

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

In the matter of an application for Leave to Appeal under and in terms of the Article 128(2) of the Constitution read with Section 5C of the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Ummu Yasmin Mulafer,
No. 39/5, Railway Lane,
Colombo 02.

Plaintiff

SC Appeal No: 23/2019
SC Leave to Appeal No:
SC/HCCA/LA/185/2018
HCCA Case No:
WP/HCCA/HO/43/2017 (F)
DC Kaduwela Case No: 277/L

Vs.

1. Merinnage Rupika Wijesingha,
No. 9/D/193, Jayawadanagama,
Battaramulla.
2. P. Sunil Lakshman Fernando,
No. 3/D/47, Jayawadanagama,
Battaramulla.

Defendants

AND

Ummu Yasmin Mulafer,
No. 39/5, Railway Lane,
Colombo 02.

Plaintiff-Appellant

Vs.

1. Merinnage Rupika Wijesingha,
No. 9/D/193, Jayawadanagama,
Battaramulla.
2. P. Sunil Lakshman Fernando,
No. 3/D/47, Jayawadanagama,
Battaramulla.

Defendant-Respondents

AND NOW BETWEEN

Merinnage Rupika Wijesingha,
No. 9/D/193, Jayawadanagama,
Battaramulla.

1st Defendant-Respondent-Petitioner

Vs.

Ummu Yasmin Mulafer,
No. 39/5, Railway Lane,
Colombo 02.

Plaintiff-Appellant-Respondent

P. Sunil Lakshman Fernando,
No. 3/D/47, Jayawadanagama,
Battaramulla.

2nd Defendant-Respondent-Respondent

Before: Justice L.T.B. Dehideniya
Justice Yasantha Kodagoda, PC
Justice A.L. Shiran Gooneratne

Counsel: Thanuka Nandasiri with Susil Wanigapura appear for the **1st Defendant-Respondent-Petitioner.**

Shafraz Hamza, AAL appears for the **Plaintiff-Respondent-Respondent** instructed by R.M. Irsath.

Argued on: 18/05/2022

Decided on: 06/10/2022

A.L. Shiran Gooneratne J.

The Plaintiff-Appellant-Respondent (referred to as the Plaintiff) filed Plaintiff dated 28/06/2010 against the 1st and 2nd Defendant-Respondent-Petitioners (referred to as the 1st and 2nd Defendants, respectively) in the District Court of Kaduwela seeking *inter alia*, a declaration of title to a corpus of 3.17 perches in extent , identified as residential premises bearing assessment No. 9/D/193, Jayawadanagama, Battaramulla, morefully

described in the schedule to the Plaint, the ejectment of the 1st Defendant and all those holding under her, restoration of possession of the said allotment to the Plaintiff and damages.

The said premises was initially vested with the National Housing Development Authority and by Deed No. 914 dated 18/01/1990, marked 'P1', was transferred to one Wijeyanthi Miguel Hewaratne and thereafter by Deed No. 2198 dated 08/11/2006, marked 'P2', the said Wijeyanthi Miguel Hewaratne transferred the said property to the 2nd Defendant. The 2nd Defendant by Deed No. 16 dated 21/01/2008, marked 'P3', transferred the property to the Plaintiff. The 2nd Defendant, the brother-in-law of the 1st Defendant, and his parents vacated the premises and handed over vacant possession to the Plaintiff within two weeks of the said Deed of transfer dated 21/01/2008. The cause of action of the Plaintiff arises on the continued occupation of the said premises by the 1st Defendant.

The 1st Defendant in her answer claimed *inter alia*, entitlement to the said property by prescription against her predecessors in title and sought for a dismissal of the Plaint. The Plaintiff filed replication dated 13/05/2011, and claimed that the 1st Defendant was a licensee of the 2nd Defendant and therefore, the 1st Defendant cannot claim prescriptive title to the subject matter. The 2nd Defendant admitted the Plaintiffs title and prayed for a dismissal of the action.

