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

1. Sirinivasam Prasanth,
2. Gayathiry Prasanth,
   Both of Ratnagara Place,
   Dehiwala.
   And presently of 289, Cossack Court, Mississauga, L5 B4 C2, Ontario, Canada.

   Acting through their Power of Attorney holder,
   Kanagasundram Sathiakantham
   of No.442, R.A. De Mel Mawatha,
   Kollupitiya, Colombo 3.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/163/2019
SC LA NO: SC/HCCA/LA/327/2019
HCCA NO: WP/HCCA/COL/131/2015 (F)
DC COLOMBO NO: DLM/00041/2013

Vs.

1. Nadaraja Devarajan,
2. Sri Jayadevi Devarajan,
   Both of No. 541/4 – 1/2A,
   Galle Road, Wellawatta,
   Colombo 6.
   Defendants

AND BETWEEN

1. Nadaraja Devarajan,
2. Sri Jayadevi Devarajan,
   Both of No. 541/4 – 1/2A,
   Galle Road, Wellawatta,
   Colombo 6.
   Defendant-Appellants

Vs.

1. Sirinivasam Prasanth,
2. Gayathiry Prasanth,
   Both of Ratnagara Place,
   Dehiwala.
   And presently of 289, Cossack
   Court, Mississauga, L5 B4 C2,
   Ontario, Canada.

   Acting through their Power of
   Attorney holder,
   Kanagasundram Sathiakantham
   of No.442, R.A. De Mel Mawatha,
   Kollupitiya, Colombo 3.
   Plaintiff-Respondents

AND NOW BETWEEN

1. Sirinivasam Prasanth,
2. Gayathiry Prasanth,
   Both of Ratnagara Place,
   Dehiwala.
   And presently of 289,
   Cossack Court, Mississauga,

L5 B4 C2,
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Acting through their Power of
Attorney holder,
Kanagasundram Sathiakantham
of No.442, R.A. De Mel Mawatha,
Kollupitiya, Colombo 3.
Plaintiff-Respondent-Appellants

Vs.

1. Nadaraja Devarajan,
2. Sri Jayadevi Devarajan,
Both of No. 541/4 – 1/2A,
Galle Road, Wellawatta,
Colombo 6.
Defendant-Appellant-
Respondents

Before: Buwaneka Aluwihare, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Palitha Kumarasinghe, P.C., with Viraj Bandaranayake for the Plaintiff-Respondent-Appellants.
Lakshman Wickramaratne for the Defendant-Appellant-Respondents.

Argued on : 17.02.2021

Decided on: 22.03.2021

Mahinda Samayawardhena, J.

The Plaintiffs filed this action in the District Court of Colombo seeking a declaration of title to the property described in the third schedule to the plaint, the ejectment of the Defendants therefrom and damages. The Defendants sought the dismissal of the Plaintiffs' action and claimed prescriptive title to the property. After trial, the District Court entered Judgment for the Plaintiffs except damages. On appeal, the High Court of Civil Appeal set aside the Judgment of the District Court and entered Judgment for the Defendants. Hence this appeal by the Plaintiffs.

Leave was granted by this Court on the question whether the High Court erred in holding that the Defendants acquired prescriptive title to the property within the meaning of section 3 of the Prescription Ordinance, No. 22 of 1871, as amended, on the strength of the evidence adduced at the trial.

The property in suit is a condominium unit. The parties to the case are close relations. The Power of Attorney holder who filed this case is the father of the 2nd Plaintiff; the 1st Plaintiff is the husband of the 2nd Plaintiff. The 2nd Defendant is the uterine sister of the 2nd Plaintiff's father; the 1st Defendant is the husband of the 2nd Defendant.

The aforesaid Power of Attorney holder of the Plaintiffs was the owner of the property by Deed P1 executed in 1994. He gifted the property to his daughter, the 2nd Plaintiff, by Deed P2. It is significant that Deeds P1 and P2 were not marked subject to proof at the trial. Nor was an issue raised by the Defendants at

the trial disputing the Deeds. The Defendants do not have a Deed to this property.

