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

S.C. Appeal No. 155/2011

SC/HCCA/LA No. 224/2011

NWP/HCCA/KUR/08/2005(F)

D.C. Kuliyapitiya Case No. 3901/L

Ranasinghe Arachchilage Samadara Malini Ranasinghe

(**Deceased)**

PLAINTIFF

1A. Senarath Arachchilage William Singho

1B. Senarath Arachchilage Thushara Senarath

1C. Senarath Arachchilage Samindra Senarath

1D. Senarath Arachchilage Lasantha Senarath

All of Weralugama Kuliyapitiya (Post)

SUBSTITUTED-PLAINTIFFS

Vs.

Adhikari Appuhamilage Appuhamy

(**Deceased)**

DEFENDANT

1A. Wijesinghe Arachchilage Rosalin Nona
(C/o. Balagolla Kade, Kobeygane (Post)

1B. Kalubowila Appuhamilage Rosalin Nona

1C. Adhikari Appuhamilage Ariyawansha

1D. Adhikari Appuhamilage Gunawansha

1E. Adhikari Appuhamilage Gunasinghe

1F. Adhikari Appuhamilage Wijesinhge

1G. Adhikari Appuhamilage Weerawansha

1H. Adhikari Appuhamilage Ariyakusum

1I. Adhikari Appuhamilage Chandra Kusum

1J. Adhikari Appuhamilage Dimuna Sanjeewanie

All of No. 13, Jayasirigama, Pannala (Post)

1K. Jayalath Balagallage Solomon Dias

1L. Jayamanna

Both of Thalammehera, Pannala (Post)

SUBSTITUTED-DEFENDANTS

AND BETWEEN

1k. Jayalath Balagallage Solomon Dias

Thalammehera, Pannala (Post)

1K SUBSTITUTED-DEFENDANT-APPELLANT

Vs.

Ranasinghe Arachchilage Samadara Malini Ranasinghe

(**Deceased)**

1A. Senarath Arachchilage William Singho

1B. Senarath Arachchilage Thushara Senarath

1C. Senarath Arachchilage Samindra Senarath

1D. Senarath Arachchilage Lasantha Senarath

All of Weralugama Kuliyapitiya (Post)

SUBSTITUTED-PLAINTIFFS-RESPONDENTS

Adhikari Appuhamilage Appuhamy

(**Deceased)**

1A. Wijesinghe Arachchilage Rosalin Nona

Balagolla Kade, Kobeygane (Post)

1B. Kalubowila Appuhamilage Rosalin Nona

1C. Adhikari Appuhamilage Ariyawansha

1D. Adhikari Appuhamilage Gunawansha

1E. Adhikari Appuhamilage Gunasinghe

1F. Adhikari Appuhamilage Wijesinhge

1G. Adhikari Appuhamilage Weerawansha

1H. Adhikari Appuhamilage Ariyakusum

1I. Adhikari Appuhamilage Chandra Kusum

1J. Adhikari Appuhamilage Dimuna Sanjeewanie

All of No. 13, Jayasirigama, Pannala (Post)

1L. Jayamanna

of Thalammehera, Pannala (Post)

SUBSTITUTED-DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1k. Jayalath Balagallage Solomon Dias

Thalammehera, Pannala (Post)

1K SUBSTITUTED-DEFENDANT-APPELLANT-APPELLANT

Vs.

Ranasinghe Arachchilage Samadara Malini Ranasinghe

(**Deceased)**

1A. Senarath Arachchilage William Singho

1B. Senarath Arachchilage Thushara Senarath

1C. Senarath Arachchilage Samindra Senarath

1D. Senarath Arachchilage Lasantha Senarath

All of Weralugama Kuliyapitiya (Post)

SUBSTITUTED-PLAINTIFF-RESPONDENT-RESPONDENTS

Adhikari Appuhamilage Appuhamy

(**Deceased)**

1A. Wijesinghe Arachchilage Rosalin Nona

Balagolla Kade, Kobeygane (Post)

1B. Kalubowila Appuhamilage Rosalin Nona

1C. Adhikari Appuhamilage Ariyawansha

1D. Adhikari Appuhamilage Gunawansha

1E. Adhikari Appuhamilage Gunasinghe

1F. Adhikari Appuhamilage Wijesinhge

1G. Adhikari Appuhamilage Weerawansha

1H. Adhikari Appuhamilage Ariyakusum

1I. Adhikari Appuhamilage Chandra Kusum

1J. Adhikari Appuhamilage Dimuna Sanjeewanie

All of No. 13, Jayasirigama, Pannala (Post)

1L. Jayamanna

of Thalammehera, Pannala (Post)

SUBSTITUTED-DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE: Chandra Ekanayake J.,
Rohini Marasinghe J. &
Anil Gooneratne J.

