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

1. Dewrage Punchihamy,
2. Kankanam Arichchige Wijedasa,
   Meddawahena, Parapamulla West,
   Deiyandara.
   Defendant-Respondent-Appellants

SC/APPEAL/132/2018
SP/HCCA/MA/25/2016 (F)
DC MATARA L/10694

Vs.

Kalappu Arichchi Liyanage
Somawathie,
Deepika Niwasa, 372,
Parapamulla West, Deiyandara.
Substituted Plaintiff-Appellant-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice Janak De Silva
Hon. Justice Mahinda Samayawardhena

Counsel: P. Peramunugama for the Appellants.
Chandima Muthukumarana for the Respondent.

Argued on: 25.10.2024

Written Submissions:
By the Appellants on 11.12.2024
By the Respondent on 23.12.2024

Decided on: 05.03.2025

Samayawardhena, J.

The plaintiff filed this action in the District Court of Matara seeking a declaration of title to the land described in the Grant marked P2 dated 08.08.1984 issued under the Land Development Ordinance, the ejectment of the two defendants from Lot 1 in Plan No. 1481 dated 20.03.2006 marked P1 and damages. The defendants filed answer seeking dismissal of the plaintiff's action on the basis that they have acquired Lot 1 by prescriptive possession. After trial, the District Court dismissed the plaintiff's action. On appeal, the High Court of Civil Appeal of Matara set aside the judgment of the District Court and entered judgment for the plaintiff. This appeal by the defendants is from the judgment of the High Court. This Court granted leave to appeal on the following question of law:

> *Having come to the correct conclusion as to the right of the 1st defendant to prescribe to the portion of land in dispute (Lot 1 in Plan No. 1481) against the plaintiff, did the High Court err in holding that "the prescriptive claim of the 1st defendant must necessarily fail", notwithstanding the analysis of evidence by the District Judge?*

Although the Grant was issued in 1984, the land had not been physically demarcated on the ground with the assistance of a government surveyor. There is no dispute that the land to the north of Lot 1 has been in possession of the defendants at least since 1984. The defendants also have a Grant for their land. Both parties have been in possession of these adjoining parcels of land well prior to the issuance of the Grants as Permit holders under the Land Development Ordinance. According to the evidence led, they appear to have been residing on these lands for generations.

The red lines on Plan No. 1481 do not represent the existing boundary lines. They were drawn after the superimposition of the Final Village Plan on the existing boundaries of the plaintiff's land. According to the superimposition, the plaintiff has encroached on others' lands from all sides, including a portion of the defendants' land along its southern boundary. However, no one, including the defendants, appears to be complaining about these encroachments by the plaintiff, perhaps because the existing boundaries have remained unchanged for a long time.

The plaintiff came to know that Lot 1 is part of his land only after the government surveyor surveyed the land and demarcated the correct boundaries on 01.01.2003, which is approximately 19 years after the Grant was issued. The plaintiff filed this action in the District Court on 30.07.2003. This is unequivocally accepted by learned counsel for the plaintiff in his post-argument written submissions in the following manner:

> *Both lands which are abutting each other had been granted to the plaintiff and 1st defendant in the year 1984. By that time, boundaries had not been demarcated. Exact boundaries were demarcated on the ground for the first time in the year 2003 whereby both parties discovered for the first time that lot 1 of the said plan though belonging to the plaintiff, has been in possession of the defendants.*

There is no boundary line on the ground between Lot 1 and the defendants' land. There are two latrines in Lot 1 and the old one, according to the 2nd defendant's evidence, had been built in the 1970s. There is an old plantation in Lot 1, which the 2nd defendant stated to have been planted by her parents.

Against this overwhelming evidence supporting a claim for prescriptive possession, what led the High Court to overturn the judgment of the District Court?