Nevertheless, the learned High Court Judge seems to be disputing Deed P1 on the basis that the consideration for P1 was not paid by the transferee, the 2nd Plaintiff's father, to the transferor (the owner of the condominium unit), but by the sister of both the 2nd Plaintiff's father and the 2nd Defendant, who at that time was living in the UK. This is clear by looking at the answer given by the learned High Court Judge in the impugned Judgment to issue No.1, which reads "*there can be encumbrances or fetters in the alleged paper title*" of the transferee of Deed P1 as the consideration was supplied by a third party.

A Deed does not become invalid or less valid merely because consideration was paid by a third party. There is no law that consideration must be paid by the transferee personally. In this case, the sister living in the UK, by P3 marked at the trial not subject to proof, whilst stating "*the above property was bought by my brother [the transferee of P1]*" and "*I provided him with financial assistance to buy this property*", expressly admits "*I am fully aware that I have no legal right to this property.*" Therefore the learned High Court Judge was erroneous to have held that Deed P1 is subject to "*encumbrances or fetters*".

Hence there is no difficulty in concluding that the Plaintiffs have the paper title to the property.

In a vindicatory action, the initial burden is on the Plaintiff to prove title to the property. If he fails to prove title, the Plaintiff's action shall fail no matter how weak the case of the Defendant

is. However, once the paper title to the property is accepted by the Defendant or proved by the Plaintiff, the burden shifts to the Defendant to prove on what right he is in possession of the property.

Let me add this for clarity. The right to possession and the right to recover possession are essential attributes of ownership of immovable property. The owner is entitled to these as of right. The law does not require that the owner must possess his property. That is his choice. He can either possess it or leave it as it is. In simple terms, merely because the owner does not possess the property, he does not lose ownership of the property.

In *Siyaneris v. Udenis de Silva (1951) 52 NLR 289* the Privy Council held: "*In an action for declaration of title to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant.*" In *Theivandran v. Ramanathan Chettiar [1986] 2 Sri LR 219 at 222*, Sharvananda C.J. stated: "*In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the Defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the Plaintiff, the burden of proof is on the Defendant to show that he is in lawful possession.*" This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana [1998] 3 Sri LR 227 at 229* and reiterated in *Candappa nee Bastian v. Ponnambalam Pillai*

[1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah [1999] 1 Sri LR 53, Gunasekera v. Latiff (1999) 1 Sri LR 365 at 370, Jayasekera v. Bishop of Kandy [2002] 2 Sri LR 406* and *Loku Menika v. Gunasekera [1997] 2 Sri LR 281 at 282-283*.

Let us now consider whether the Defendants discharged their burden of proof. The Defendants did not make a claim in reconvention in the prayer to the answer that they have acquired prescriptive title to the property. But by issue No.13 raised at the trial, they did claim prescriptive title to the property. This is permissible in terms of section 146 of the Civil Procedure Code which allows issues to be raised on matters where "*the parties are at variance*" and "*the right decision of the case appears to the Court to depend*."

It is settled law that once issues are framed and accepted by Court, the case of each party is crystallised in the issues and the pleadings recede to the background. Thereafter the case is tried and the parties marshal their evidence not on the pleadings but on the issues. Practically, the Judgment is the answers to the issues with reasons.

Issue No.13 raised by the Defendants reads as follows: "*Did the 1st and 2nd Defendants acquire prescriptive title [to the property] from the day which they came into possession in the year 1995?*" The year 1995 is significant as I will explain below. It cannot be a mistake or typographical error as the same year is repeated in issue No.10 raised by Defendants: "*Did the Defendants obtain possession of the property from a third party in the year 1995?*" Although the Defendants state in the answer that they came into possession of the property in March 1994, they took up the clear position by way of the issues that they came and commenced

prescriptive possession from 1995 (having taken possession of the property from a third party). For whatever reason, this is how the Defendants put their prescriptive claim in issue at the trial. On the other hand, even if the Defendants pleaded in the answer that they commenced prescriptive possession from 1995, they could have (subject to objection by the Plaintiffs) raised an issue that they commenced prescriptive possession from March 1994.

