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

In the matter of an Appeal

Thammahetti Mudalige
Don Nobert Peiris
Mudukatuwa,
Marawila.

Plaintiff

SC Appeal 97/2015
SC (HC CA) LA. No. 109/2014
Civil Appellate High Court Kurunegala
NWP/HCCA/KUR/2007(F)
D.C. Marawila Case No.742/L

Vs-

1. Kulasinghe Arachchige Emalka Melani
2. Warnakulasooriya Aloysius Perera
   Both of St. Bridget, Bolawatta Road,
   Dankotuwa.
3. Gearad Desmond
   Mudukatuwa,
   Marawila.

Defendants

AND BETWEEN

Thammahetti Mudalige
Don Nobert Peiris
Mudukatuwa,
Marawila.

Plaintiff-Appellant

Vs

1. Kulasinghe Arachchige Emalka Melani
2. Warnakulasooriya Aloysius Perera
   Both of St. Bridget, Bolawatta Road,
   Dankotuwa

3. Gearad Desmond
   Mudukatuwa,
   Marawila.

Defendant-Respondents

AND NOW BETWEEN

1.Kulasinghe Arachchige Emalka Melani
(Deceased)
1A. Dissanayakage Aloysius Perera
2. Dissanayakage Aloysius Perera
Both of St. Bridget, Bolawatta Road,

Dankotuwa

1A & 2nd Defendant-Respondent-Appellants

Vs

Thammahetti Mudalige
Don Nobert Peiris (Deceased)
Mudukatuwa,
Marawila.

Plaintiff-Appellant-Respondent

Herath Mudiyanselage Somawathi
Mudukatuwa, Marawila

(Substituted) Plaintiff-Appellant-Respondent

Gearad Desmond
Mudukatuwa,
Marawila.

3rd Defendant-Respondent-Respondent

Before: Sisira. J. de Abrew J
P. Padman Surasena J &
S.Thurairaja PC J

Counsel: Kuvera de Zoysa President's Counsel for the 1A & 2nd Defendant-

Respondent- Appellants

Romesh de Silva President's Counsel for the Plaintiff-

Appellant- Respondent

Argued on : 14.10.2020

Decided on: 12.2.2021

Sisira. J. de Abrew, J

This is an appeal against the judgment of the Civil Appellate High Court dated 8.1.2014 wherein the learned Judges of the Civil Appellate High Court set aside the judgment of the learned District Judge dated 1.3.2007 who held the case in favour of the 1st and the 2nd Defendant-Respondent-Appellants.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the 1st, 2nd and 3rd Defendants seeking a declaration of title to the property in dispute on the basis of prescription. The Learned District Judge by his judgment dated 1.3.2007 dismissed the action of the Plaintiff-Respondent and decided that the 1st Defendant is the owner of the property in dispute. 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 8.1.2014 set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 1st and the 2nd Defendant-Respondent-Appellants (hereinafter referred to as the Defendant- Appellants) have appealed to this court. This court by its order dated 1.6.2015 granted leave to appeal on question of law set out in paragraphs 10(1), 10(2), 10(3), 10(4), and10(5) of the Petition of Appeal dated 17.2.2014 which are set out below verbatim. In

addition to the said questions of law, learned counsel for the 1st and 2nd Defendant-Appellants has raised a question of law which will be stated below as question of law No.6.

1. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by coming to the conclusion that the Respondent had prescribed to the land in question.

2. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by coming to the conclusion that the Appellant-Respondent clearly had more than 10 years of possession of the Corpus before he was evicted from the land on 20.08.1993.

3. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by failing to consider that the Respondent had adverse possession of the land against the Petitioners in determining that the Appellant-Respondent had prescribed to the land.

4. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by holding that the Respondent diligently defended his right to the land up to the time he was dispossessed on 20.08.1993 based on his evidence given before Court on 22.11.1982 (Respondent gave evidence before Court on 22.11.1982 showing that he was diligently defending his rights up to the time he was dispossessed on 20.08.1993)

5. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in Law by holding that the Appellant-Respondent was entitled to damages as prayed for in the Prayer to the Plaint when there was no evidence to substantiate such damage.

