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

Geethani Nilushika
Samarawickrama,
Polgedara,
Denipitiya.
Plaintiff

SC APPEAL NO: SC/APPEAL/93/2017
SC LA NO: SC/HCCA/LA/186/2016
HCCA KEGALLE NO: SP/HCCA/MA/RA/5/2015
DC MATARA NO: 20891/P

Vs.

1. Waruni Harshani
   Samarawickrama,
   No. 15/2,
   Gomas Park,
   Colombo 05.
2. Dilhar Agasha Jinadasa,
   No. 260, Park Road,
   Colombo 05.
3. Nishamani Serosha Jinadasa,
   No. 260, Park Road,
   Colombo 05.
4. Indrani Samarawickrama,
5. Nanda Samarawickrama,
6. Adarawathi Samarawickrama,
7. Malani Samarawickrama,
8. Eujin Samarawickrama,

9. Kananke Suriarachchi
   Liyanage Indika Thilak
   Kumara,
   All of
   Elagawa Gedara,
   Eluwawila, Denipitiya.
10. Nihal Ranjith
    Samarawickrama,
    No. 13/3,
    Sri Mahabodhi Road,
    Dehiwala.

Defendants

AND BETWEEN

4. Indrani Samarawickrama,
5. Nanda Samarawickrama,
6. Adarawathi Samarawickrama,
7. Malani Samarawickrama,
8. Eujin Samarawickrama,
9. Kananke Suriarachchi
   Liyanage Indika Thilak
   Kumara,
   All of
   Elagawa Gedara,
   Eluwawila, Denipitiya.
10. Nihal Ranjith
    Samarawickrama,
    No. 13/3, Sri Mahabodhi Road,
    Dehiwala.

4th-10th Defendant-Petitioners

Vs.

Geethani Nilushika
Samarawickrama,
Polgedara,
Denipitiya.
Plaintiff-Respondent

1. Waruni Harshani
   Samarawickrama,
   No. 15/2,
   Gomas Park,
   Colombo 05.
2. Dilhar Agasha Jinadasa,
   No. 260, Park Road,
   Colombo 05.
3. Nishamani Serosha Jinadasa,
   No. 260, Park Road,
   Colombo 05.

   1st–3rd Defendant-Respondents

AND NOW BETWEEN

4. Indrani Samarawickrama,
5. Nanda Samarawickrama,
6. Adarawathi Samarawickrama,
7. Malani Samarawickrama,
8. Eujin Samarawickrama,
9. Kananke Suriarachchi
   Liyanage Indika Thilak
   Kumara,
   All of

Elagawa Gedara,
Eluwawila,
Denipitiya.
4th-9th Defendant-Petitioner-Appellants

Vs.

Geethani Nilushika
Samarawickrama,
Polgedara, Denipitiya.
Plaintiff-Respondent-Respondent

1. Waruni Harshani
Samarawickrama,
No. 15/2, Gomas Park,
Colombo 05.
2. Dilhar Agasha Jinadasa,
No. 260, Park Road,
Colombo 05.
3. Nishamani Serosha Jinadasa,
No. 260, Park Road,
Colombo 05.
1st–3rd Defendant-Respondent-Respondents

10. Nihal Ranjith
Samarawickrama,
No. 13/3, Sri Mahabodhi Road,
Dehiwala.
10th Defendant-Petitioner-Respondent

Before: Buwaneka Aluwihare, P.C., J.
Murdu Fernando, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage with Manoj Jayasena for the 4th-9th Defendant-Petitioner-Appellants.

H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondent-Respondent.

Argued on: 24.03.2021

Written submissions:

By the 4th-9th Defendant-Petitioner-Appellants on 22.09.2017.

No written submissions filed by the Plaintiff-Respondent-Respondent.

