennie

3. Hettiarachchige Godfrey

4. Hettiarachchige Ranjith

All of No. 196, Rajawatte,

Pamunugama.

Defendants

AND

- 1a. Paththinikuttige Mary Bernadette
Fernando
- 1b. Baddeliyanage Don Ruphus
Both of No. 149, Seththappaduewa,
Pamunugama.

Plaintiff-Appellants

Vs.

(deceased)

1. Ranaweera Arachchige Dona Rita
Resiya

- 1a. Philip Neri Hettiarachchi
No. 196, Rajawatta,
Seththappaduwa,
Pamunugama.

2. Hettiarachchige Don Ignatius Glennie

3. Hettiarachchige Godfrey

(deceased)

4. Hettiarachchige Ranjith

All of No. 196, Rajawatte,
Pamunugama.

- 4a. Arachchige Rose Mary Nirmala
No.301A, Bollathe, Ganemulla.

Defendant-Respondents

AND NOW BETWEEN

- 1a. Philip Neri Hettiarachchi
No. 196, Rajawatta,
Seththappaduwa,
Pamun
2. Hettiarachchige Don Ignatius Glennie
3. Hettiarachchige Godfrey
Both of No. 196, Rajawatte,
Pamunugama.

Defendant-Respondent-Petitioners

Vs.

- 1a. Paththinikuttige Mary Bernadette
Fernando
- 1b. Baddeliyanage Don Ruphus
Both of No. 149, Seththappaduwa,
Pamunugama.

Plaintiff-Appellant-Respondents

- 4a. Arachchige Rose Mary Nirmala
No. 301A, Bollathe,
Ganemulla.

Defendant-Respondent-Respondent

Before : Sisira J. de Abrew, J.
Prasanna Jayawardena, PC, J. &
L. T. B. Dehideniya, J.

Counsel : H. Withanachchi with Anuradha Weerakkody for the

Defendant-Respondent-Appellants.

S. A. D. S. Suraweera for the Substituted Plaintiff-
Appellant-Respondents.

Argued on : 02.10.2018

Decided on : 03.12.2018

Sisira J. de Abrew, J.

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action bearing No.3329/L in the District Court of Negombo against the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) for a declaration of title to the land described in the plaint (Dhangahawathukabella). The learned District Judge after trial by his judgment dated 2.4.2001 dismissed the case of the Plaintiff. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 19.8.2011 set aside the judgment of the learned District Judge and entered judgment in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment the Defendant-Appellant has appealed to this court and this court by its order dated 5.11.2012 granted leave to appeal on questions of law stated in paragraphs 25(i),(ii),(iii),(v),(vi) and (vii) of the Petition of Appeal dated 16.12.2011 which are set out below.

1. Did the High Court err in law by misconstruing the principles laid down in Sirajudeen Vs. Abbas in determining the acquisition of prescriptive rights claimed by the Plaintiffs?

2. Were the learned Judges of the High Court in error by the application of the starting point of the acquisition of prescriptive rights in favour of the Plaintiffs?
3. Has the High Court misdirected itself by holding that the 1st Plaintiff commenced his possession of the land in suit from the day the same was mistakenly transferred to the Defendants?
4. Did the High Court err in law by reversing the findings of the learned Trial Judge arrived at against the Plaintiffs on the question of prescription?
5. Has the High Court erred in law by holding that the Plaintiffs had established adverse possession against the Defendants so as to acquire the corpus by way of prescription?
6. Did the learned High Court Judges err with regard to the burden of proof by casting the burden on the Defendants to establish their prescriptive claim?

Facts of this case may be briefly summarized as follows.

It is undisputed that nine lands including a land called Dhangahawathukabella which is the subject matter of this case and a land called Kadolgahawatta had been transferred to Plaintiff Anthony Nonis (now deceased) by deed No 815(P1) dated 12.2.1960 by RA Danial Fernando, HD Philip Neri, and Justin Hamy. Plaintiff-Respondent claimed that Anthony Nonis by deed No 818 (V1) dated 1.3.1960 transferred seven (7) lands out of nine lands referred to in deed No.815 to Rita Resiya (the 1st defendant) , the wife of Philip Neri keeping the land called Dhangahawathukabella and the land called Kadolgahawatta with Anthony Nonis. Thus Plaintiff-Respondent and his heirs were under honest belief that they were

the owners of the said two lands. Although the Plaintiff-Respondent and his heirs thought that lands called Dhangahawathukabella and the land called Kadolgahawatta had not been transferred to the 1st defendant, the deed No 818 (V1) dated 1.3.1960 reveals that the said two lands had been transferred to the 1st defendant. But the Plaintiff-Respondent claimed that Anthony Nonis and his heirs (the wife and children) possessed these two lands from March 1960 onwards on the basis that they were the owners of the two lands. Most important question that must be decided in this case is whether Plaintiff-Respondent and his heirs have acquired prescriptive title to these two lands in terms of Section 3 of the Prescription Ordinance. Section 3 of the Prescription Ordinance reads as follows.

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:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

In terms of Section 3 of the Prescription Ordinance, a person who claims prescription should prove the following ingredients.

1. Uninterrupted possession of the property.
2. Undisturbed possession of the property.
3. Adverse possession or independent possession of the property.

for a period of ten years.