6. Could the Plaintiff alleging prescriptive title to the corpus maintain this rei-vindicatio action against the 1st and the 2nd Defendant- Appellants?

Learned President's Counsel for the Plaintiff-Respondent contended that land described by the Plaintiff-Respondent and the land described by Defendant-Appellants are two different lands and that therefore the judgment of the Civil Appellate High Court was correct. I now advert to this contention. If these are two different lands why did the Plaintiff-Respondent file this action to eject the 1st and the 2nd Defendant-Appellants? The above contention of learned President's Counsel fails on this question. I therefore reject the above contention.

The Plaintiff-Respondent claims title to this land on the basis of prescription. Therefore, he should prove prescriptive title in terms of Section 3 of the Prescription Ordinance which 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.

To claim prescriptive title in terms of Section 3 of the Prescription Ordinance, one of the conditions that the claimant should prove is that his possession to the land in dispute is adverse possession. The Plaintiff-Respondent in his evidence says that his father cultivated the land in dispute from 1935 to 1973 and from 1973 to 20.8.1993 he possessed the land in dispute. Was his alleged possession to the land in dispute an adverse possession? The Plaintiff-Respondent in his evidence says that he gave the land in dispute to a church in the area for the purpose of conducting wedding ceremonies, musical shows and carnivals. But there is no clear evidence to establish that it was the land in dispute which was given to the church for the above purposes. There is also no clear evidence to establish that it was the Plaintiff-Respondent who gave the land to the church.

Dissanayake Aloysius Perera who is the 2nd Defendant in this case says in his evidence that his wife is the 2nd owner of the land in dispute and prior to her ownership her father was the owner of the land in dispute and that from 1975 they were in possession of the land in dispute.

Warnakulasuriya Camilus Fernando who was called by the Defendants in his evidence says that he plucked coconuts in the land owned by the 1st and the 2nd Defendants which is the land in dispute for a period of 20 to 25 years and that Nobert Peiris who was the original Plaintiff in this case never objected to the plucking of coconuts in the land in dispute.

Reginold Julian Dondinu who was called by the Defendants says in his evidence that he was the Grama Niladhari in the area in which the land in dispute is situated; that he never received any complaint regarding the land in dispute; and that the Plaintiff-Respondent was not in possession of the land in dispute.

If the Plaintiff-Respondent did not object to the plucking of coconuts in the land in dispute, how does he claim that he had adverse possession of the land in dispute? The above evidence clearly shows that the Plaintiff-Respondent did not have adverse possession to the land in dispute.

When I consider the totality of the evidence led at the trial, I hold that the Plaintiff-Respondent has failed to prove that his alleged possession to the land in dispute was adverse possession. The learned District Judge has come to the conclusion that the alleged possession of the Plaintiff-Respondent was not an adverse possession.

Can it be contended that mere possession for a period of over ten years amounts to the possession discussed in Section 3 of the Prescription Ordinance? I now advert to this question.

In Tillekeratne Vs Bastian 21 NLR 12 it was held *"(a) that it is open to the court from lapse of time in conjunction with the circumstances of the case to presume that a possession originally that of a co-owner has since become adverse*

and (b) that it is a question of fact whenever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before action brought."

The above judgment in the case of Tillekeratne Vs Bastian 21 NLR 12 was disapproved by the Privy Council in the case of I.L.M.Cadija Umma and Another Vs S.Don Manis Appu and other 40 NLR 392. Privy Council held that

"the words in section 3 of the Prescription Ordinance, viz., by a "title adverse to or independent of the claimant or plaintiff" cannot be construed as introducing the requirement known to the Roman law as Justus titulus or justa causa,.
The purpose of the parenthetical clause in the section, viz., "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" is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription.
The dictum of Bertram C. J. in Tillekeratne v. Bastian (21 N. L. R. 12) that the parenthesis has no bearing on the meaning of the words "adverse possession", disapproved."