There was agreement between the parties on the identity of the corpus and the Plaintiffs documentary title to the subject matter. At the conclusion of the trial the learned District Judge by Judgement dated 31/07/2013 held *inter alia*, that the 1st Defendant resided in the said premises for over 10 years, made improvements and has acquired prescriptive

title to the corpus in suit and accordingly, decided in favour of the 1st Defendant and granted relief as prayed for in the answer.

Aggrieved by the said decision, the Plaintiff appealed to the Homagama High Court of Civil Appeal seeking, *inter alia*, to set aside the said Judgement dated 31/07/2013. The Civil Appeal Court, by Judgement dated 03/05/2018, held that the 1st Defendant did not satisfy adverse, undisturbed and independent possession against the true owner and as such cannot claim prescriptive title. The 1st Defendant is before this Court challenging the said Judgement.

This Court by Order dated 08/01/2019, granted Leave to Appeal on the questions of law stated in paragraph 19 (a) and (c) of the Petition of Appeal dated 06/06/2018, as set out below.

1. Did Honourable Judges of the Provincial High Court of Western Province (Exercising Civil Appellate Jurisdiction) Holden at Homagama err in law and fact to hold that the Petitioner has failed to establish her prescriptive title to the subject matter?
2. Did Honourable Judges of the Provincial High Court of Western Province (Exercising Civil Appellate Jurisdiction) Holden at Homagama err in fact to hold that the Petitioner is a licensee of the 2nd Defendant?

The 1st question of law is formulated on the basis that, the 1st Defendant is the licensee of the 2nd Defendant and therefore, the 1st Defendant cannot claim prescriptive title to the subject matter. The 2nd Defendant became the absolute owner of the premises in suit by Deed of Transfer No. 2198, dated 08/11/2006, marked 'P2' and the Plaintiff by Deed of Transfer No. 16, dated 21/01/2008, marked 'P3'.

The 1st Defendant's position is that subsequent to her marriage to the brother of the 2nd Defendant, the 2nd Defendant and their parents agreed to part with the subject matter in her favour and since then, the 1st Defendant enjoyed the said premises as her own (ud dominus). The 1st Defendant in her testimony before the trial court, marked several documents in proof of improvements carried out on the said premises to establish independent and adverse possession to that of the interest of the 2nd Defendant.

The Plaintiff raised Issue No. 6 to establish that the 2nd Defendant as the vendor was obligated to hand over vacant, uninterrupted and peaceful possession to the Plaintiff, but failed to fulfil his duty by not placing the Plaintiff in possession of the subject matter. A verbal agreement had been reached between the Plaintiff and the 2nd Defendant to hand over vacant possession of the premises to the Plaintiff by 07/02/2008.

The position of the Plaintiff is that the 1st Defendant was an occasional visitor to the subject matter. It is contended that the 1st Defendant unlawfully and forcibly remained in the said premises until 07/02/2008, two weeks from the date of transfer of the premises in suit to the Plaintiff. The said agreement was not a precondition to the said transfer. Eventhough the Plaintiff claimed in her replication dated 13/05/2011, that the 1st Defendant was a licensee of the 2nd Defendant, the 2nd Defendant has not subscribed to such a stand anywhere in these proceedings.

The transfer of the premises by the 2nd Defendant to the Plaintiff by Deed dated 21/01/2008, marked 'P3' was on the basis that the 2nd Defendant was the vendor and the absolute owner of the premises. In paragraph 12 of the Plaint the cause of action against the 2nd Defendant was limited to a claim in damages. Accordingly, the trial court permitted both causes to proceed in one and the same action.

The 1st Defendant also contended that she was in possession of the said premises since 1993, through her marriage to the 2nd Defendant's brother and claims entitlement to their matrimonial house on the basis that the 2nd Defendant and their parents agreed to transfer the property to her husband.