Decided on: 18.06.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action naming the 1st to 3rd Defendants as parties to partition the land described in the schedule to the plaint among them on the pedigree set out in the plaint. The 4th to 10th Defendants were later added as parties. The 4th to 8th Defendants filed a joint statement of claim seeking to partition the land among those Defendants on a different pedigree, and also claiming prescriptive title to the land. After trial, the District Court rejected the 4th to 8th Defendants' pedigree and their prescriptive claim and partitioned the land as prayed for by the Plaintiff. The revision application filed against this Judgment by the 4th to 8th Defendants was dismissed by the High Court of Civil

Appeal. Hence this appeal by the 4th to 8th Defendants (Appellants).

This Court granted leave to appeal against the Judgment of the High Court on two questions of law: whether the High Court failed (a) to investigate title of the parties to the land, and (b) to consider the prescriptive title of the Appellants.

The High Court dismissed the revision application of the Appellants on procedural impropriety as well as on its merits.

Let me now consider the nature of the revision application filed before the High Court and the Judgment of the High Court thereon.

The Judgment of the District Court was delivered on 22.08.2014. The Appellants did not appeal against the Judgment as they were statutorily entitled to do if they were dissatisfied with the Judgment. Instead, they filed a revision application on 16.03.2015 – about 07 months after the delivery of the Judgment.

Revision is a discretionary remedy. A party cannot invoke this extraordinary jurisdiction of the Appellate Court as of right.

When a right of appeal is available against a Judgment or an Order, a party seeking to come before Court by way of revision shall explain in the petition why he did not exercise his right of appeal.

In the revision application filed before the High Court there was no such explanation at all.

Unlike in an appeal, there is no stipulated time limit within which a revision application may be filed in Court. The Petitioner must come to Court within reasonable time from the date of the impugned Judgment or Order. What constitutes reasonable time is a question of fact to be determined on the facts and circumstances of each individual case. In essence, the party seeking revision shall come to Court without undue delay. If there is a delay, he shall explain it in the petition.

However I must hasten to add that if the Judgment or Order sought to be challenged is palpably wrong, perverse, made without jurisdiction or suffering from a similar grave infirmity, the Court shall not dismiss a revision application on the ground of delay alone.

In the instant case, there was no explanation whatsoever for the undue delay in filing the revision application.

The existence of exceptional circumstances is a *sine qua non* for the invocation of revisionary jurisdiction. Such exceptional circumstances, albeit briefly, shall be averred in the petition for the Court to be satisfied on *prima facie* basis that notice in the first instance be issued on the Respondents.

In the instant case, the main ground urged under exceptional circumstances was the failure of the District Court to identify the corpus to be partitioned.

This assertion is simply devoid of merit. At the trial, when the Plaintiff raised the first issue of whether the land to be partitioned is depicted in the Preliminary Plan, counsel for the Appellants informed Court that there was no necessity to

raise such an issue as the corpus was admitted by the Appellants. The Appellants, obviously, did not raise an issue on the identification of the corpus. The 7th Defendant-Appellant who gave evidence on behalf of all the Appellants in the District Court admitted the corpus in her evidence. Having taken up such a clear position in the lower Court, the Appellants cannot take up a diametrically opposite position in the Appellate Court. The doctrine of estoppel, and the doctrine of approbate and reprobate (which is one of the species of estoppel) forbit this.

The Appellants also stated in the revision application that the presumption of prescriptive title created in favour of them on the basis of their long possession had not been rebutted by the Plaintiff. In my view, the Appellants made this claim in passing.

By reading the impugned Judgment of the High Court, it is clear that the Appellants did not pursue this ground at the argument before the High Court, and the only ground urged before the High Court was the failure to identify the corpus.

Be that as it may, the Appellants do not in fact affirmatively state that they proved prescriptive title to the land against the Plaintiff but instead attempt to shift the burden of disproof onto the Plaintiff.

I accept that a presumption of ouster can be drawn on long exclusive possession in the unique facts and circumstances of a case. *(Tillekeratne v. Bastian (1918) 21 NLR 12 at 24)* But the well-established general principle is that the burden of proof of prescriptive title (as against the party who is able to

point to a paper title) rests fairly and squarely upon the party who asserts such prescriptive title.