A claimant who claims prescriptive title will be successful only if he proves the above ingredients.

1st and 2nd Ingredients are supported by the judicial decision in the case of Fernnado Vs Wijesooriya 48 NLR 320 at pages 325 and 326 wherein Canekeratne J observed thus:

“Another essential requisite to constitute such an adverse possession as will be of efficacy under the statute is continuity; and whether a possession is " undisturbed and uninterrupted " depends much upon the circumstances. If the continuity of possession is broken before the expiration of the period of time limited by the statute, the possession of the true owner is restored; in such a case to gain a title under the statute a new adverse possession for the time limited must be had.”

In the present case, has the Plaintiff-Respondent enjoyed uninterrupted and undisturbed possession of the property in dispute (land called Dhangahawathukabella) for a period of ten years. Lucia Fernando who is the wife of Plaintiff Anthony Nonis in her evidence at pages 163 and 164 states that her husband executed deed No 818(V1) dated 1.3.1960 and from 1.3.1960 she and her husband were possessing the lands called Dhangahawathukabella and Kadolgahawatta till 25.3.1983 without any dispute. The sons of the 1st defendant on 25.3.1983 came and disturbed their possession to the lands. The case was filed in August 1984. The 1st defendant in her evidence at page 323 states that she even does not know the names of the said two lands. The above evidence clearly demonstrates that Plaintiff Anthony Nonis and his wife have had uninterrupted and undisturbed possession of the property in dispute for a period of 23 years.

The next question that must be considered is whether possession of the property in dispute by Plaintiff Anthony Nonis and his wife was an adverse possession. I now advert to this question. To claim prescriptive title under Section 3 of the Prescription Ordinance, the claimant's possession to the property should be an adverse possession or independent possession. This is one of the conditions that should be proved by the claimant. In this connection, I would like to consider certain judicial decision. In *Fernnado Vs Wijesooriya* 48 NLR 320 at pages 325 Canekeratne J observed thus:

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. 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. It is necessary to inquire in what manner the person who had been in possession during the time held it, if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse.

In *De Silva Vs Commissioner General of Inland Revenue*, 80 NLR 292 it was held as follows:

“Where property belonging to the mother is held by the son the presumption will be that it is permissive possession which is not in denial of the title of the mother and is consequently not adverse to her.”

In the case of *Seeman Vs David* [2000] 3 SLR 23 wherein His Lordship Justice Weerasuriya held as follows. “The proof of adverse possession is a condition precedent to claim prescriptive rights”.

Considering the above legal literature I hold that in order to prove adverse possession the claimant must prove that he possessed the property adverse to the original owner

Therefore it is seen that if a person, who claims prescription in terms of Section 3 of the Prescription Ordinance, possesses the property with a secret intention his possession cannot be considered as an adverse possession and as such he is not entitled to succeed in a claim of prescription. Further I hold that if a person who knows that he is not the owner of a property starts possessing the property with a secret intention that he would be able to claim prescription at the end of ten years, such a person is **not** entitled to claim prescription under Section 3 of the Prescription Ordinance. This view is supported by the following judicial decisions. In *Madunawala Vs Ekneligoda* 3 NLR 213 wherein Bonser CJ held as follows:

“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, C.J. further observed thus:

“Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as owner.”

In Corea Vs Appuhamy 15 NLR 65 Privy Council held:

A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or some thing equivalent to ouster could bring about that result.

I further hold that if a person possesses a land with leave and licence of the owner, such a possession is not adverse possession. This view is supported by judicial decisions in *De soysa vs Fonseka* 58 NLR 501 and *Siyaneris Vs Jayasinghe Udenis de Silva* 52 NLR 289

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 the case of Navaratne Vs Jayatunga 44 NLR 517 Howard CJ held thus:

“Where a person enters into occupation of property belonging to another with the latter's permission he cannot acquire title to such property by prescription unless he gets rid of his character of licensee by doing some overt act showing an intention to possess adversely.

As I pointed out earlier Anthony Nonis's wife Lucia Fernando in her evidence stated that they possessed the land in dispute for a period of 23 years without any dispute from 1.3.1960. She at page 202 states that she planted 40 coconut plants in this land. As I pointed out earlier, the 1st defendant in her evidence states that she even does not know the name of the lands. The above evidence clearly establishes that the Plaintiff-Respondent has possessed the land in dispute on the honest belief that he is the owner of the land and that possession by the Plaintiff-Respondent was an adverse possession.

For the above reasons, I hold that the Plaintiff-Respondent has proved undisturbed, uninterrupted and adverse possession for a period of 23 years; that he has proved the necessary ingredients set out in Section 3 of the Prescription Ordinance and that the Plaintiff-Respondent is entitled to succeed in this case. For the aforementioned reasons, I answer the above questions of law in the negative. For the above reasons, I affirm the judgment of the learned Judges of the Civil Appellate High Court dated 8.11.2011 and dismiss this appeal with costs. The Judges of the Civil Appellate High Court were correct when they entered judgment in favour of the Plaintiff-Respondent. The Plaintiff-Respondent

is entitled to judgment in this case. The learned District Judge is directed to enter judgment accordingly.

The Plaintiff-Respondent is entitled to costs in all three courts.

Appeal dismissed.

Judge of the Supreme Court.

Prasanna Jaywardena PC J

I agree.

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.