There is no dispute that Lot 3 in Plan No. 1481 belongs to the plaintiff and that its northern boundary is the defendants' land. Although Lot 2 in Plan No. 1481 is part of Lot 3, the superimposition suggests that it should be part of the defendants' land. Regarding the northern boundary of Lot 3, the learned High Court Judge first makes the following finding:

> *When one examines the northern boundary of Lot 2 and Lot 3 as shown in Plan No. 1481, there is a fence on the northern boundary of Lot 2 and Lot 2 forms part of the northern boundary of Lot 3. A ditch forms the balance part of the northern boundary in Lot 3. The surveyor has shown this ditch and the fence as the existing physical boundary of the corpus.*

Plan No. 1481 was marked by the plaintiff as P1. The surveyor was not called to give evidence. The plaintiff relies on this Plan. According to the Plan, the northern boundary of the plaintiff's land is the fence and the ditch, and Lot 1 is possessed by the defendants as part of the defendants' land. Hence, the above finding of the learned High Court Judge that the northern boundary of Lot 3 is the fence and the ditch is consistent with the Plan.

Thereafter the learned High Court Judge has changed his mind and states that there is no physical demarcation of the common boundary between Lot 1 and Lot 3:

> *The ditch which is there for mere convenience of possession cannot be treated as a physical demarcation of the boundary. Therefore the 1st defendant fails to prescribe to Lot 1. To prescribe to Lot 1 the 1st defendant must possess Lot 1 as a separate entity or she must*

possess it as a part of her land which is situated to the north of the corpus.

It is purely on this basis that the High Court set aside the judgment of the District Court and allowed the appeal. I find myself unable to agree with the latter finding of the learned High Court Judge that the ditch cannot be treated as a boundary line. In old deeds prepared without survey plans, it is quite common to identify boundaries using natural or physical features such as ditches, streams, bunds and trees. A boundary need not necessarily be a man-made wall or fence. Whether a discernible boundary exists is purely a question of fact to be determined based on the unique facts and circumstances of each case. In the instant case, the fence and the ditch form part of the common boundary between the two lands. What the learned High Court Judge states is: "*To prescribe to Lot 1 the 1st defendant must possess Lot 1 as a separate entity or she must possess it as a part of her land which is situated to the north of the corpus.*" This requirement has been satisfied by the defendants. The red line drawn as the northern boundary of Lot 1 is not the existing boundary but the superimposed boundary. Admittedly, the 1st defendant possessed Lot 1 as part of his land, which lies to the north of Lot 1.

The case was filed not because the common boundary between the two lands was indefinite, but because the plaintiff, upon the survey conducted by the government surveyor, realised that the portion to the north of the ditch, identified in the Plan as Lot 1 and possessed by the defendants as part of their land, should rightfully belong to him. For the aforesaid reasons, the subsequent finding of the learned High Court Judge that there is no physical boundary between Lot 1 and the plaintiff's land is unsustainable.

Next, learned counsel for the plaintiff, citing *Sirajudeen v. Abbas* [1994] 2 Sri LR 365, strenuously submits that the establishment of a starting

point of prescriptive possession is a *sine qua non* to succeed in a claim of prescriptive title, and as the defendants in this case have failed to do so, the Court must reject the defendants' claim without further ado. In *Chelliah v. Wijenathan* (1951) 54 NLR 337 at 342, Gratiaen J. stated 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 fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights*." This was rightly quoted with approval in many cases including the said judgment of G.P.S. De Silva C.J. in *Sirajudeen v. Abbas*. No one disputes this principle in law.

According to the post-argument written submissions of the plaintiff's counsel himself, which I quoted above, it can be concluded that the starting point of prescriptive possession is 1984, when the Grant was issued. I will further explain this below.

The argument of learned counsel for the plaintiff is that the defendants were not in adverse possession from the date of the Grant on 08.08.1984 until 01.01.2003, when the government surveyor demarcated the boundaries on the ground because both parties had believed that the disputed portion (Lot 1) is part of the defendants' land. His argument appears to be that adverse possession commenced on 01.01.2003 and since the action was instituted in the District Court on 30.07.2003, the defendants did not have ten-years of possession to succeed in their prescriptive claim. This is an interesting and important legal point, which has not come up too often before this Court.

Section 3 of the Prescription Ordinance, insofar as relevant to the present purposes, reads as follows:

> *Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs.*

It must be emphasised that adverse possession is not synonymous with possession acquired or maintained through violent acts. Even assuming, for the sake of argument, that it were, a possessor who resorts to violence cannot claim prescriptive title, as such possession would not be undisturbed and uninterrupted for the requisite period. The necessity of resorting to violence itself indicates that the possession has been subject to disturbance and interruption.