The above two issues were answered by the learned District Judge in the negative and by the learned High Court Judge on appeal in the affirmative in that the learned High Court Judge states that the Defendants commenced prescriptive possession not from 1995 but from March 1994. The answer to issue No.13 by the learned High Court Judge is as follows: "*The 1st and 2nd Defendant Appellants have acquired prescriptive title from continuous, uninterrupted, adverse and independent possession from March 1994.*"

The Plaintiffs countered the prescriptive claim of the Defendants on the premise that the Defendants were permitted to occupy the house in order for the Defendants' children to continue their education in Colombo, as the Defendants were displaced during the civil war in the North. It may be recalled that the transferee of Deed P1 is the brother of the 2nd Defendant and the purchase price of the house was paid, according to the Defendants, by their sister in the UK. The learned High Court Judge in his Judgment says the claim that the 2nd Plaintiff's father granted leave and license to his sister, the 2nd Defendant, to stay in the house is unsustainable because Deed P1 was executed on 01.12.1994 whereas the Defendants had come into occupation

of the house in March 1994 having obtained the keys to the house from the vendors of Deed P1.

This approach of the learned High Court Judge is not permissible given the issues raised by the Defendants at the trial as quoted above. If I may repeat, the position taken up by the Defendants at the trial as crystallised in the issues is that they came and commenced prescriptive possession of the property from 1995 and not from March 1994. Upon acceptance of the issues, the position is that the 2nd Plaintiff's father became the owner of the property by Deed P1 dated 01.12.1994, before the Defendants came into possession of the house in 1995.

In the adversarial system of justice associated mainly with common law jurisdictions, the case is decided by the Judge on a competitive process between the Plaintiff and the Defendant without the Judge himself taking part in the dispute. Conversely, in the inquisitorial system of justice associated mainly with civil law jurisdictions, the pre-trial in particular and also the trial itself is, practically, an expedition presided over by the Judge in pursuit of the truth. Notwithstanding that the goal of both the adversarial and inquisitorial systems is the ascertainment of the truth, the former seeks to attain it by pitting the parties against one another, whereas the latter seeks to attain the same by the Judge's direct involvement in the process. Both systems have advantages and disadvantages.

Sri Lanka is known to have a common law system (although strictly speaking we have a mixed system with features of both legal systems). The system of justice we practice here is adversarial and not inquisitorial. Hence the Judge trying a case shall be careful not to overstep his limits in the guise of due

administration of justice. The Judge shall decide the case as it is presented before him by the two competing parties and not based on his own conception of justice and injustice, unless there is a compelling reason to deviate from the fundamental principle.

It was held in *Pathmawathie v. Jayasekara [1997] 1 Sri LR 248*: "*It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. Our civil law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make findings as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or Judge is duty bound to determine the dispute presented to him and his jurisdiction is circumscribed by that dispute and no more*."

The Supreme Court in *Saravanamuthu v. Packiyam [2012] 1 Sri LR 298* observed: "*It must be remembered that the jurisdiction of the Court is limited to the dispute presented for adjudication by the contesting parties*."

Chief Justice G.P.S. de Silva in *Beebi v. Warusavithana [1998] 3 Sri LR 227 at 230-231* observed:

> *It must be noted that the proceedings before the District Court were adversarial in character. The Court of Appeal was in error when it placed a burden on the District Court "to make sure that inadequate information is not placed before it." As a general proposition, "it is no part of a*

> *Judge's duty in a civil action to fill in the deficiencies in a case of one of the disputants by calling evidence on his own." per Nihill, J. in Rewata Thero v. Horatala 14 CLW 155. Sections 150, 151 and 163 of the Civil Procedure Code indicate that the burden is on each party to lead such evidence as is necessary to establish his case or his defence, having regard to the issues upon which the case proceeds to trial.*

