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

In the matter of an appeal

1. Maththumagala Kankanamalage Victor Alwis
2. Mallawaarachchige Nalani Chandralatha
3. Maththumagala Kankanamalage Dushantha Sanjeewa

All of No.191/29 Maladolawatta,
Ihala Biyanwala, Kadawatha

Plaintiff

SC Appeal 5/2013
SC Leave to Appeal Application
No. SC/HCCA/238/12
High Court Civil Appeal Case
No.WP/HCCA/GPH/18/2007(F)
DC Gampaha 38626/Land

Vs

Maththumagala Kankanamalage
Newton Alwis
No.589, Kandy Road, Eldeniya,
Kadawatha

Defendant

AND THEN BETWEEN

Maththumagala Kankanamalage
Newton Alwis
No.589, Kandy Road, Eldeniya,
Kadawatha

Defendant-Appellant

Vs

1. Maththumagala Kankanamalage Victor Alwis
2. Mallawaarachchige Nalani Chandralatha
3. Maththumagala Kankanamalage Dushantha Sanjeewa

All of No.191/29 Maladolawatta,
Ihala Biyanwala, Kadawatha

Plaintiff-Respondents

AND NOW BETWEEN

1. Mallawaarachchige Nalani Chandralatha
2. Maththumagala Kankanamalage Dushantha Sanjeewa

All of No.191/29 Maladolawatta,
Ihala Biyanwala, Kadawatha

Plaintiff-Respondent-Petitioner-Appellants

Vs

Maththumagala Kankanamalage
Newton Alwis
No.589, Kandy Road, Eldeniya,
Kadawatha

Defendant-Appellant-Respondent-Respondent

Before : Nalin Perera CJ
Sisira J de Abrew J
Murdu Fernando PC J

Counsel : Migara Dass for the Plaintiff-Respondent-Petitioner-Appellants

P.K. Prince Perera for the Defendant-Appellant-Respondent-Respo
Argued on : 12.6.2018

Written Submission
Tendered on : 25.1.2018 by the Plaintiff-Respondent-Petitioner-Appellants
19.1.2018 by the Defendant-Appellant-Respondent-Respondent

Decided on : 03.12.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court wherein the learned Judges of the said Court set aside the judgment of the District Court and held in favour of the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent). Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Respondent-Petitioner-Appellants (hereinafter referred to as the Plaintiff-Appellants) have appealed to this court. This court by its order dated 18.1.2013 granted leave to appeal on questions of law set out below.

1. The learned Judges of the Civil Appellate High Court have misdirected themselves in fact and in law.
2. The learned Judges of the Civil Appellate High Court have failed to consider the fact that 3rd Plaintiff though a minor at the time of execution of the Deed of Gift had in fact accepted the gift by signing the same and the Attesting Notary has certified to this fact.
3. If there was sufficient acceptance of gift by the minor whether the judgment of the Civil Appellate High Court on the question of acceptance was correct in law.

The Plaintiff-Appellants filed this case in the District Court seeking a declaration of title to the property described in the schedule of the plaint and to eject the Defendant-Respondent from the said property. The Defendant-Respondent is the brother of the 1st Plaintiff. Since the Plaintiff-Appellants have sought a declaration of title, they must prove their title to the land. In this connection I would like to consider Peiris Vs Savunahamy 54 NLR wherein this court held as follows: "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 Dharmadasa Vs Jayasena [1997] 3 SLR 327 this court held as follows: "In a rei vindicatio action the burden is on the plaintiff to establish the title pleaded and relied on by him."

The 1st Plaintiff by Deed No.13276 dated 24.4.1970 attested by DI Wimalaweera Notary Public became the owner of the property in dispute. The said deed was produced at the trial marked P1. Thereafter the 1st Plaintiff by Deed No.7249 dated 8.6.1991 attested by DC Gunawathi gifted the said property to his son retaining life interest of him and his wife (the 2nd Plaintiff). This deed was produced at the trial marked P2.

The Defendant-Respondent contended that deed of gift marked P2 was not valid since the gift has not been validly accepted by the 3rd Plaintiff who is the son of the 1st Plaintiff. The Defendant-Respondent contended that the 3rd Plaintiff could not have accepted the gift since he was a minor on the day of the execution of the deed of gift (P2). I now advert to this contention. It is true that the 3rd Plaintiff who is the donee in the said deed of gift was a minor at the time of execution of said deed of gift. But does it mean that the 3rd Plaintiff was not capable of accepting the gift? The 3rd Plaintiff was, at the time of execution of the deed of gift, 15 years old. This was the evidence of the mother of the 3rd Plaintiff. In this connection I would like

to consider the judgment in the case of Mohideen Hadjiar Vs Ganeshan 65 NLR 421 wherein their Lordships held as follows: "that the donee, though a minor, had sufficient understanding to accept the donation and that the evidence was sufficient to establish acceptance by him of the donation."

In Abubucker Vs Fernando [1987] 2SLR 225 this Court held as follows. A donation can be accepted by a minor provided he was of sufficient understanding. Looking after the donor in his illness can be evidence of such sufficient understanding.