As noted earlier, the said premises was initially owned by the National Housing Development Authority and by virtue of Deed marked 'P1' dated 18/01/1990, was transferred to one Wijeyanthi Miguel Hewaratne. By Deed marked 'P2' dated 08/11/2006, the said Wijeyanthi Miguel Hewaratne transferred the said property to the 2nd Defendant. There is no evidence that the said Wijeyanthi Miguel Hewaratne was in possession of the said property since 1990 or that the 1st Defendant was a licensee of the said Wijeyanthi Miguel Hewaratne.

Knowing the settled law as we do, in the case of immovable property, when a Defendant claims prescriptive title adverse to and independent of that of the Plaintiffs title, initially, the burden is on the Plaintiff to prove title to the land in suit on a balance of probability.

The issue that arose for determination in the instant case is whether the Plaintiff's documentary title to the subject matter by virtue of Deed No. 16 dated 21/01/2008, ranks higher than the 1st Defendant's claim of prescriptive title. As noted earlier, the documentary title of the Plaintiff to the premises in suit is unchallenged and therefore, the burden now shifts to the 1st Defendant to establish the plea of prescriptive title with strong and cogent evidence.

Prescriptive title of the 1st Defendant

In **Priyangika Perera vs. Gunasiri Perera (SC Appeal No. 59/2012)**, Prasanna Jayawardena PC, J. observed that;

“a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, the Plaintiff has to prove that: he has had undisturbed and uninterrupted possession and the use of the right of way for a minimum of ten years and that such possession and use of the right of way has been adverse to or Independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way.”

As observed earlier, the Plaintiff came into Court to vindicate her paper title which is uncontested. In the circumstances, the learned counsel for the Plaintiff submitted that the 1st Defendant failed in discharging the burden of proof on prescriptive title. The learned Counsel relied on **Juliana Hamine vs. Don Thomas (59 N.L.R. 546 at page 548)**, where L.W. De Silva A.J. held,

*“The paper title being in the 2nd and 3rd Defendants, the burden of proving a title by prescription was on the Plaintiff. That burden he has failed to discharge. Apart from the use of the word possess, the Witnesses called by the Plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram C.J. in the Full Bench Case of **Alwis vs. Perera [(1919) 21 N.L.R. at 326]**:*

“I wish very much that District Judges - I speak not particularly, but generally - when a witness says ‘I possessed’ or ‘we possessed’ or ‘We took the produce’, would not confine themselves merely to recording the words, but would insist on those words

being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record.”

When deciding whether the 1st Defendant had acquired prescriptive title, the Civil Appeal High Court, whilst correctly asserting that there is a burden cast upon the 1st Defendant to establish her prescriptive title to the subject matter, has totally disregarded to examine and evaluate the oral evidence led before the trial court.

The 1st Defendant in her oral evidence before the District Court claimed that she was in possession of the said premises since 1993 through her marriage to the 2nd Defendant’s brother, had taken care of her husband’s parents and considered the said premises as their matrimonial house. She also claimed that improvements were made to the house as her husband’s parents and the 2nd Defendant agreed to transfer the premises to her husband. In the impugned Judgement the Civil Appeal High Court was correct in observing that, *“the 2nd Defendant (the predecessor in title of the Plaintiff), his parents and the 1st Defendant were in possession of the subject matter when the Plaintiff purchased the same.”*

The 1st Defendant tendered to Court document marked ‘1V1’, the Birth Certificate of the daughter of the 1st Defendant born in 1994, where the informer address refers to the impugned property. Extracts of the electoral register and the Grama Niladhari Certificates to establish that the 1st Defendant was residing in the said premises from 1993 to 2010, marked ‘1V2’ to ‘1V19’ and ‘1V20 and 1V21’, respectively. The receipts to prove the purchase of raw material used for structural improvements to the premises were also tendered in evidence. It has not been established in evidence that the 2nd

Defendant had in any manner interrupted the 1st Defendant carrying out such improvements or alterations.