COUNSEL: W. Dayaratne P.C. with Ms. D.N. Dayaratne
for the 1K Substituted-Defendant-Appellant-Appellant
Dr. Jayatissa de Costa P.C., with Daya Guruge
For the Substituted-Plaintiff-Respondent-Respondent

ARGUED ON: 11.02.2015

DECIDED ON: 02.04.2015

GOONERATNE J.

This is an appeal from the judgment of the High Court (Civil Appeals) of the North Western Province, delivered on or about 19.5.2011. Leave to Appeal was granted by this court on 07.10.2011, on questions of law referred to in

paragraphs 17(a), (b), (c) and (i) of the petition of 1K Substituted-Defendant-Appellant-Petitioner. (reference to above paragraphs will be done subsequently) It would be necessary to briefly refer to the facts of the case and to the order made by the Court of Appeal on 02.10.1992, for a trial De Nova, prior to considering the judgment of the said High Court, and the Appellant's case.

The original Plaintiff was one Malani Ranasinghe who filed action in the District Court of Kuliyapitiya in case No. 3901/L for a declaration of title to the land described as lot 2 of "Meegahamulawatta' alias Kongahamulawatta in an extent of about 2 Roods, 37.5/.24 perches and for damages and ejectment of the Defendant-Respondent. Original-Plaintiff's position was that the land in dispute was partitioned on or about 1954 (Plaintiff's grand-father by virtue of the partition decree became entitled to said lot 2) and that the Defendant was in possession of the land with the permission of the said Plaintiff's grand-father. However Defendant made a claim to the land in dispute based solely on prescriptive title. It was the view of the Court of Appeal (vide order of 02.10.1992) that there were certain shortcoming in placing evidence before the District Court and both parties have not proved each other's case and as such the Plaintiff should have taken a commission to identify the land in dispute properly, since the

land in question had been described by more than one name. Court of Appeal set aside the judgment and decree entered by the learned District Judge, dismissing the action, and ordered a trial De Nova. In doing so the Court of Appeal observed that it is open for parties to lead any further oral or documtentary evidence.

In compliance with the Court of Appeal order fresh trial was held in the District Court on issues already settled earlier before the District Court. However the learned District Judge dismissed the claim based on prescriptive title of the Defendant-Appellant and entered judgment in favour of the Plaintiff. In the appeal to the High Court by the Defendant-Appellant the learned High Court Judge dismissed the appeal.

It must be noted that the 1st abortive trial commenced on 24.11.1977. During the course of the second trial before the District Court both original Plaintiff and Defendant died and 1A to 1D substituted Plaintiffs and 1A to 1L Substituted Defendants were substituted. In the second trial before the District Court which is in fact relevant to this appeal, Plaintiff's party led the evidence of Surveyor, substituted 1A Plaintiff, and led evidence of the depositions and read in evidence the depositions as per Section 33 of the Evidence Ordinance of original Plaintiff's wife Leanora. Deposition produced and marked as P12 which was her

evidence in the first trial. In the same way the deposition of one Dhanapala was produced and marked as P14 & P14a, without any objection.

The learned President's Counsel for the Appellant contended before this court that Plaintiff failed to establish title to the land in dispute or to the title pleaded in the plaint and that the Defendant-Appellant has placed sufficient evidence of undisturbed and uninterrupted adverse possession of the corpus for a period of over 40 years. On that basis learned President's Counsel for Appellant argued that his client has prescribed to the land in dispute. He further argued that based on the evidence of the Plaintiff's party alone, the Appellant was successful in establishing undisturbed, uninterrupted and independent possession to the land in question. At a certain point of time in his submissions, learned President's Counsel also thought it fit to submit to this court that the inventory filed in the testamentary case which was filed after the demise of the original owner Plaintiff's father does not include the land in dispute, although Plaintiff's mother Leanora Ranasinghe was the executor and beneficiary to the last will.

I would at this point of the judgment advert to some of the salient points emphasized by the learned President's Counsel on behalf of the Appellant.

(a) Civil Appellate High Court failed to consider whether the District Court properly investigated title of the original plaintiffs.

