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

In the matter of an Appeal, with Leave to Appeal obtained from this Court.

CHAMINDA ABEYKOON
No. 52, Rockhouse Lane,
Modera, Colombo-15
PLAINTIFF

S.C.Appeal No.54A/2008
S.C. (Spl.LA)No.213/2007
C.A.Appeal No. 418/98(F)
D.C. Colombo Case No.15465/L

VS.

H. CARALAIN PIERIS
No.34/3/E, Ellie House Road,
Modera, Colombo 15.
DEFENDANT

AND

H. CARALAIN PIERIS (deceased)
DEFENDANT- APPELLANT

P. NICHOLAS ANTHONY FERNANDO
No.34/3/E, Ellie House Road,
Modera, Colombo 15.
SUBSTITUTED DEFENDANT-APPELLANT

VS.

CHAMINDA ABEYKOON
No. 52, Rockhouse Lane,
Modera, Colombo-15.
PLAINTIFF-RESPONDENT

AND NOW BETWEEN

CHAMINDA ABEYKOON
No. 52, Rockhouse Lane,
Modera, Colombo-15.
PLAINTIFF- RESPONDENT-PETITIONER

VS.

P. NICHOLAS ANTHONY FERNANDO
No.34/3/E, Ellie House Road,
Modera, Colombo 15.
SUBSTITUTED DEFENDANT-APPELLANT

1) **EVONNE KUMARI FERNANDO**
2) **ANURUDDHIKA ROSHINI FERNANDO**
3) **DISNA RANJANI FERNANDO**
4) **DILIP FERNANDO**

All of 34/3E, Mowbray Lane, Colombo 15.
SUBSTITUTED DEFENDANTS-APPELLANTS- RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
Vijith K. Malalgoda, PC, J.
L.T.B. Dehideniya, J.

COUNSEL: Faisz Mustapha, PC with Keerthi Tillekaratne and Randika de Silva for the Plaintiff-Respondent-Appellant-Appellant.
Rohan Sahabandu, PC with Hasitha Amarasinghe for the Substituted Defendant-Appellant- Respondent.

ARGUED ON: 19th March 2018

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Respondent-Appellant on 01st August 2008.
By the Defendant-Appellant-Respondent on 20th October 2008 and 12th July 2018.

DECIDED ON: 02nd October 2018

Prasanna Jayawardena, PC, J.

The land and premises which are the subject matter of this dispute are located at No. 34/3 E, Ellie House Road, Colombo 15. The land is about 19 perches in extent. The land and premises will be referred to as "the property" in this judgment.

On 26th February 1992, the Plaintiff-Respondent-Appellant ["the plaintiff"] instituted action in the District Court of Colombo against the original Defendant seeking a

declaration of title to the property, the ejectment of the defendant from the property and recovery of damages at the rate of Rs. 1000/- *per mensem* from 01st April 1991 until the date of the ejectment of the defendant from the property.

The plaintiff's case, as pleaded in the plaint, was that: (i) the original owner of the property was one Wijekulasuriya Patabendige Milliner Fernando; (ii) upon his death, Liyanage Mary Margaret Perera was appointed the Executrix of his Estate under and in terms of Milliner Fernando's Last Will no. 2174 dated 19th August 1971; (iii) probate was issued to the said Executrix in D.C. Colombo Case No. 26821; (iv) subsequently, the said Executrix of the Estate of the deceased Milliner Fernando conveyed the property to the plaintiff's father - Abeykoon Joseph Anthony - by Executor's Conveyance no. 2239 dated 31st August 1978; (v) thereafter, the plaintiff's father gifted the property to the plaintiff by Deed of Gift no. 410 dated 27th October 1981; (vi) at the time of execution of this Deed of Gift, the plaintiff was a minor; (vii) upon reaching the age of majority, the plaintiff's Attorneys-at-Law addressed a letter dated 05th February 1991 to the defendant informing the defendant that the plaintiff was the owner of the property; (viii) however, the defendant refused to accept the plaintiff's title to the property; (ix) in these circumstances, the plaintiff's Attorneys-at-Law sent the defendant a notice dated 01st March 1991 requiring the defendant to quit and vacate the property on or before 31st March 1991; (x) despite this notice, the defendant remained in unlawful occupation of the property and, therefore, the plaintiff is entitled to the reliefs mentioned in the preceding paragraph.

The defendant filed answer admitting only receipt of the letter dated 05th February 1991 and notice dated 01st March 1991. The defendant denied that the plaintiff has title to the property and denied the other averments in the plaint. The defendant stated that she was entitled to the property by prescription. She further pleaded that the plaintiff could not have and maintain the said action by reason of the principle of *res judicata* in view of the dismissal of D.C. Colombo Case No. 6938/RE which had been instituted in respect of the same property. However, despite the defendant stating in her answer that she had prescriptive title to the property, the defendant did not make a claim in reconvention on the basis that she had title to property by prescription and did not pray for a declaration that she was the owner of the property.

