

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

In the matter of an Appeal

Samarasinghe Dassanayakege Babun Nona alias  
Dassanayakege Babun Nona Samarasinghe  
No.509/6, Namal Mawatha,  
Habarakada, Homagama.

**Plaintiff**

SC Appeal 197/2012  
SC/(HC)CALA/81/2012  
WP/HCCA/AV/1058/2008(F)  
DC Homagama Case No.2042/L

Vs

1. Kalyanawathi Wickramasinghe
2. Kanduboda Arachchige Rajeewa Kumara Perera  
No.269/3, Habarakada, Homagama.

**Defendants**

**AND BETWEEN**

1. Kalyanawathi Wickramasinghe
2. Kanduboda Arachchige Rajeewa Kumara Perera  
No.269/3, Habarakada, Homagama.

**Defendant-Appellants**

Samarasinghe Dassanayakege Babun Nona alias  
Dassanayakege Babun Nona Samarasinghe  
No.509/6, Namal Mawatha,  
Habarakada, Homagama.

Vs

**Plaintiff-Respondent**

**AND NOW BEWEEN**

Samarasinghe Dassanayakege Babun Nona alias  
Dassanayakege Babun Nona Samarasinghe  
No.509/6, Namal Mawatha,  
Habarakada, Homagama.  
(The Plaintiff died before the Judgment delivered in the  
District Court and now her son was substituted in her place)

**Deceased Plaintiff**

Upali Dayaratne Perera  
No.269/2, Habarakada, Homagama.

**Substituted Plaintiff-Respondent-Petitioner-Appellant**

Vs

1. Kalyanawathi Wickramasinghe
2. Kanduboda Arachchige Rajeewa Kumara Perera  
No.269/3, Habarakada, Homagama.

**Defendant-Appellant-Respondent-Respondents**

Before : Eva Wanasundera PC J  
Sisira J de Abrew J  
Nalin Perera J

Counsel : Ranjan Suwadaratne PC with Sunari Thennakoon for the  
Substituted Plaintiff-Respondent-Petitioner-Appellant  
Kamal Dissanayake with Sureni Amarathunga for the  
Defendant-Appellant-Respondent-Respondents

Argued on : 19.1.2018

Written Submission  
Tendered on : 7.5.2013 by the

Substituted Plaintiff-Respondent-Petitioner-Appellant  
1.2.2013 by the Defendant-Appellant-Respondent-Respondents

Decided on : 21.6.2018

**Sisira J de Abrew J**

The Plaintiff-Respondent-Petitioner-Appellant hereinafter referred to as the Plaintiff-Appellant) filed this case against the Defendant-Appellant-Respondent-Respondents (hereinafter referred to as the Defendant-Respondents) for a declaration of title. The learned District Judge after trial decided the case in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Respondents appealed to the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 23.1.2012 set aside the judgment of the learned District Judge and held in favour of the Defendant-Respondents. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 9.11.2012, granted leave to appeal on questions of law set out in paragraphs 32 (c) and 32 (d) of the Petition of Appeal dated 5.3.2012 which are set out below.

1. Have the Judges of the Civil Appellate High Court misdirected themselves by failing to consider the fact that the learned Trial Judge before whom the factual evidence was led has duly evaluated the evidence and arrived at her judgment dated 23.1.2012?
2. Have the Judges of the Civil Appellate High Court misdirected themselves by arriving at the finding that the deceased Plaintiff has never disputed her deserted husband's ownership despite of the strong and cogent evidence to the effect that the deceased Plaintiff's husband has completely deserted the

deceased Plaintiff and the child and was living with another woman in Thanamalwila area in arriving at their final decision?

The Defendant-Respondents have taken up the position that David Perera who is the husband of the Plaintiff-Appellant by deed No 961 dated 12.10.1991 marked V1 transferred the property in question to Jamis Siriwardena; that Jamis Siriwardena by deed No.1024 dated 8.2.1993 marked V3 transferred the property to the 1<sup>st</sup> Defendant-Respondent; and that the 1<sup>st</sup> Defendant-Respondent is the owner of the property. The Defendant-Respondents sought a declaration that the 1<sup>st</sup> Defendant-Respondent is the owner of the property.

The Plaintiff-Appellant claims title to the property by prescription. Has she obtained the prescriptive title to the property in question? If this question is answered in the negative her case should fail. I now advert to this question. The plaintiff is the wife of David Perera. Their marriage has not been dissolved. The following evidence given by the Plaintiff-Appellant is important to decide the above question.

Q. Your husband gave the land and the house for you to maintain yourself.

A. Yes.

Q. You possess the property on the title of your husband.

A. I possess the property.

The above evidence demonstrates that her possession is not an adverse possession. Under Section 3 of the Prescription Ordinance for a person to claim prescriptive title his or her possession should be an adverse possession. Since the possession of the Plaintiff-Appellant is not adverse possession she is not entitled to

claim prescriptive title to the property. Further when wife possesses a property of her husband she cannot claim prescriptive title under Section 3 of the Prescription Ordinance against her husband because such a possession cannot be considered to be an adverse possession against her husband. In the present case, the Plaintiff-Appellant is the wife of David Perera who is the owner of the property. David Perera transferred the property to Siriwardena on 12.10.1991. Thus the declaration of title Deed No. 333 dated 1.2.1993 written by Plaintiff-Appellant has been written without her acquiring the prescriptive title. The case was filed in the District Court on 25.2.1993. When I consider all the above matters, I hold that the Plaintiff-Appellant has not acquired the prescriptive title to the property and that Plaintiff-Appellant has not proved that he is the owner of the property. This is a rei vindicatio action. In an action for rei-vindicatio the plaintiff must prove that he is the owner of the property. This view is supported by the following judicial decisions.

In *De Silva Vs Gunatilake* 32 NLR 217 at 219 Macdonell CJ held thus: “There is abundant authority that, a party claiming a declaration of title must have title himself. ... The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.”

In *Peiris Vs Savunahamy* 54 NLR 207 Dias SPJ (with whom Justice Gratiaen agreed) held thus:

“Where in an action for declaration of title to land, the Defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium.”

In *Abeykoon Hamine Vs Appuhamy* 52 NLR 49 Dias SPJ (with whom Jayatilake CJ agreed) observed thus:

“This being action for rei vindicatio, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute.”

In *Wanigaratne Vs Juwanis Appuhamy* 65 NLR 167 Supreme Court held thus: “In an action rei vindicatio the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established.”

Since the Plaintiff-Appellant has not proved that she is the owner of the property, she is not entitled to succeed in her action filed against the Defendant-Respondents. The Defendant-Respondents have proved his title. Considering all the above matters, I answer the above questions of law in the negative. For the above reasons, I refuse to interfere with the judgment of the Civil Appellate High Court, affirm the judgment of the Civil Appellate High Court and dismiss this appeal. Considering the facts of this case, I do not make an order for costs.

Judge of the Supreme Court.

**Eva Wanasundera PC J**

I agree.

Judge of the Supreme Court.

**Nalin Perera J**

I agree.

Judge of the Supreme Court.