Further Privy Council at page 395 of the above judgment has made the following observation. *"Bertram C. J. (in Tillekeratne v. Bastian) relying on Lord Macnaghten's language in Corea's case, held that "the parenthesis has no bearing on the meaning of the words ' adverse title': it may henceforth be left out of*

account in the discussion of the question". Their Lordships cannot accept this dictum of the learned Chief Justice."

In Mithrapala and Another Vs Tikonis Singho [2005] 1 SLR 206 at page 211Court of Appeal referring to an unreported judgment in Court of Appeal No.418/2002(6) observed as follows. *"But mere possession is not prescriptive title. A person in possession who claims title by virtue of prescription must prove that he had possessed the property in the manner and for the period set out in section 3 of the Prescription Ordinance".*

In Sirajudeen and Two Others Vs Abbas [1994] 2 SLR 365 at page 370 this court held as follows. *"But what needs to be stressed is that the fact of occupation alone would not suffice to satisfy the provisions of section 3 of the Prescription Ordinance. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession 'by a title adverse to or independent of that of the claimant or plaintiff.'"*

In the case of Hamidu Lebbe Vs Ganitha 27 NLR 33 forty to fifty-year period of possession of the defendant who was a co-owner was not accepted as adverse possession against the plaintiff who had purchased ½ share from the brother the defendant. Ennis ACJ (De Sampayo J agreeing) at page 35 held as follows. *"The defendant and his brother, Suddana, were clearly co-parceners in the land, and as such the possession per se of one could not be held as adverse to the other."*

In Seeman Vs David [2000] 3 SLR 23 at page 26 Weerasuriya J as follows. *"The learned District Judge had come to the finding that the Defendant-Respondents had acquired prescriptive rights to the entire property on the basis that along with their predecessors in title they had possessed the property for a period of 70 years*.

This appears to be an erroneous view. To claim prescriptive rights the Defendant-Respondents ought to prove adverse and uninterrupted possession for a period of ten years."

Considering the above legal literature, I hold that mere possession for a period of over ten years does not amount to possession discussed in Section 3 of the Prescription Ordinance; that a person claiming such possession is not entitled to succeed in a claim of prescription in terms of Section 3 of the Prescription Ordinance; and that in order to succeed in a claim of prescription, the claimant should prove that his possession is adverse, uninterrupted and undisturbed possession for a period of ten years.

The learned District Judge in his judgment dated 1.3.2007 decided that the Plaintiff-Respondent had failed to prove that his alleged possession to the land in dispute was adverse possession and that therefore the Plaintiff-Respondent had failed to prove his case. I have earlier held that the Plaintiff-Respondent has failed to prove that his alleged possession to the land in dispute was adverse possession. The learned District Judge was correct when he came to the above conclusion. The learned Judges of the Civil Appellate High Court without giving due consideration to the above matters, have set aside the judgment of the learned District Judge. The learned Judges of the Civil Appellate High Court were wrong when they set aside the judgment of the learned District Judge.

The learned District Judge after considering the Deed Nos. 1906 dated 15.12.1951, 4536 dated 18.8.1962 and 8922 dated 19.3.1988 came to the conclusion that the 1st Defendant-Appellant is the owner of the land in dispute on the basis of the above deeds. This decision is, in my view, correct. In view of the conclusion reached

above, I answer the 1st, 2nd and 3rd questions of law in the affirmative. The 4th,5th and 6th questions of law do not arise for consideration.

For the aforementioned reasons, I set aside the judgment of the learned Judges of the Civil Appellate High Court dated 8.1.2014 and affirm the judgment of the learned District Judge dated 1.3.2007. I allow the appeal of the 1st and the 2nd Defendant-Appellants with costs. The 1st and the 2nd Defendant-Appellants are entitled to costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

P.Padman Surasena J

I agree.

Judge of the Supreme Court.

S.Thurairaja PC J

I agree.

Judge of the Supreme Court.