When the trial commenced in the District Court on 04th March 1994, the defendant admitted receipt of the plaintiff's letter dated 05th February 1991 and the notice dated 01st March 1991. Thereafter, the plaintiff framed four issues based on the averments in the plaint. The defendant framed three issues which asked whether the plaintiff had no cause of action, whether the plaintiff could not have and maintain the said action by reason of the principle of *res judicata* in view of the dismissal of D.C. Colombo Case No. 6938/RE and whether, if either of these issues were answered in the affirmative, the plaintiff's action should be dismissed. On that day, the defendant

did not frame any issues on whether the defendant had acquired title to the property by prescription.

At the time the trial commenced on 04th March 1994, the plaintiff's attorney gave evidence. The evidence-in-chief of this witness was concluded on that day. During the course of his evidence-in-chief, this witness produced the following documents marked "පැ 1" to "පැ 8": (i) the Power of Attorney granted by the plaintiff to the witness, marked "පැ 1"; (ii) the Deed of Gift no.410 in favour of the plaintiff, marked "පැ 2"; (iii) the Executor's Conveyance no. 2239 in favour of the plaintiff's father, marked "පැ 3"; (iv) the plaintiff's birth certificate, marked "පැ 4"; (v) the letter dated 05th February 1991 sent by the plaintiff's Attorney-at-Law to the defendant, marked "පැ 5"; (vi) the reply thereto dated 08th February 1991 sent by the defendant's Attorney-at-Law, marked "පැ 6"; (vii) the notice dated 01st March 1991 sent by the plaintiff's Attorney-at-Law to the defendant, marked "පැ 7"; and (viii) the reply thereto dated 14th March 1991 sent by the defendant's Attorney-at-Law, marked "පැ 8";

The plaintiff's attorney stated, *inter alia*, that he was the plaintiff's uncle and that the plaintiff was abroad. He said the plaintiff had obtained title to the property by Deed of Gift no.410 marked "පැ 2" executed in the plaintiff's favour by the plaintiff's father and, at that time, the plaintiff was nine years of age. The plaintiff's father had earlier obtained title to the property by Executor's Conveyance no. 2239 marked "පැ 3".

On the next date of trial, before the evidence commenced, the defendant framed two more issues asking whether the defendant had acquired title to the property by prescription and, if so, whether the plaintiff's action should be dismissed. The plaintiff framed a further issue asking whether no prescriptive title could be acquired against the plaintiff while he was a minor.

In cross examination, the plaintiff's attorney stated that he had first come to know of the property in or about the year 1983 after the plaintiff's father [who was the brother of the witness] had gifted the property to the plaintiff by Deed of Gift marked "පැ 2". The witness said that, in 1983, the property was a bare land. The witness said the defendant had commenced occupying the property after 1983. When learned counsel for the defendant showed the witness an extract from an Electoral Register for the year 1965 which recorded the defendant as being a resident of the property in 1965, the witness only acknowledged that this document stated that the defendant was a resident of the property in 1965 and said he did not know whether the defendant had been residing on the property after 1965. That extract from the Electoral Register was marked "වි 1". Thereafter, learned counsel for the defendant showed the witness the judgment in D.C. Colombo Case No. 6938/RE, which was marked "වි 2". The witness acknowledged that the plaintiff named in the judgment was his sister and that the defendant named in the judgment is the defendant in the present case. The witness stated that he was unaware of that action and that his

sister had not mentioned to him that she had filed a case. The witness also stated that he became aware of the documents marked "පැ 2" to "පැ 8" when he came to testify in the present case. When learned counsel for the defendant put to the witness that the defendant had been in occupation of the property for thirty years, the witness stated that he was not aware that the defendant had occupied the property for that claimed period of time.

The plaintiff also led the evidence of an officer from the Record Room of the District Court of Colombo who produced the case record in D.C. Colombo Case No. 26821/T. Finally, Mr. Herman Perera, Attorney-at-Law and Notary Public testified and stated that he had attested the Executor's Conveyance marked "පැ 3".

Thereafter, the plaintiff's case was closed leading in evidence the documents marked "පැ 1" to "පැ 8". As evident from Journal Entry No. 27, the defendant did not require further proof of any of these documents.

The defendant gave evidence and, in her evidence-in-chief, stated that the owner of the property - who she referred to as 'Mr. Calvin' - had permitted her to reside on the property *["අයිතිකාරයා කැල්වින් මහතා තමයි දුන්නෙ"]* and that, at the time she gave evidence on 04th July 1996, she had resided there for thirty-five years. She said her son had lived with her from the time she entered the property and now her son's family also resides there. The defendant later clarified that the person she referred to as "Mr. Calvin" was the aforesaid Milliner Fernando [who the plaintiff claimed as his predecessor in title] - *vide:* the following evidence of the defendant:

Q: තමා කියා සිටියා තමාට මේ දේපොලේ පදිංචි වීමට අවසර දුන්නෙ කැල්වින් මහත්තයා කියල, හරිද ?