The Plaintiff closed her case reading in evidence documents marked 'P1' to 'P3'. Documents 'P7' and 'P9' were marked during cross examination of the 1st Defendant by the Plaintiff. In the proceedings before the District Court dated 16/07/2012, a statement made by the 1st Defendant to the Thalangama Police dated 07/02/2008 was marked as 'P9' and the affidavit tendered by the 1st Defendant to the Magistrates Court of Kaduwela, was marked as 'P6'. The Civil Appeal High Court in their findings have extensively referred to and acted upon 'P6' and 'P9' (both documents were referred to as the affidavit of the 1st Defendant), "*tendered to the Magistrates Court of Kaduwela in Case Bearing No. 72869 (instituted under Section 66 of the Primary Courts Ordinance)*". Document marked 'P7' is the affidavit filed by one Ayarin Alawathi, the mother-in-law of the 1st Defendant. In the action instituted in the Magistrates Court, the 1st Defendant was given possession of the impugned premises.

In the said Judgement, the Civil Appeal High Court erroneously referred to 'P9' as the affidavit tendered by the 1st Defendant. The proceedings dated 12/02/2008, held before the Magistrates Court of Kaduwela in Case Bearing No. 72869, is marked 'P9'. According to the said proceedings the 1st Defendant had agreed to purchase the subject matter for Rs. 1,450,000/- in order to arrive at a settlement. Thereafter in the affidavit dated 16/03/2008 marked 'P6' (also referred to by the appellate court as 'P9'), in the Magistrates Court, the 1st Defendant referred to the said proceedings dated 12/02/2008 and explained her position stating that the agreement to settle the dispute was conditional upon the handing over of a room occupied by the parents of the 1st Defendant. She further states that due to fear and intimidation by the parties involved,

the settlement did not go through. Based on the said consideration to settle this action, the appellate court came to a precise conclusion that the 1st Defendant has no *ud dominum* and adverse possession against the true owner to the subject matter. In arriving at the said conclusion, the Appeal Court was utterly misdirected when it failed to appreciate the compass of Section 66(6) of the Primary Courts' Procedure Act, where it is mandated upon the learned Magistrate "to make every effort to induce the parties and the persons interested (if any) to arrive at settlement of the dispute" before fixing the case for inquiry.

Based on the same affidavit the Court also came to a decisive finding that;

"the 2nd Defendant purchased the property in 1990 and from 1997 the possession of the 1st Defendant has been disturbed by the former. As such, it is established that the 1st Defendant did not have undisturbed possession for a period of ten years as required in law".

This finding too, is totally erroneous for the following reasons;

Firstly, the evidence led before the District Court does not challenge the 1st Defendants position of continuous possession being converted to "disconnected and divided" due to any disturbance created by any party.

Secondly, the 2nd Defendant was never the owner, a licensor, lessor, or a landlord of the impugned property during the said period.

Withers, J. in **Siman Appu vs. Christian Appu, (1895) 1 NLR 288** observed that, *"possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of*

the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user”.

It is an admitted fact that the 2nd Defendant acquired documentary title to the subject matter on 08/11/2006 by Deed No. 2198, marked ‘P2’. The 2nd Defendant was living at No: 3/D/47, Jayawadanagama, Battaramulla and not in the impugned property (9/D/193, Jayawadanagama, Battaramulla). The 2nd Defendant has never enjoyed ownership of the subject matter at any time prior to 2006. The above observation clearly indicate that the reliance placed upon the affidavit marked ‘P6’, also referred to as ‘P9’, to say the least, is irrational and/or misconceived in law and in fact.