The Appellants must understand that what was filed before the High Court was not a final appeal but a revision application and they cannot clutch at straws for survival.

The purpose of revisionary jurisdiction is to promote the due administration of justice and correct miscarriage of justice. But it is well to remember that unlike in an appeal, not every error of fact or law may be corrected in revision. In short, the general ground that the Judgment is incorrect, which is sufficient to invoke the statutory right of appeal, does not *per se* constitute an exceptional ground to invoke the extraordinary jurisdiction of revision. The error complained of shall shock the conscience of the Court.

In a revision application, unlike in a statutory right of appeal, there is a threshold or vetting process before the applicant is afforded a full hearing.

In the facts and circumstances of this case, it is my considered view that the revision application should have been dismissed *in limine* without notice being issued on the Respondents.

The High Court, having taken the view that the Petitioner did not pass the gateway, nevertheless considered the merits of the application notably on the limited ground urged, i.e. failure to identify the corpus, before it dismissed the application.

The Judgment of the High Court is flawless.

Let me now consider the appeal before this Court.

Learned counsel for the Appellants stated at the argument that he confines his argument only to the question of prescription.

As I have already stated, in my view, the Appellants did not vigorously pursue the plea of prescriptive title before the High Court. Therefore the High Court did not consider it. Hence the Appellants cannot complain that the High Court failed to consider their prescriptive title to the land, and therefore this Court shall now consider it and allow the appeal.

What is before this Court is not a revision application but a final appeal. The Appellants have come before this Court not against the Judgment of the District Court but against the Judgment of the High Court.

Nonetheless, as this is the final Court, I thought I must consider the Appellants' plea of prescriptive title.

At the trial, the Plaintiff's father gave evidence on behalf of the Plaintiff and produced deeds and documents from the Land Registry marked P1-P4 and 1V1. He also marked the Preliminary Plan and the Report as X and X1, respectively. The 7th Defendant-Appellant gave evidence on behalf of the Appellants. In her evidence, she only marked the Death Certificate of her mother, which is an admitted fact.

According to the Plaintiff's pedigree:

The original owner of the land is Jamis Samarawickrama. By deed No. 11825 dated 28.02.1933, he alienated this property to his daughter Emalia Samarawickrama. The fact that this

deed was registered at the Land Registry and is now destroyed is established by P1 issued by the Land Registry. Emalia Samarawickrama was the elder sister of Dinoris Samarawickrama who was the Plaintiff's grandfather. Emalia Samarawickrama gifted this land together with several other lands by deed No. 1588 dated 19.03.1967 marked P2 to Dayaratne Jinadasa and Nandawathie Jinadasa who are her two children, and to the 2nd and 3rd Defendants who are her grandchildren, in the proportion of 1/3 share each to her two children and the balance 1/3 share equally to her two grandchildren. Dayaratne Jinadasa married Rupa Jinadasa and his 1/3 share devolved on their children Lakkhi Jinadasa, Omala Jinadasa and Tissanath Jinadasa. Thereafter, by deed No. 1532 dated 27.02.2001 marked P3, they donated this 1/3 share to the Plaintiff. The aforesaid Nandawathie Jinadasa transferred her 1/3 share by deed No. 201 dated 18.01.1991 marked 1V1 to the 1st Defendant. The Land Registry extracts relevant to these transactions were marked P4. According to the Plaintiff's pedigree, the Plaintiff and the 1st Defendant are each entitled to 2/6 share, and the 2nd and 3rd Defendants are each entitled to 1/6 share.

The learned District Judge accepted this pedigree.

Conversely, the Appellants unfolded a different pedigree but did not mark any deeds in evidence. Deeds executed after the *lis pendens* was registered were not marked.