A: කැල්වින් මහත්තයා.

Q: කැල්වින් මහත්තයා කියන්නේ කැල්වින් මිලින විජේකුලසූරිය ?

A: ඔව්.

When her counsel asked her in which year she had entered the property, the defendant stated she could not remember the year. The proceedings show that, upon a considerable amount of prompting and suggestion by counsel, the defendant stated that it could be about the year 1959. The proceedings also show that, thereafter, the defendant agreed to a suggestion put to her by counsel for the defendant that, at the time the Deed of Gift marked "පැ 2" was executed in 1981, the defendant had resided on the property for 22 years. The defendant then stated she was the owner of the property.

In cross examination, the defendant again stated that she had entered the property with the permission of Milliner Fernando - *vide:* the following evidence of the defendant:

Q: විජේකුලසූරිය යන අයගේ අවසරය මත ආවා කිව්වා ?

A: කැල්වින් මහතාගේ අවසර මත. කැලය සුද්ද කරල. ගෙයක් හදා ගන්න.

Next, the defendant's son gave evidence and stated that his father and mother and the witness had entered the property in or about the year 1957 and that they had built a house on the property and resided in it ever since. The witness said that, during this time, no person had claimed a right to the property or a right to possess the property or disturbed his mother's possession of the property. He said that when the letter dated 05th February 1991 marked "පැ 5" was received, the defendant and his mother rejected the plaintiff's claim that he was the owner of the property. The witness stated that his mother was the owner of the property.

In cross examination, the defendant's son too stated that the original owner [*"මුල් අයිතිකරු"*] was "Mr. Calvin" - *ie:* the aforesaid Milliner Fernando - and that Milliner Fernando permitted the defendant and her family to live on the property - *vide:* the following evidence of the defendant's son:

Q: කැල්වින් මහත්තයට මේ ඉඩම අයිතිව තිබුණු බව දන්නවද ?

A: නාත්න එක්ක ගිහින් කතා කරල. මේ ඉඩම කැලෑවක් තිබුනේ. පරම්පරාවට ඉන්න කීව.

Q: ලිපියක් හෝ ඔප්පුවක් තිබෙනවද ?

A: නැහැ.

Q: තමා පිළිගන්නවා කැල්වින් මහත්තයගේ ඉඩම කියා ?

A: ඔව්. කැල්වින් මහතා අවසර දුන්න.

In cross examination, the witness denied that his mother had paid rent to the plaintiff's mother. Thereafter, the defendant's case was closed leading in evidence the documents marked "වි 1" and "වි 2"

In her judgment, the learned District Judge outlined the cases of the two parties. Thereafter, the learned judge observed that, on the one hand, the plaintiff claims title to the property under and in terms of the Deeds marked "පැ 2" and "පැ 3" and, on the other hand, the defendant's position is that, the plaintiff has no title to the property because the defendant had acquired prescriptive title to the property.

The learned District Judge held that the plaintiff had established his title to the property. The learned judge observed that, although the defendant had claimed in her answer that she had prescriptive title to the property, that claim will fail because the defendant had not stated a definite date on which she came into possession of the property and had not stated the date on which she commenced possessing the

property adverse to the plaintiff. The learned judge held that, in any event, the documents marked "වී 1" and "වී 2" did not establish the defendant's claim to have acquired prescriptive title to the property. Accordingly, the learned District Judge entered judgment for the plaintiff as prayed for in the plaint.

The defendant appealed to the Court of Appeal. During the pendency of that appeal, the defendant died and her son - Nicholas Anthony Fernando - was substituted as the defendant-appellant.

A single judge of the Court of Appeal has, with the agreement of the parties, heard and decided this appeal. The learned Judge of the Court of Appeal did not examine the determination by the District Court that the plaintiff had `paper title' to the property. Instead, the learned Judge only considered the defendant's claim and held that the defendant had proved, *"on civil standards"*, that she had acquired prescriptive title. In reaching this view, the learned judge appears to have considered that the testimony of the defendant that she had *"long and undisturbed possession of the land"* for about thirty five years, had been *"corroborated by"* the evidence of her son and that this oral evidence together with the extract from the Electoral Register marked "වී 1" was sufficient for the Court of Appeal to determine the defendant had acquired prescriptive title to the property. The Court of Appeal also took the view that the District Court erred when it held the defendant had failed to prove the date from which the defendant claimed to have acquired prescriptive title and the learned Judge of the Court of Appeal held *"A party is also not required to state in the answer the date and the amount of years the prescriptive right was enjoyed. It is sufficient if the party states that he is relying under the Prescription Ordinance."*. Finally, the learned Judge stated *"Long undisturbed and uninterrupted possession amounted to adverse possession against the plaintiff-respondent. This has been proved by the Defendant-appellants."*. On the aforesaid basis, the Court of Appeal set aside the judgment of the District Court and dismissed the plaintiff's action.