Considering the above legal literature, I hold that a minor who is of sufficient understanding is capable of accepting a gift given in a deed of gift. The mother of the 3rd Plaintiff has said in evidence that the 3rd Plaintiff at the time of execution of the deed of gift was 15 years old. The Defendant-Respondent has not, during the cross-examination, suggested to her that the 3rd Plaintiff was not of sufficient understanding at the time of execution of the deed of gift. When I consider all the above matters, I hold that the 3rd Plaintiff was capable of accepting the gift given in the deed of gift by his father and he has validly accepted the Deed of Gift marked P2. Considering all the above matters, I hold that the Plaintiff-Appellants have proved that they were the owners of the property described in the schedule to the plaint.

The Defendant-Respondent took up the position that he has acquired prescriptive title to the land described in the schedule to the plaint. The learned District Judge decided that Defendant-Respondent had not acquired the prescriptive title to the said property. But the learned Judges of the Civil Appellate High Court decided that the Defendant-Respondent had acquired the prescriptive title to the land described in the schedule to the plaint. Therefore the most important question that must be decided is whether the Defendant-Respondent has

acquired the prescriptive title to the said property or not. I now advert to this question. The Defendant-Respondent has admitted in evidence that he came to occupy the said property on an invitation of his brother, the 1st Plaintiff; that he paid assessment rates to the Municipal Council in the name of the 1st Plaintiff; that he obtained electricity in the name of the 1st Plaintiff; that his name is not included in the Electoral Register; and that he occupied the property since his brother, the 1st Plaintiff gave him permission.

Learned counsel for the Defendant-Respondent tried to advance an argument that the Defendant-Respondent did an overt act since he constructed a house. But I am unable to accept the said contention since the Defendant-Respondent has occupied the property with permission of 1st Plaintiff and electricity was obtained after obtaining permission of the 1st Plaintiff. When I consider the above evidence, I hold that the Defendant-Respondent has admitted in evidence that he occupied the said property as a licensee of the 1st Plaintiff. If that is so, has he acquired the prescriptive title to the said property? 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.

When I consider the above section, I hold that if a person claims that he has acquired prescriptive title to a property in terms of Section 3 of the Prescription Ordinance, one of the conditions that he should prove is that his possession of the property was an adverse possession. This view is supported by the judgment 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". In de Silva Commissioner General of Inland Revenue 80 NLR292 this court held thus: " 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."

When a person possesses a property with leave and licence of the owner such a possession cannot be considered as an adverse possession. Such a person is not

entitled to acquire prescriptive title to the property in terms of Section 3 of the Prescription Ordinance. As I pointed out earlier the Defendant-Respondent has possessed the property with leave and licence of the 1st Plaintiff. Can a licensee of an owner of a property acquire prescriptive title to the property? In considering 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 Pabalinahamy 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"

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."

Applying the principles laid down in the above legal literature, I hold that licensee of an owner of a property cannot acquire prescriptive title to the property against the owner of the property so long as he holds the status of a licensee. I further 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 that 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.

When a person occupies a land as a licensee of the owner the land, such a person (licensee), by his own act, accepts the title of the owner. Therefore the licensee has no right to challenge the title of the owner. In such a case his duty is first to restore the property to the owner. This view is supported by the following judicial literature. Section 116 of the Evidence Ordinance reads as follows.

> *"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and*
>
> *No person who came upon any movable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."*

Ruberu Vs Wijesooriya [1998] 1 SLR 58 Justice U de Z Gunawardena held as follows:

> *"Whether it is a licensee or a lessee, the question of title is foreign to a unit in ejectment against either. The licensee (defendant - respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the plaintiff-appellant without whose permission he would not have got it. The effect of S. 116 Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-respondent is perforce an admission of the fact that the title resides in the plaintiff."*

In Gunasinghe Vs Samarasundera [2004] 3 SLR 28 Justice Dissanayake held thus:

> *"A licensee or a lessee is estopped from denying the title of the licensor or lessor. His duty in such a case is first to restore the property to licensor or the lessor and then to litigate with him as to the ownership."*

In the present case, I have earlier held that the Defendant-Respondent occupies the land as a licensee of the 1st Plaintiff. For the aforementioned reasons, I hold that the Defendant-Respondent has failed to acquire prescriptive title to the property and that he cannot be accepted as the owner of the property on the basis of prescriptive title. Considering all the above matters, I hold that the Plaintiff-Appellants are entitled to the judgment in this case; that the judgment of the learned District Judge is correct; and that the judgment of the learned Judges of the Civil Appellate High Court is wrong and contrary to the established legal principles.

In the above circumstance, I answer the 1st question of law as follows.

“The learned Judges of the Civil Appellate High Court have misdirected themselves on facts and in law.”

When the court holds that the Defendant-Respondent is not entitled to acquire prescriptive title to the property in dispute, he cannot challenge the title of the Plaintiff. Therefore the Plaintiff-Appellants are entitled to the judgment in this case. In my view the 2nd and 3rd questions of law do not arise for consideration.

For the above reasons, I affirm the judgment of the learned District Judge and set aside the judgment of the learned Judges of the Civil Appellate High Court. I allow the appeal of the Plaintiff-Appellants with costs. The Plaintiff-Appellants are entitled to costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

Nalin Perera Chief Justice

I agree.

Chief Justice

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.