(b) Civil Appellate High Court failed to consider the directions given by the Court of Appeal to commence the trial De Novo which is also a direction to adopt the previous evidence of the abortive first trial in the District Court

(c) In a rei vindication suit it is not necessary to consider whether Defendant has title and possession where Plaintiff fails to prove title to the corpus. If it is so action should be dismissed by the learned District Judge.

On the other hand learned Counsel for the Substituted Plaintiff-Respondent in his brief submissions supported both the judgment of the learned District Judge which was delivered on 18.01.2005 and the judgment of the Civil Appellate High Court. Learned Counsel for the Respondent emphasized that Plaintiff had good paper title based on a partition decree of 1954 which by a process and inheritance devolved on the Plaintiff. He also submitted that the burden of proof in a case of this nature would shift to the Defendant party to prove title, as per Section 3 of the Prescription Ordinance.

It is also Trite Law that Plaintiff should set out his title on the basis on which he claims a declaration of title to the land in dispute and the burden rest

on the Plaintiff to prove that title as against the opposing Defendant party. Vide Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167. The other important principle would be as set out in *Karunadasa Vs. Abdul Hameed 60 NLR 352 per Sansoni J.* "In a rei vindication action it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties.

The aspect of evidence which is of much significance is the depositions produced and read in evidence marked P12, P14 & P14a. Evidence given under Section 33 of the Evidence Ordinance is substantive evidence used to prove the truth of facts and not merely used to contradict. S.S. Fernando Vs., the Queen 55 NLR 392; King Vs. Sudu Banda 47 NLR 183; 47 NLR 203. No doubt the trial Judge approached the case with a clear understanding of all above and the factual and legal position of the Defendant-Appellant's case, and that of the Plaintiff-Respondent.

This was an action that spread over a fairly long period of time. The learned counsel on either side argued this appeal of Substituted parties. In fact over the years parties had to go through and taken along the path which resulted in four judgments being pronounced by our courts, prior to this appeal being heard, by

the Appex Court. Notwithstanding the position taken up by the Appellant the starting point for the parties concerned emerge from the judgment pronounced by the Court of Appeal which gave a ruling as regards the future course of action which set aside the 1st judgment of the District Judge. In civil disputes parties could come to certain understandings and agree on certain matters. As such in the 2nd trial an admission was recorded and both parties agreed as regards the corpus, and identity of the land in dispute. (lot (1) in plan 764) Parties also agreed to proceed to trial on issues raised in the 1st abortive trial.

I find that the learned trial Judge has adequately investigated title of the predecessors of the Substituted-Plaintiff-Respondent and that of the Plaintiff-Respondent, Samadara Malini Ranasinghe. Documents relevant to the case had been produced marked P1 – P16. Although the Apex Court or any other court sitting in appeal is not required to re-write the judgment and evidence led at the trial, it would be prudent to refer to certain items of evidence which fortify Substituted-Plaintiff-Respondent's case. The Surveyor's evidence remains uncontradicted. Documents P1- P4 being documents relevant to the testamentary case pertaining to the original owner of the property in dispute, conditional transfer deed, the transfer deed in favour of original Plaintiff S. Malini Ranasinghe and the important documents inclusive of documents pertaining to

partition decree were all produced and marked without any objection. So are the other documents produced on behalf of the Plaintiff-Respondent. At the close of the Plaintiff's case all Plaintiff's documents were read in evidence without any objection. The learned trial Judge has given his mind to each and every document produced by the Plaintiff's party. There are also findings of the trial judge as regards the Substituted-Appellant's predecessor's possession to the land in dispute. It was the view of the learned trial Judge that the original Defendant being a relative of the Plaintiff entered the land in dispute and possessed it with the permission of the original Plaintiff's, father.

Evidence of Leanora Ranasinghe (P12) also suggest that her husband used to collect and enjoy the produce (coconuts) and after his death she had collected the coconuts from the land in dispute.

Partition decree may not bind the state, but such a decree would be good and conclusive against all persons whomsoever. Therefore the Substituted-Plaintiff's party had good title, to begin with this suit.