The plaintiff sought special leave to appeal from this Court. The plaintiff has annexed to the petition, marked "Y4", a copy of a letter said to have been issued by the Rent Department of the Colombo Municipal Council stating that the defendant had deposited rent payable to the plaintiff's mother for the period September 1978 to December 1985.

This Court granted special leave to appeal on the following questions of law which are reproduced *verbatim*:

(i) Did the Court of Appeal misdirect itself by the conclusion that the long and undisturbed possession of the original Respondent conferred prescriptive title to her ?

(ii) Did the Court of Appeal err in law with regard to the burden and quantum of proof regarding prescriptive possession inasmuch as the paper title of the Appellant remained unchallenged ?

(iii) Did the Court of Appeal misdirect itself with regard to the nature of possession by the original Respondent which commenced in the character of license ?

(iv) Whether the original Respondent had established change of his subordinate character by an overt act ?

(v) Whether the Court of Appeal justified in coming to a finding of prescriptive title on insufficient evidence ?

(vi) Whether Y4 could be legally admissible before this court ?

During the pendency of the present appeal in this Court, the Substituted Defendant-Appellant-Respondent [*ie:* the defendant's son] died and his children have been substituted in his place as the 1st to 4th Substituted Defendants-Appellants-Respondents.

Before considering the questions of law, it should be stated here that the plaintiff's action is in the nature of a *rei vindicatio*. Thus, the burden on the plaintiff was to establish the identity of the corpus of the property and to establish that he had title to the property. On the other hand, the defendant does not claim that she has 'paper title' to the property on a rival chain of title. In her bid to have the plaintiff's action dismissed, the defendant relies solely on her claim that she had acquired prescriptive title.

With regard to the plaintiff's case, it is clear that there is no dispute regarding the identity of the *corpus* of the property. Next, the fact that Milliner Fernando was the original owner of the property is not in dispute. Thereafter, the Executors' Conveyance marked "පැ 3" was proved by the evidence of Mr. Herman Perera, who attested that deed. Finally, the Deed of Gift marked "පැ 2" by which the plaintiff received title to the property was produced by the plaintiff's attorney and was not challenged when that witness was cross examined. Further, although both deeds marked "පැ 2"and "පැ 3" were marked 'subject to proof', neither deed was objected to when the plaintiff's case was closed and neither the defendant nor her son disputed the authenticity of these deeds when they gave evidence. In these circumstances, the plaintiff proved that he had 'paper title' to the property. Thus, the plaintiff appears to have satisfied the requirements necessary to succeed in this action, which is in the nature of a *rei vindicatio*.

Consequently, in order to defeat the plaintiff's action, the burden was cast firmly on the defendant to prove that she had acquired title to the property by prescription. If

the defendant failed to do so, the plaintiff was entitled to succeed in this action - *vide:* sections 101, 102 and 103 of the Evidence Ordinance. In similar circumstances, Siva Supramaniam J stated in PERERA vs. PREMAWATHIE [74 NLR 302 at p. 306] *"Since the legal title to the disputed 1/4 share was in the appellants by reason of the due and prior registration of 4D7, the onus was on the respondents to prove that Joronis and his successors in title had acquired prescriptive title to that share. In the absence of such proof, the appellants were entitled to succeed."*.

The first five questions of law all raise issues which are connected to and are part of the question of whether the Court of Appeal was correct when it held that the defendant had proved that she had prescriptive title to the property. These five questions of law are facets of that central question. Therefore, they can be considered together.

It hardly needs to be said that, in order for the defendant to prove that she acquired title to the property by prescription, the defendant had to establish the requisites stipulated in section 3 of the Prescription Ordinance No. 22 of 1871, as amended. Thus, as stated in section 3, the defendant had to prove that: she had undisturbed and uninterrupted possession of the property for a minimum of ten years *and* that such possession and use of the property by the defendant has been adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property during those ten years.

In this regard, both the defendant and her son unequivocally admitted that they entered the property with the permission of Milliner Fernando, who was the original owner of the property. Thus, it has been admitted that the defendant commenced possessing the property as the licensee of Milliner Fernando.

It is a well-established principle of law that, so long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some "overt act" which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give [or deem to give] notice to the owner that his erstwhile licensee or agent is no longer holding the property in the capacity of a licensee or agent and is, from that time onwards, claiming to possess the property adverse to or independent of the owner. The overt act makes the owner aware [or is deemed to make him aware] that he runs the risk of losing title to the property if the licensee or agent complete ten years of such adverse or independent possession and acquires prescriptive title to the property. Thus, as far back as in 1898, Bonser CJ stated in MADUANWELA vs. EKNELIGODA [3 NLR 213 at p.215] *"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.". Similarly, in NAGUDA MARIKAR vs. MOHAMMADU [7 NLR 91] the Privy Council held that, in the absence of any evidence to show that the plaintiff had got rid of his character of agent, he was not entitled to the benefit of section 3 of the Prescription Ordinance. The requirement for such an overt act has similarly been upheld in ORLOFF vs. GREBE [10 NLR 183], LEBBE MARIKAR vs. SAINU [10 NLR 339], THE GOVERNMENT AGENT, WESTERN PROVINCE vs. ISMAIL LEBBE [1908 2 Weer. 29], THE GOVERNMENT AGENT, WESTERN PROVINCE vs. PERERA [11 NLR 337], NAVARATNE vs. JAYATUNGE [44 NLR 517], DE SOYSA vs. FONSEKA [58 NLR 501] and SEEMAN vs. DAVID [2000 3 SLR 23].