In *Bandaranaike v. Premadasa [1978-79] 2 Sri LR 369 at 384* Soza J. explained this in the following terms:

> *When we speak of the adversary or accusatorial system as distinguished from the continental inquisitorial system, we refer to a particular philosophy of adjudication whereby the function of the counsel is kept distinct from that of the Judge. It is the function of counsel to fight out his case while the Judge keeps aloof from the thrust and parry of the conflict. He acts merely as an impartial umpire to pass upon objections, hold counsel to the rules of the game and finally to select the victor. This common law contentious procedure has its defects and has been criticised by jurists like Roscoe Pound (see Landmarks of Law ed. Hensen-Beacon series pp. 186, 187) but it is the Anglo American system and prevails in India and Sri Lanka too. In fact the Foster Advisory Committee in its Report on the English Civil Procedure (1974) recommends the retention of the adversary system of procedure—see the Stevens publication of the report—chapter 5 paragraph 102 pp. 28, 29. This system is built on the English notion of fair play and justice where the Judge does not descend into the arena and so*

> *jeopardise his impartiality. Under this system it is counsel's duty to prove the facts essential to his case with the other party striving to disprove these facts or to establish an affirmative defence.*

Is it possible or believable that the Defendants obtained the keys to the house quite independently from the transferor of Deed P1 (the owner of the condominium unit) when the transferee of the Deed and the party who paid the consideration for the Deed were very much alive and available? In my judgment, it is not. There is no reason for the transferor to give the keys to the unit to an outsider unless the transferee or the person who paid the consideration for the Deed told the transferor to do so. No such thing happened.

This conclusion is amply justified by P3, the letter of the 2nd Defendants' sister in the UK, marked not subject to proof. It *inter alia* reads as follows:

> *This is to confirm that the above property was bought by my brother Mr. Kanagasundaram Sathiakantham (the father of the 2nd Plaintiff) in 1994. I provided him with financial assistance to buy this property. I also confirm that as our sister, Mrs. Srijeyathevi Devarajan [the 2nd Defendant] was having problem with accommodation during that time Mr. Sathiakantham agreed to let Mrs. Devarajan and her family stay in the property without rent so that her family can stay in Colombo until her children complete their secondary school education….Mrs. Devarajan's children have completed their education, currently in full time employment and are in better financial position. Mrs. Devarajan's family should therefore abide by*

the agreement leave the above property and find their own accommodation.

P3 amply corroborates the Plaintiffs' version of events that the Defendants came into possession of the house as licensees of the transferee of Deed P1.

The learned High Court Judge accepts P3 but unfortunately says: P3 was issued after the institution of the action; its maker did not give evidence nor was she was cross-examined; its contents were never verified; hence its evidentiary value is very low. I am unable to agree. The maker of P3 is not a stranger but the 2nd Defendant's sister who, according to the 1st Defendant, paid the purchase price to the vendor. Although the letter was issued after the institution of the action, it speaks of events anterior to the date of filing the action. This is what witnesses do in the course of their evidence in Court. The maker of P3 was not called as a witness because P3 was not marked subject to proof. Had it been marked subject to proof, the maker could have been called as a witness. It is naive to think that in a civil case the parties shall call the makers of all marked documents as witnesses in order to prove those documents whether or not they are marked subject to proof.

In a civil case, if the opposing party disputes a document, he must, at the time of marking the document, raise that objection and, if necessary, make an application to Court to mark it subject to proof. Otherwise, there is no necessity to call witnesses to prove all marked documents. The explanation to section 154 of the Civil Procedure Code reads: "*If the opposing party does not, on the document being tendered in evidence, object to it being received and if the document is not such as is*

forbidden by law to be received in evidence, the Court should admit it." This principle is applicable even to Deeds, irrespective of section 68 of the Evidence Ordinance. (*Siyadoris v. Danoris (1841) 42 NLR 311, Silva v. Kindersly (1914) 18 NLR 85, Seyed Mohomed v. Perera (1956) 58 NLR 246, Cinemas Ltd v. Sounderarajan [1998] 2 Sri LR 16 at 18, Hemapala v. Abeyratne [1978-79] 2 Sri LR 222, Wijeardena v. Ellawala [1991] 2 Sri LR 14 at 34-35, Kandasamy v. Sinnathamby [1985] 2 Sri LR 249 at 255*)