It is of much importance to consider the last will P1 and deed marked and produced P2. Trial Judge has given serious consideration to deed P2 which was a conditional transfer in favour of one Karunaratne, and deed P2 refer to

deed No. 2356 and its schedule and also includes the land in dispute described by its name and details of lot 2 in plan No. 237 emanating from the partition decree covering the extent of 2 Roods and 37.5/24 perches. P2 also state that Leanora Ranasinghe became entitled to the land in dispute by virtue of testamentary case Anuradhapura No. 655/T. Thereafter both Leanora Ranasinghe and the above named Karunaratne transferred the property in dispute to the original Plaintiff by deed P3. Trial Judge emphasis that both P2 and P3 deeds, refer to the land which devolved from partition case 9259/P and described in plan 237 as lot 2 and that it is the same land described in deed P4 (land subject to the final partition decree). Therefore the land described in plan P5 is one and the same land referred to in P1 – P4. It is also shown in Plan P9.

I wish to observe that this court need not be concerned of the abortive first trial and judgment which was set aside by the Court of Appeal. It is the second trial that matters since parties agreed to proceed to trial based on certain understandings and admissions reached between them. As such I would reject the submission that, Plaintiff's action was dismissed by the learned District Judge in the abortive trial, on the basis that title was not established by original Plaintiff. In fact it would be misleading and unnecessarily confusing to select and apply items of evidence from the abortive trial, merely to match and suit the

Appellant's case. The learned trial Judge has analysed title of Plaintiff's party in an acceptable and convincing manner according to law. I also emphasis that the original Plaintiff's mother Leanora Ranasinghe was the beneficiary and heir to all the properties of her deceased husband Kiribanda Ranasinghe. In the last will the husband had also nominated her as the executor. The last will was duly proved in the testamentary proceedings. If any argument was advanced that the subject property was not included in the inventory cannot have any impact to defeat the title of any property lawfully devolved on the original owner Kiribanda Ranasinghe who bequeath all his properties to his wife Leanora. As such one cannot be permitted to pick on another clause in the last will where the testator required his funeral rights to be performed along with his five children. Such a request and desire is separate and distinct to the testators wish to convey all his properties to his wife, to the exclusion of all others.

The only issue relied upon by the Defendant is issue No. (6) based on prescriptive rights. Learned District Judge very correctly observes that the evidence of 1K Defendant-Appellant only suggest mere possession, and the two witnesses who gave evidence on behalf of the Defendant was highly unsatisfactory and unsupportive of possession as no specific knowledge or instances of possession had not been demonstrated by them. The items of

evidence established by the Plaintiff's party that the original Defendant entered the land with the permission of Kiribanda Ranasinghe had not been disproved by the Defendants-Appellant's party. There is nothing to show that the nature of possession as above changed or turned to be adverse and independent to that of the original owner. If it was the case that Defendant was in possession for long years (possession of Defendant party not denied by Plaintiff's party) something equivalent but nothing short of 'ouster' could bring the desired result for the Appellant to prescribe to the land in dispute. Let us see what type of acts could be considered as 'ouster'.

In the case of *Rajapakse Vs. Hendrick Singho 61 NLR 32.*

There was overwhelming evidence that the defendants, since the year 1922 were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title and gave them no share of the produce, paid them no share of the profits, nor any rent, and did not act from which an acknowledgement of a right existing in them would fairly and naturally be inferred, It was held in this case that the evidence disclosed an ouster of the plaintiffs by the defendants and that the ouster continued for a period of over ten years.

In this case the acts like the occupation of the land by the defendants since 1922, taking the produce to the exclusion of the plaintiffs, non-payment of the share of profits to the plaintiffs and the act of not giving any share of the produce to the plaintiffs were considered as "ouster".

Mere possession for a period of time cannot give rise to a plea of 'ouster'. As recognized in the above case, to prevent possession and enjoyment of the produce derived from the land in question to the exclusion of the owner would be an essential fact. Evidence of the Defendant party suggest only mere possession.

I would fortify my views with reference to the following decided cases.

Navaratne Vs. Jayatunge 44 NLR at pg. 517…..

Where a person enters into occupation of property belonging to another with the latter's permission he cannot acquire title to such property by prescription unless he gets rid of his character of licensee by doing some overt act showing an intention to possess adversely.

Naguda Marikar v. Mohammedu (7 N.L.R. 96) followed.

Sirajudeen and Two Othrs Vs. Abbas 1994(2)S.L.R at pg. 365…

Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.

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.

A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

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. The occupation of the premises must be of such character as is incompatible with the title of the owner.