As Bertram CJ stated in TILLEKERATNE vs. BASTIAN [21 NLR 12 at p 19] *"…where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove ?* ***He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom sets up his possession****."*. [emphasis mine]. Similarly, in SIYANERIS vs. JAYASINGHE UDENIS DE SILVA [52 NLR 289 at p.292], the Privy Council emphasised that *"…if a person goes into possession of land in Ceylon as an agent for another* ***time does not begin to run until he has made it manifest that he is holding adversely to his principal****."* [emphasis mine]. In JAYANERIS vs. SOMAWATHIE [76 NLR 206 at p.207-0208], Weeramantry J stated "*The adverse aspect of his possession cannot in other words remain a mere concept in the recesses of the agent's mind but must so manifest itself that those against whom it is urged may see in it a challenge to their claims. Even as possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner, so also is possession through an agent incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent."*. Thereafter, in DE SILVA vs. COMMISSIONER OF INLAND REVENUE [80 NLR 292 at p. 295-296], Sharvananda J, as His Lordship then was, lucidly enunciated the applicable principles and the rationale that lay behind these principles and, thereafter, held *"Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse."*. In SEEMAN vs. DAVID [at p.26], Weerasooriya J, then in the Court of Appeal, held that *"It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster."*

Learned President's Counsel for the defendant has submitted that the requirement of an overt act applies only in the case of claims of prescription between co-owners as in the celebrated case of COREA vs. APUHAMY [15 NLR 65] and that an overt act is not required where a *"complete outsider"* claims to have prescribed to a property. However, in the present case, the defendant was by no means a *"complete outsider"*. Instead, the defendant admits that she commenced her possession of the property as a licensee of Milliner Fernando and, as stated earlier, it is established law that the defendant had to commit an overt act in order to cast aside the character of a licensee and start the running of prescription against Milliner Fernando.

In any event, as evident from the decisions cited above, the requirement that the possession of one co-owner is the possession of the other co-owners and that an overt act in the nature of ouster must occur to demonstrate a change of the character of that possession and start the running of prescription in favour of one co-owner; applies with equal force to instances where a licensee or an agent possesses a property in a subordinate character. In such instances, an overt act must occur to demonstrate change in the character of that possession and start the running of prescription in favour of the erstwhile licensee or agent.

Learned President's Counsel for the defendant has also submitted that a 'presumption of ouster' can be drawn where there has been *"long continued and uninterrupted possession"* and he cited the decision in APPUHAMY vs. RAN NAIDE [1915 1 CWR 92] in support of this contention. However, a perusal of the facts in that decision show that, quite apart from a long period of possession, the defendant had always possessed the property as the sole owner without any knowledge of a rival claimant to the property. In ALWIS vs. PERERA [21 NLR 321], Bertram CJ held that, where a party's possession of land admittedly commenced in a subordinate character, the possession of the land by that party for a *"very considerable length of time"* may justify a Court in drawing a `presumption of ouster' *provided* the other circumstances of the case justified doing so. In this connection, the learned Chief Justice said [at p.324] *"….. where it is shown that people have been in possession of land for a very considerable length of time, that fact,* ***taken in conjunction with the other circumstances of the case****, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession"*. [emphasis mine].The circumstances which led Bertram CJ to consider that there had been adverse possession included the parties who claimed prescriptive title remaining in possession of the land for over sixty years *after* transferring the property to the opposing party's predecessor in title and also one of the parties who claimed prescriptive title successfully asserting title to the land and resisting a seizure of the land in execution of a writ against one of the opposing parties. In the later case of HAMIDU LEBBE vs. GANITHA [27 NLR 33 at p.39], Dalton J observed that *"In the result it seems to me that the law of this Colony on this point is clearly laid down in Tillekeratne v. Bastian (supra). It is a question of fact where ever 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 that separate and exclusive possession had become adverse at some date more than ten years before action brought."*. Similarly, in RAN NAIDE vs. PUNCHI BANDA [31 NLR 478 at p.480] Jayewardene AJ held that *"It is open to the Court from lapse of time* ***in conjunction with other circumstances*** *to presume that a possession, originally permissive, has since then become adverse."* [emphasis mine].