What is meant by adverse possession? Simply stated, adverse possession is possession in a manner incompatible with the title of the true owner. The parenthetical clause of section 3 of the Prescription Ordinance provides a statutory definition of adverse possession: "*that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred.*" Violence is not a requirement under this definition. The Privy Council in *Cadija Umma v. Don Manis Appu* (1938) 40 NLR 392 at 396 observed that although "*the clause is no mere illustration, it is not so completely successful an attempt to achieve the full and self-contained definition as might be wished.*" However, in *Nonis v. Peththa* (1969) 73

NLR 1 at 3, the Privy Council stated that it constitutes a complete definition, rather than merely an illustration. Whether or not it is a complete definition, this definition underscores that for possession to be adverse, it must be exclusive, continuous and exercised as of right, without any recognition of the ownership of another. In the circumstances of this case, there can be no doubt that the defendants' possession was of such a character. It is therefore abundantly clear that the defendants' possession was, in fact, adverse in the strict legal sense. This view finds support in judicial precedent.

In *Fernando v. Wijesooriya* (1947) 48 NLR 320 at 325, Canekeratne J. held:

> *There must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent plainly is to hold the land against the claim of all other persons, the possession is hostile or adverse to the rights of the true owner. It is the intention to claim the title which makes the possession of the holder of the land adverse; if it be clear that there is no such intention there can be no pretence of an adverse possession. It is necessary to inquire in what manner the person who had been in possession during the time held it, if he held in a character incompatible with the idea that the title remained in the claimant to the property it would follow that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant's title—his possession may be on behalf of the claimant or may be the possession of the claimant (p. 396 of 40 NLR) or from the conduct of the party's possession an acknowledgment of a right existing in the claimant could fairly and naturally be inferred. To prevent the operation of the statute, a parol acknowledgment of the adverse possession by the person in possession must be such as to*

show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute are not sufficient—Angel on Limitation p. 388.

The judgment of Walter Pereira J. in *Ayanahamy v. Silva* (1913) 17 NLR 123 at 125 is directly on the point:

As regards the second point pressed, it seems to me that the fact that the defendant was not, at the time of his possession of the land in claim, aware that it belonged to the plaintiff, rather strengthens his claim based upon prescription. He was a bona fide possessor, and while a mala fide possessor might, just as well as a bona fide possessor, maintain a claim by prescription, it is manifest in the case of the latter, that the possession was a possession on his own account. It has been argued that the possession of a person possessing in the belief that the thing possessed is not the property of another is not adverse possession, and English authorities have been cited. We have nothing to do with the definition in English law of either the term "possession" or the term "adverse possession." Both these terms are fully discussed in the Encyclopaedia of Laws, vol. I., p. 160, and vol. X., p. 228 (1st edition), and it will be found that there are points of essential difference in what is laid down there and our own conception of the terms. Possession under the Roman-Dutch law is either possessio civilis or possessio naturalis. Possessio civilis is detentio animo domini. It is this possession that is necessary to be proved where a person seeks either any of the possessory remedies or to establish a claim by prescription. Where a person is in occupation of property in the bona fide (albeit mistake) belief that the property is his own and belongs to nobody else, clearly he has the detentio animo domini. The next question is whether his possession is adverse. As to that we have to look for guidance within

> *the four corners of our own Ordinance relating to prescription of actions. The words in section 3—"A possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred"—have been held by this Court to contain not an illustration, but a definition of "adverse possession" (see Daniel v. Markar Ram. 1843-55, 2, Vand. Rep. 44, Carrim v. Dholl 2 CLR 12). The possession by the defendant in the present case manifestly answers to the description given in the definition mentioned above.*

For a comparable analysis, let me refer to the South African position. Section 1 of the Prescription Act, No. 68 of 1969 in South Africa reads as follows: "*Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years.*" Applying this section to the facts of *Morgenster 1711 (Pty) Ltd v. De Kock NO and Others* 2012 (3) SA 59 (WCC), decided on 05.12.2011, the High Court of South Africa stated at para 14:

> *The critical requirement in the present case is encapsulated in the phrase "possessed openly and as if he were the owner thereof" in s 1. The possession contemplated in s 1 is so-called civil possession. Such possession has an objective and a subjective element, namely physical possession coupled with animus domini (see Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & Another 1972 (2) SA 464 (W) at 474B-C and cases there cited; Glaston House (Pty) Ltd v Cape Town Municipality 1973 (4) SA 276 (C) at 281D-F; Pienaar v Rabie 1983 (3) SA 126 (A) at 134A-D). The mental state of possessing*

> *as if one is the owner covers both the bona fide possessor and the mala fide possessor. This means that possession in the bona fide but mistaken belief that one is the owner suffices (Morkels Transport supra at 474E). The fact that the person would not have had that state of mind if he had known the true facts (ie would not have wished to behave as if he were the owner adversely to the true owner) is irrelevant.*

From the foregoing analysis, it should now be clear that the defendants had, in fact, been in adverse possession since 1988, as their possession was clearly incompatible with the plaintiff's title, and they never acknowledged any right of the plaintiff over the disputed portion of the land. Therefore, the argument advanced by learned counsel for the plaintiff, that the defendants did not prove adverse possession until the government surveyor demarcated the boundaries in 2003, must fail.

Without prejudice to the foregoing conclusion on adverse possession, I wish to add the following for further academic discourse and judicial determination in a suitable case in the future. According to section 3 of the Prescription Ordinance, what must be proved is undisturbed and uninterrupted possession by a title **adverse to or independent of** that of the party who holds legal title to the property for ten years preceding the institution of the action. Notwithstanding the strong body of case law on prescription, I could not find any authority that discusses the "independent of" component in section 3. All the decided authorities focus on the "adverse to" component only. I wonder whether this omission arises from the perception that the "independent of" component conflicts with the concept of prescriptive possession. It could be argued that independent possession alone is insufficient for a successful prescriptive claim, as it lacks the essential element of intent to exclude the true owner's rights, which is fundamental to prescription. At the argument,

although learned counsel for both parties were invited to address this point in their post-argument written submissions, they too have not ventured to do so. The term "or" is a coordinating conjunction used to present alternatives. If I may reiterate at the cost of repetition, the parenthetical clause, defines what is meant by a title adverse to or independent of that of the owner: "*that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred*". As pointed out in *Tillekeratne v. Bastian* (1918) 21 NLR 12 at 17, the parenthetical clause applies to both situations—possession by a title adverse to or independent of that of the owner, thereby identifying them as two distinct concepts. Hence, it may be argued that the unequivocal admission of learned counsel for the plaintiff—that "*exact boundaries were demarcated on the ground for the first time in the year 2003, whereby both parties discovered for the first time that Lot 1 of the said plan, though belonging to the plaintiff, had been in possession of the defendants*"—leads to the conclusion that from the date of the Grant on 08.08.1984 until 01.01.2003, when the government surveyor demarcated boundaries on the ground, the defendants had been in *ut dominus* possession of Lot 1 "by title independent of that of the plaintiff" for over 18 years, and thereafter have continued to possess Lot 1 "by title adverse to that of the plaintiff" up to the present. If this argument can be accepted, this should satisfy the requirements in section 3 of the Prescription Ordinance under the "independent of" category, subject to the qualification that the institution of the action suspends the running of prescription until the case is finally decided. Until this point is fully argued and determined in a future case, the views I have expressed in this paragraph may be treated as *obiter dicta*, without any binding effect.

Learned counsel for the plaintiff, in the post-argument written submissions, attempts to cast doubt on the applicability of the Prescription Ordinance to the facts of this case. The High Court has rightly held that there is no bar to the defendants claiming prescriptive possession against the plaintiff. The question of law on which leave was granted by this Court also presupposes the applicability of the Prescription Ordinance. The plaintiff defends the judgment of the High Court, which allowed the plaintiff's appeal. Therefore, there is no basis for learned counsel for the plaintiff to argue that the Prescription Ordinance does not apply in this case. The defendants are not claiming prescriptive title against the State, but only against the plaintiff.

I answer the question of law on which leave was granted in the affirmative. The judgment of the High Court is set aside, the judgment of the District Court is restored, and the appeal is allowed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court