The judgment of the Civil Appellate High Court delivered on 19.5.2011, ultimately decided to dismiss the appeal. When a Court of law sit in an Appellate capacity according to law, there cannot be a necessity to refer to all items of evidence and re-write the evidence. The Civil Appellate High Court has no doubt examined two important aspects of this case. i.e Plaintiff-Respondent's title to the property in dispute and the claim of the 1K Defendant-Appellant based on

prescriptive rights. On the question of title the High Court takes the view that with or without a last will, under the common law, on inheritance title devolves on a half share basis to the original owner's wife Leanora and the Plaintiff. This part of the analysis by the High Court Judge would be to demonstrate, in any event the entitlement of Plaintiff, under laws of succession and inheritance. However the Civil Appellate High Court has considered the last will P1 of the original owner "Kiribanda", who bequeath all his properties both movable and immovable to his wife Leanora. The last will P1, was duly proved in the testamentary proceedings, held in the District Court of Kurunegala. Even if a doubt as regards the subject property being not included in the inventory filed in the testamentary case, it cannot defeat the original owner's right and title to the properties, he owned during his life time. On an examination of the last will P1, it is clear beyond doubt that the original owner's wish and intention was to bequeath all his properties to his wife, Leanora.

Therefore all deeds executed by Leanora the mother of the original Plaintiff would be valid for all future 'transfers' and 'gifts' of property. As such this court is not in a position to disturb the findings of the Civil Appellate High Court. Further on the question of prescriptive rights, the views of the Civil Appellate High Court need not be disturbed, as it is clear that the provisions contained in Section

3 of the Prescription Ordinance had not been adequately proved before the Original Court, by the Appellants. I have already dealt with the question of 'ouster', from which Appellants are unable to get any benefit based on same. As such I have no alternative but to dismiss this appeal. The questions of law are answered as follows:

17. (a) Have their Lordships of the Civil Appellate High Court completely failed to consider whether the learned Additional District Judge has properly and adequately investigated the title of the original Plaintiff?

This question is answered in the negative. Based on the investigation of title by the learned District Judge, the Civil Appellate High Court dismissed the appeal.

17. (b) Civil Appellate High Court failed to consider that in the order of the Court of Appeal to hear the case de novo it was clearly stated that at the trial de novo it will be open to the parties to lead any further oral or documentary evidence by calling witnesses which will help in the decision of the case which is a direction to adopt the previous evidence as part and parcel of the proceedings of the trial de novo which was not complied with the learned District Judge, and adopted part of the evidence produced under Section 33 of the Evidence Ordinance?

The Court of Appeal set aside the judgment of the trial court and directed that trial de novo be held. Court of Appeal never gave any direction to adopt the evidence in the abortive 1st trial. Only observation by the Court of Appeal was to enable parties to lead both oral and documentary evidence. Learned District Judge cannot be faulted in any manner for compliance of an order of the Court of Appeal. I observe that the Appellant merely seeks to confuse the issues, but the learned District Judge had correctly adhered to the directions given by Court of Appeal.

17. (c) Have Their Lordships of the Civil Appellate High Court completely failed to consider the well-established legal principle that rei vindicatio action, it is not necessary to consider whether the defendant has any title or right to possession where the Plaintiff has failed to establish title to the corpus and the action ought to be dismissed?

Civil Appellate High Court based on the learned District Judge's judgment examined title of Plaintiff-Respondent. learned High Court Judge has also considered prescriptive rights in relation to the provisions contained in

Section 3 of the Prescription Ordinance. As such the question posed does not arise.

17. (i) Have their Lordships of the Civil Appellate High Court misdirected themselves in considering the lack of evidence as to the nature of possession of the original Defendant and the capacity in which he entered upon the corpus when their Lordships should have in fact considered those issues in relation to the original Defendant and not in relation to the Petitioner who has been merely substituted in his place?

The Civil Appellate High Court as well as the learned trial Judge very correctly considered the judgment of the Court of Appeal. Judgment delivered by the 1st trial Judge has been set aside by the Court of Appeal. There was no application by the Substituted-Defendant-Appellant to read in evidence as per Section 33 of the Evidence Ordinance the evidence of the original Defendant in the previous proceedings between parties. In these circumstances, there is no obligation vested in the original court to consider the evidence as suggested by the Appellant, in the abortive trial, as regards the Appellants.

Accordingly this appeal is dismissed, and the Judgment of the Civil Appellate High Court is affirmed. There shall be no costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

Rohini Marasinghe J.

I agree.

JUDGE OF THE SUPREME COURT