Thus, it is clear that *"long continued and uninterrupted possession"* [to use the words of learned President's Counsel] does not, *by itself*, permit the drawing of a 'presumption of ouster' at some point during this period. Instead, there must be, in addition to such lengthy possession, some event or circumstances which justify the

Court taking a view that the possession had become adverse to the owner during this period. Thus, in ABDUL MAJEED vs. UMMU ZANEERA [61 NLR 361 at p. 381], H.N.G.Fernando J, as he then was, stated *"It is significant that, in these and other cases, there was almost invariably reliance, even by unsuccessful possessors, upon some circumstance additional to the mere fact of long and undisturbed and uninterrupted possession, and that proof of some such additional circumstance has been regarded in our Courts as a sine qua non where a co-owner sought to invoke the presumption of ouster."*.

In the same case, K.D. De Silva J observed [at p. 373] that one of the reasons for drawing a 'presumption of ouster' where there has been exclusive possession by one co-owner for a very long time, is the likely absence of living witnesses who could speak to when there was denial of the rights of the other co-owners. In this regard, His Lordship stated *"The presumption of ouster is drawn, in certain circumstances, when the exclusive possession has been so long-continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time, in the distant past, there was in fact a denial of the rights of the other co-owners. The duration of exclusive possession being so long it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the case comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster."* This approach was also followed by Wimalaratne J in WALPITA vs. DHARMASENA [1980 2 SLR 183]. However, it is clear that, such a `presumption of ouster' cannot be drawn in the present case for the simple reason that both the defendant and her son testified and were in a position to state the basis on which the defendant claims to have commenced possessing the property adverse to and independent of the owner of the property.

The defendant has also placed much reliance on the decision of the Court of Appeal in SIRIYAWATHIE vs. ALWIS [2002 2 SLR 384] where Dissanayake J, then in the Court of Appeal, held that the defendant who had entered possession of the property as a licensee of the original owner had successfully prescribed to the property against a successor to that original owner. The defendant relies on Dissanayake J's citation of the statement by Withers J in ANTHONISZ vs. CANNON [3 CLR 65 at p. 67] that *"Once given exclusive power to deal with immovable property, if that power is continuously exercised without disturbance and interruption and without any act of acknowledgement of another's title for ten years previous to action brought, the animus possidendi shall be imputed to him who has so exclusively exercised that power, if he chooses to claim the property for himself, and a decree shall be awarded him accordingly."*. However, this statement by Withers J must be read as being qualified by the principle established in the line of decisions commencing from MADUANWALA vs. EKNELIGODA that an overt act is required to shed the character of subordinate possession by a licensee or an agent and start the running of prescription. In fact, in SIRIYAWATHIE vs. ALWIS, Dissanayake J stated [at p.388]

"…*it is necessary to bear in mind, that a person who has commenced possession in a subordinate and a dependent character, cannot claim to be adverse user of the property, until by ouster he changes his subordinate or dependent character."*. It should also be mentioned that the decision in SIRIYAWATHIE vs. ALWIS was based on a series of overt acts committed by the defendant including the defendant paying the rates and taxes to the Town Council and building extensive extensions to the original owner's house.

In the light of the established principle of law set out above - *ie:* that a licensee or agent or other person who commences possession of a land in a subordinate capacity must establish an overt act which commences the running of prescription in his favour - the learned Judge of the Court of Appeal erred when she held that *"Long undisturbed and uninterrupted possession" per se* constituted adverse possession against the plaintiff. The learned Judge has completely overlooked the fact that the defendant admits she entered possession as a licensee of Milliner Fernando.

Learned President's Counsel for the defendant has also submitted that the Court of Appeal was correct when it took the view that a party who relies on a defence of prescriptive title is not required to state in the answer the period over which prescriptive title was acquired. I cannot agree with this contention since it is settled law that, where a defendant raises a defence of prescriptive title in an action where the plaintiff claims a declaration of title to immovable property, the defendant must give, in his answer, sufficient details of the period over which such prescriptive title was acquired including the starting point from which adverse possession is claimed. This requirement is imposed because the plaintiff must be given notice of the nature of the claim of prescriptive title so that he can seek to meet it at the trial. The requirement that these details must be given in the answer is an application of the principle stipulated in section 40 (d) of the Civil Procedure Code that a plaint shall set out where and when a cause of action arose read with section 70 (e) of the Civil Procedure Code which imposes a similar requirement when a defendant makes a claim in reconvention in the answer.

Thus, in CHELLIAH vs. WIJENATHAN [54 NLR 337 at p. 342], Gratien J held *"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 fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognised by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years."*. In SIRAJUDEEN vs. ABBAS [1994 2 SLR 365 at p.370], De Silva CJ cited the aforesaid statement by Gratien J with

approval and went on to observe that, in the case before him, *" ….. the 1st defendant has failed to establish a starting point for his acquisition of prescriptive title. This too is another important lacuna in the 1st defendant's case."*.

Since it is settled law that a defendant who relies on a defence of prescriptive title in a *rei vindicatio,* is required to state, in his answer, the period over which prescriptive title was acquired, including the starting point from which adverse possession is claimed, the learned Judge of the Court of Appeal erred when she took the view that the defendant was not required to state the date on which she claims adverse possession commenced.