The appellate court also relied on document marked ‘P7’, the affidavit filed by Ayarin Alawathi, to establish that the 1st Defendant visited the subject premises to take care of her husband’s parents. The Plaintiff never relied on the said affidavit, as it were, to confront the 1st Defendant on the issue of leave and licence. Notwithstanding the evidence, the Court held that on facts transpired from the said affidavit filed by Ayarin Alawathi, the 1st Defendant became a licensee only for the purpose of looking after the parents. As observed earlier no evidence was led to establish that the 1st Defendant was a licensee of the 2nd Defendant with a leave and licence or as an agent who entered the premises in a subordinate character with the latter’s permission.

Prior to the institution of action in the Magistrates Court the 2nd Defendant did not give any undertaking to the Plaintiff to dispose of the 1st Defendant from the subject premises. In the circumstances, it is clearly observed that the appellate court merely extracted facts from Ayarin Alawathi’s affidavit in support of its reckoning.

In **D. R. Kiriamma vs. J.A. Podibanda 2005 (BLR) 9**, Udalagama, J. made reference to the requisite elements of law in establishing prescriptive possession as,

“Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. Considerable circumspection is necessary to recognize prescriptive title as undoubtedly it deprives the ownership of the party having paper title. title by prescription is an illegality made legal due to the other party not taking action”

The court also made reference to the following passage in Walter Perera’s “Laws of Ceylon”, 2nd Edn. 396, which reads as follows;

“as regards to the mode of proof of prescriptive possession, mere general statements of witnesses that the Plaintiff ---- have possessed the land for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession to support a title of prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by court”.

The learned District Judge having placed due weight on the Plaintiff’s documentary title to the property was mindful to shift the burden to the 1st Defendant to prove her claim on prescriptive title. The trial judge considered that the 1st Defendant was in possession of the said premises from 1993 and had given due consideration to the electoral register from 1993 to 2010 and to the Grama Niladhari certificates when evaluating evidence. The trial court also considered the expenditure incurred by the 1st Defendant to complete the construction of the house.

The oral evidence, the supporting documents, or the payment receipts on incurred expenses on improvements made, remained uncontradicted in cross examination.

“Where the Petitioner has led evidence sufficient in law to prove his status, ie, a factum probandum, (the physical possession of the 1st Defendant in this appeal) the failure of

the Respondent to adduce evidence which contradicts it adds a new factor in favour of the Petitioner. There is then an additional ‘matter before the court’, which the definition in section 3 of the Evidence Ordinance requires the court to take into account, namely, that the evidence led by the Petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law”. (**L. Edrick De Silva vs. L. Chandrasa De Silva 70 NLR 169**)

The Plaintiff’s main contention that the 1st Defendant had lived in the impugned premises with a leave and licence of the 2nd Defendant has not been established nor has it been subscribed to by the 2nd Defendant in these proceedings.

Gratiaen J. in **Chelliah vs. Wijenathan 54 NLR 337**, held that;

“Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights”.

In the instant case the starting point of the acquisition of prescriptive title by the 1st Defendant from 1993 was never challenged. There is also no evidence of payment of rent, any other obligation of the 1st Defendant to her husband’s parents or any party, which could have had a negative impact on her claim. The documentary evidence tendered to the trial court has clearly bolstered the oral evidence of the 1st Defendant. The District Court has satisfactorily discharged its duty to examine and evaluate the available evidence in totality, prior to arriving at its finding. In the circumstances the District Court was correct in holding that the 1st Defendant has led evidence sufficient in law to discharged the burden of acquiring prescriptive possession.

For the aforesaid reasons, I am inclined to hold that the 1st Defendant has proved undisturbed and uninterrupted possession of the impugned premises for over 10 years prior to bringing of this action.

Accordingly, both 1st and 2nd questions of law are answered in the affirmative.

The Judgement of the Civil Appeal High Court dated 03/05/2018 is set aside and the appeal is allowed.

Appeal allowed. No costs ordered.

Judge of the Supreme Court

L.T.B. Dehideniya J.

I agree

Judge of the Supreme Court

Yasantha Kodagoda PC, J.

I agree

Judge of the Supreme Court