According to the Appellants' pedigree as described in the evidence of the 7th Defendant-Appellant:

The original owner of the land is Thiloris Samarawickrama who is the younger brother of Jamis Samarawickrema (the

original owner of the land according to the pedigree of the Plaintiff). Thiloris Samarawickrama had four children and one of them is the 7th Defendant-Appellant's father Jinoris Samarawickrema who married Angurukankanamlage Upona. After the death of Jinoris Samarawickrema and Angurukankanamlage Upona, the entire land devolved on their five children, the 4th to 8th Defendant-Appellants.

This pedigree was not accepted by the learned District Judge and the Appellants do not canvass it before this Court.

The 7th Defendant-Appellant admits in her evidence that Jamis Samarawickrema and Thiloris Samarawickrema were brothers, and her father Jinoris Samarawickrema was the son of Thiloris Samarawickrema; and that Emalia Samarawickrema (who executed the deed P2) was the daughter of Jamis Samarawickrema; and that Emalia Samarawickrema and Jinoris Samarawickrema had been on good terms throughout their lives as cousins.

On this basis, it is the submission of learned counsel for the Plaintiff that Emalia Samarawickrema, admittedly an affluent lady who had gifted 71 parcels of land by deed P2, allowed Thiloris Samarawickrema to possess the land that is the subject matter of this action.

The 7th Defendant-Appellant states that her father Jinoris Samarawickrema and her grandfather Thiloris Samarawickrema both lived on this land, the 4th to 8th Defendant-Appellants were born on this land, and there are three houses on the land where she, the 4th Defendant-Appellant and his son are living. The Plaintiff's father admits these facts in his evidence.

The 7th Defendant-Appellant has not seen her grandfather Thiloris Samarawickrema and says she does not know how her grandfather and father came into possession of the land. She does not dispute the Plaintiff's deeds but says she was unaware of those deeds and further says neither the Plaintiff nor anybody in the Plaintiff's pedigree ever possessed the land.

It is not possible to believe that the Appellants did not at least know that Emaliya Samarawickrema was the owner of the land at one point in time. The Appellants cannot say that their grandfather came to a no-man's-land. The Appellants shall explain how they came into possession of someone else's land.

In *Sirajudeen v. Abbas [1994] 2 Sri LR 365 at 371,* G.P.S. De Silva C.J. stated that 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.

The only submission of learned counsel for the Appellants is that the Appellants and their predecessors have been in physical possession of the land since 1948. But long possession alone does not amount to prescriptive possession. In order to claim prescriptive title under section 3 of the Prescription Ordinance, possession for over ten years is only one requirement. Such possession shall not only be "*undisturbed and uninterrupted*", but also, more importantly, "*by a title adverse to or independent of that of the claimant or plaintiff*". The possession shall be of a character incompatible with the title of the true owner.

The commencement of prescriptive possession can coincide with the commencement of possession itself if the possessor enters the land in a capacity inconsistent with the owner's title. If not, the possessor shall signify the change in the character of possession by an overt act or a series of acts indicative of a challenge to the owner's title. The prescriptive period begins to run only from that point and not from the date of entry to the land. (*Sirajudeen v. Abbas [1994] 2 Sri LR 365, Reginald Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37, Chelliah Vs. Wijenathan (1951) 54 NLR 337 at 342, Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212*)

Where the relationship between the two parties is very close such as in the instant case, the proof of change in the character of possession from innocuous to adverse is greater than in a case where the two parties are total outsiders. (*De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292, Podihamy v. Elaris [1988] 2 Sri LR 129*)

In the instant case, the Appellants have failed to prove that they commenced adverse possession from the outset or that they changed their character of possession subsequently. The evidence of the 7th Defendant-Appellant is that the Appellants continued their possession without any objection from the Plaintiff or the other co-owners. This is not sufficient to claim prescriptive tittle.

In the facts and circumstances of the case, the learned District Judge cannot be found fault with for rejecting the prescriptive claim of the Appellants.

I answer the questions of law in respect of which leave was granted in the negative.

The appeal is dismissed but without costs.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C.J.
I agree.

Judge of the Supreme Court

Murdu Fernando, P.C.J.
I agree.

Judge of the Supreme Court