In the light of the aforesaid principles of law and since the defendant categorically admits that she entered possession as the licensee of Milliner Fernando, it is first necessary to examine the evidence to ascertain whether the defendant has proved that, by committing an overt act, she shed her character of a licensee and commenced adverse possession during the lifetime of Milliner Fernando or during the time his Estate was being administered prior to the Executrix of the Estate transferring the property to the plaintiff's father by "පැ 2" on 31st August 1978.

In this regard, the defendant and her son only say that, in or about the year 1957 or 1959, they entered the property and built a house thereon with the permission of Milliner Fernando and lived in the property with his permission. They go on to say that, from then onwards, no person has disturbed their possession of the property or claimed a right to the property or claimed a right to possess the property. However, neither the defendant nor her son say that they committed any overt act or made any statement to Milliner Fernando or the Executrix of his Estate which would have demonstrated to either of them that the defendant has cast aside the character of a licensee and, from then on, was possessing the property adverse to and independent of Milliner Fernando and his Estate. As mentioned earlier, no *"secret act"* by the defendant or secretly held intention in the mind of the defendant to acquire prescriptive title to the property, would have sufficed to start the running of prescription against Milliner Fernando and his Estate. As Bonser CJ stated in MADUANWALA vs. EKNELIGODA [at p.215] *"No secret act will avail to change the nature of his occupation."* and as Wigneswaran J held in FERNANDO vs. FERNANDO [1997 2 SLR 356 at p. 361] *"…an overt act is considered necessary to prove ouster since any secret intention to prescribe may not amount to ouster."*.

Thus, it is clear that the evidence of the defendant and her son is not at odds with the defendant's continued possession of the property in the character of the licensee of Milliner Fernando and his Estate. To the contrary, so long as the defendant preserved the *status quo* and appeared to possess the property as licensee and did not commit any overt act to demonstrate that she had shed the character of a licensee, Milliner Fernando and his Estate would not have any cause to disturb the defendant's possession or occupation of the property. To apply the words of Bertram CJ in TILLEKERATNE vs. BASTIAN, the defendant had not demonstrated to Milliner

Fernando and his Estate that the defendant had *"an intention on his [her] part to possess adversely"* and had not demonstrated *"a manifestation of that intention"* to Milliner Fernando and his Estate. On an examination of the facts of the present case, I also do not consider that the case before us is one in which a `presumption of ouster' can be correctly drawn due to very long and undisturbed possession since there is a total absence of any event or circumstances which would justify this Court taking a view that the defendant's possession of the property had become adverse to Milliner Fernando and his Estate at any point of time.

In these circumstances, the defendant cannot claim to have prescribed to the property during the lifetime of Milliner Fernando or while his Estate was being administered. It is also seen from the text of the Executor's Conveyance marked "පැ 2" that Milliner Fernando's Estate was being administered up to the time Executor's Conveyance marked "පැ 2" was executed on 31st August 1978.

Therefore, it follows that the defendant cannot claim to have prescribed to the property up to 31st August 1978 when the Executor's Conveyance marked "පැ 2" transferred the property to the plaintiff's father.

Next, it seen from the facts narrated earlier that, on 31st August 1978, the plaintiff's father has purchased the property with the defendant being the incumbent licensee. Therefore, as far as the plaintiff's father was concerned, the defendant was holding the property as his licensee when he acquired title to the property. The plaintiff's father had taken no action to terminate that license or to request the defendant to leave the property and it can be reasonably presumed that the plaintiff's father was happy to permit the *status quo* to continue and to allow the defendant to continue in occupation of the property as his licensee.

In these circumstances, if the defendant wished to transform her possession from that of a licensee to possession adverse to or independent of the title of the plaintiff's father, the defendant was mandatorily obliged to commit some overt act which served to demonstrate to the plaintiff's father that she did not acknowledge any right he had to the property and that she was possessing the property adverse to and independent of the plaintiff's father. As stated earlier, a *"secret act"* or a *"secret intention"* on the part of the defendant would not suffice to render the defendant's possession of the land adverse to or independent of the title of the plaintiff's father.

In JAYANERIS vs. SOMAWATHIE, Weeramantry J stated [at p. 207-208] that *"clear and cogent evidence"* and a *"high order of proof"* is required to establish adverse possession where an agent or a licensee claims prescriptive title against the owner who placed him in possession of the property. In GUNASEKERA vs. TISSERA [1994 3 SLR 245 at p.257], Fernando J referred to a rule that *"stronger evidence would be required"* to establish adverse possession among co-heirs. In SIRAJUDEEN vs ABBAS [at p.371], De Silva CJ cited, with approval, a passage from Walter Pereira's

Laws of Ceylon, which states *"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. Peynis v. Pedro [3 SCC 125]. In the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the 1st defendant to a decree in his favour in terms of section 3 of the Prescription Ordinance.".* In KIRIAMMA vs. PODIBANDA [2005 BLJ Vol.XI 9 at p.11], Udalagama J observed that *"…considerable circumspection is necessary to recognise prescriptive title as undoubtedly it deprives the ownership of the party having paper title."*. His Lordship referred [at p.13 and at p.14] to the need for *"assertive evidence of adverse possession as against mere evidence of occupation"* and *"assertive and cogent evidence*" to prove the acquisition of prescriptive title.