What I have stated above shall not be taken to mean that all documents the opposing party purportedly requires to be marked subject to proof must necessarily be proved by calling witnesses. There is a practice among some lawyers to get up and say "subject to proof" whenever a document is marked in evidence by the other party. This they do as a matter of course or as a matter of routine and not with any particular objective in mind, except perhaps to prolong the trial. It is regrettable that most of the time the party who produces the document obliges to this without a murmur. If we are serious about law's delays, we must put an end to this bad practice. When a counsel routinely says "subject to proof", the Judge must ask what he wants the other party to prove in the document. If this simple question is asked, I am certain the objection would be withdrawn or at least the issue to be addressed would be narrowed down. On the other hand, if the document is, take for instance, a Deed pleaded in the plaint but no issue has been raised disputing the Deed, the Defendant cannot make a routine application to mark it subject to proof when it is marked in evidence. Against this backdrop, I must emphasise that the Judge shall not mechanically refuse documents marked subject to proof but not technically proved by calling witnesses. The

Judge shall decide the question of proof at the end of the trial on the facts and circumstances of each individual case.

From the evidence adduced at the trial, it is clear that the Defendants in this case came into possession of the house with the leave and license of the transferee of Deed P1 (with the acknowledgment of the sister who provided financial assistance to purchase the property) and not as independent persons who obtained the keys to the house from the transferors of Deed P1.

The Defendants' position is that after they came into possession in 1995 they continued to possess the property until 2012, in which year the Plaintiffs disputed the possession of the Defendants. The learned High Court Judge says the Defendants "*possessed from March 1994 up to the institution of the action in 2013 as their own based on a title adverse and independent*" and therefore are entitled to claim prescriptive title to the property as provided in section 3 of the Prescription Ordinance.

Permissive possession, however long it may be, is not prescriptive possession. For permissive possession to become adverse possession in order to claim prescriptive possession, there shall be cogent evidence. The Defendants who entered into possession of the property in a subordinate character as licensees are not entitled to commence adverse possession against the owner by forming a secret intention in mind unaccompanied by an overt act of ouster. The Defendants must establish a clear starting point known to the owner in order for the former to claim prescriptive possession against the latter. The prescriptive period of ten years begins to run only from that point and not from the date the Defendants came into possession. (*Sirajudeen v. Abbas [1994] 2 Sri LR 365, Reginald*

Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37, Chelliah Vs. Wijenathan (1951) 54 NLR 337 at 342, Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212, Seeman v. David [2000] 3 Sri LR 23 at 26, Madunawala v. Ekneligoda (1898) 3 NLR 213, Navaratne v. Jayatunga (1943) 44 NLR 517, De Soysa v. Fonseka (1957) 58 NLR 501)

When the relationship between the two parties is very close, such as in the instant case, the overt act manifesting the commencement of adverse possession and strong affirmative evidence for the continuation of such adverse possession for over ten years are all the more important to successfully claim prescriptive title. (*De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292, Podihamy v. Elaris [1988] 2 Sri LR 129*)

In the instant case, the Defendants have manifestly failed to prove the commencement of adverse possession and the continuance of it for over ten years. The proof of mere possession of the property for over ten years does not satisfy the requirements under section 3 of the Prescription Ordinance. The possession shall be "*by a title adverse to or independent of that of the claimant or Plaintiff in the action.*"

I answer the question upon which leave to appeal was granted in favour of the Plaintiff-Appellants.

I set aside the Judgment of the High Court of Civil Appeal and restore the Judgment of the District Court and allow the appeal. The Plaintiffs are entitled to costs in all three Courts.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court