When these standards are applied to the present case, it is seen that the defendant was required to adduce adequate and reliable evidence to establish, on a balance of probability, that she had committed some overt act or acts which demonstrated to the plaintiff's father that she did not acknowledge that he had any right to the property and that she was possessing the property adverse to and independent of his title to the property.

However, the evidence of the defendant and her son does not suggest that they did any such thing. In this connection, the defendant does not claim that she made any statement to the plaintiff's father that she does not accept his title. The defendant does not claim that, after the plaintiff's father obtained title, she made any alterations to the property or paid the rates and taxes in respect of the property in her name or obtained electricity and water connections in her name. The defendant has not led the evidence of the Grama Sevaka or her neighbours to suggest that she was considered to be holding the property in her own right after the property was transferred to the plaintiff's father in 1978.

It can be reasonably assumed that, if the defendant did have evidence on the aforesaid lines which supported a claim that she possessed the property adverse to and independent of the plaintiff's father, she would have produced such evidence. The very fact that she did not do so or could not do so, raises the inference that the defendant had not changed the character of her possession from that of a licensee after the plaintiff's father obtained title on 31st August 1978. This is a fit case to draw the presumption set out in Illustration (*f*) to section 114 of the Evidence Ordinance *"that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it."*.

Further, the judgment in D.C. Colombo Case No.6938/RE marked "වී 2" reveals that, some years after the plaintiff's father gifted the property to the plaintiff, the plaintiff's mother instituted that action against the defendant praying for a declaration of title to the property and the ejectment of the defendant and that the plaintiff's mother's action was dismissed solely because she had no title to the property. Thus, this judgment has no adverse impact on the plaintiff's case which is before us. It is also seen that the defendant has not produced the plaint, her answer or the proceedings in D.C. Colombo Case No.6938/RE to support her claim in the present case. Here too, it can be presumed that presenting this evidence would have been unfavourable to the defendant's claim [in the case before us] that she has prescribed to the property.

Thus, the defendant has failed to discharge the burden placed on her to prove that she committed some overt act or acts which demonstrated that she did not acknowledge the plaintiff's father's title to the property and that she was possessing the property adverse to and independent of the plaintiff's father. To again apply the words of Bertram CJ in in TILLEKERATNE vs. BASTIAN, the defendant has not demonstrated to the plaintiff's father that the defendant had *"an intention on his [her] part to possess adversely"* and had not demonstrated *"a manifestation of that intention"* to the plaintiff's father.

Instead, in the aforesaid circumstances, it is evident that the defendant continued to hold the property as a licensee *after* the plaintiff's father acquired title on 31st August 1978 by the Executor's Conveyance marked "ඇ 2" and that the defendant did nothing to change that *status quo* until the plaintiff's father gifted the property to the plaintiff on 27th October 1981 by the Deed of Gift marked "ඇ 2".

Next, prescription could not *commence* to run against the plaintiff *after* he obtained title to the property on 27th October 1981 by the Deed of Gift marked "ඇ 2" since it has been established that the plaintiff was a minor at that time. That is because section 13 of the Prescription Ordinance stipulates that prescription could not begin to run against the plaintiff so long as he remains a minor.

It is seen from the plaintiff's birth certificate marked "ඇ 4" that the plaintiff attained majority on 20th January 1990. Therefore, at best, prescription could commence to run in the defendant's favour against the plaintiff only from 20th January 1990 onwards. However, this action has been instituted by the plaintiff on 26th February 1992 – *i.e.:* a mere two years and a month after prescription could have, at the earliest, commenced to run against the plaintiff.

Thus, it is clear that the defendant has not possessed the property adverse to and independent of the plaintiff for a period of ten years as required by section 3 of the

Prescription Ordinance and that, therefore, the defendant cannot succeed in her claim that she holds prescriptive title to the property.

The learned Judge of the Court of Appeal erred when she held that the defendant had acquired prescriptive title and set aside the judgment of the District Court granting the plaintiff the reliefs prayed for in the plaint. The learned Judge of the Court of Appeal failed to realise that the defendant had placed before Court only the flimsiest of evidence and that the defendant had not adduced any reliable evidence to prove she had acquired prescriptive title after, admittedly, commencing possession of the property as a licensee.

Accordingly, questions of law no.s (i) to (v) are answered in favour of the plaintiff. In view of this conclusion, it is not necessary to consider question of law no. (vi).

This appeal is allowed and the judgment dated 20th June 2007 of the Court of Appeal is set aside. The judgment of the District Court is affirmed. In the circumstances of the case, the parties will bear their own costs.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree

Judge of the Supreme Court

L.T.B. Dehideniya J.
I agree

Judge of the Supreme Court