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

In the matter of an Appeal from a Judgment of the Civil Appellate High Court.

Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama

Plaintiff

Vs

SC APPEAL 213/2012
SC/ HCCA/ LA/ 329/2011
SC / HCCA / Ma / 2008 (F)
DC / Hambantota / 224 / 96 / L

Jayasooriya Arachchi Patabendige Wijeratne
No. 203, Tangalle Road, Hungama.

Defendant

AND THEN BETWEEN

Jayasooriya Arachchi Patabendige Wijeratne
No. 203, Tangalle Road, Hungama.

Defendant Appellant

Vs

Abeydeera Jayasooriya Seena Patabendige Kusumawathie of " Sena Welandasala", Hungama

Plaintiff Respondent

AND NOW BETWEEN

Jayasooriya Arachchi Patabendige Wijeratne
No. 203, Tangalle Road, Hungama.

Defendant Appellant Appellant

Vs

Abeydeera Jayasooriya Seena Patabendige
Kusumawathie of " Sena Welandasala",
Hungama.

Plaintiff Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ,**
H. N. J. PERERA J. &
MURDU FERNANDO PCJ.

COUNSEL : Rohan Sahabandu PC with Ms. Hasitha Amarasinghe for the Defendant Appellant Appellant.
J.C.Boange with Dilshan Boange for the Plaintiff Respondent Respondent.

WRITTEN SUBMISSIONS
FILED ON : 24.07.2018.
ARGUED ON : 05.07.2018.
DECIDED ON : 05.10.2018.

S. EVA WANASUNDERA PCJ.

The Plaintiff, Kusumawathie instituted action in the District Court of Hambantota to obtain a declaration of title to the lands in the 1st and 2nd Schedules to the Plaint

and to eject the Defendant Wijeratne from the land in the 2nd Schedule and obtain possession of the same. At the end of the trial the learned District Judge entered judgment in favour of the Plaintiff and granted relief as prayed for in the Plaint. Being aggrieved by the said judgment, the Defendant appealed to the Civil Appellate High Court. The High Court affirmed the judgment of the District Court. Thereafter the Defendant in the District Court case appealed once again to the Supreme Court against the judgment of the Civil Appellate High Court.

The Defendant Appellant Appellant (hereinafter referred to as the Defendant) was granted leave to appeal by this Court on the following questions of law:-

1. In the circumstances pleaded, could the learned District Judge as well as the High Court reject the claim of the Defendant on prescription, stating that the Defendant had not established the starting point of his adverse possession?
2. Has the Defendant established his prescriptive rights over the land in dispute?
3. In the circumstances pleaded, have the learned District Judge as well as the High Court misinterpreted the principles governing prescription?

Kusumawathie , the Plaintiff and Wijerathna, the Defendant were in adjoining lands. Kusumawathie had a boutique named " Sena Welandasela" on the land which is in the 1st Schedule to the Plaint. To the east of that land on which the boutique was situated, was another building with a boutique run by Wijerathna. The Plaintiff alleged in the Plaint that Wijerathna had entered into her land behind her boutique and had started using the said land which belonged to the Plaintiff. There had been a quarrel on the issue of Wijerathna trying to build a fence encroaching on the land belonging to Kusumawathie. As a result of a complaint filed by Kusumawathie against wrong actions of Wijerathna on 08.01.1996 at the Hungama Police, the police had filed an action in the Primary Court to keep peace between the parties, under Section 66 of the Primary Courts Act.

After an inquiry, the Primary Court Judge had granted possession of 'the rest of the land excluding only the boutique "Sena Welandasela" of Kusumawathie', to Wijerathna on **11.09.1996**. **Thereafte**r Wijerathna had commenced work on the said land and tried to build a fence and other buildings on the land. That is the reason and basis of the Plaintiff as indicated in the Plaint, to have filed within less than three months from the order of the Primary Court Judge, a re-vindicatio

action against Wijerathna on **28.11.1996**. Wijerathna filed answer of one page on 03.02.1997 denying all the averments of the Plaint and stating that he had been possessing the land with adverse possession for over 10 years and claiming that he has title on prescription. Later on, after 5 years and 7 months, the Plaint was amended on 09.09.2002 and amended Answer was filed about 7 months thereafter, on 09.07.2003. A commission was issued to survey the land by Court and it was returned with a Report. The Plaintiff and the Defendant had given evidence. Other persons also had given evidence. Documents P1 to P7 were marked on behalf of the Plaintiff and documents V1 to V14 were marked on behalf of the Defendant. The case had proceeded for about 11 years and at the end of the trial, **the District Judge delivered Judgment on 05.02.2008 granting the reliefs as prayed for by the Plaintiff in his judgment of 23 pages of A4 size in Sinhala**.

Being aggrieved by the said Judgment, the Defendant appealed to the Civil Appellate High Court and the Judges of the **High Court affirmed** the judgment of the District Court. Now this case is before this Court and leave has been granted on the questions of law as aforementioned.

The Plaintiff Respondent Respondent (hereinafter referred to as the Plaintiff) sought a declaration that she is the owner of the lands in the 1st and 2nd Schedules in the Plaint. She had bought the lands originally coming from Asena Marikkar Naina Mohamed Hajjiar and claimed title on the chain of deeds as well as prescriptive title. The Defendant took up the position that he had prescribed to the property and moved for dismissal of the action.

The District Judge had concluded that the **Plaintiff had proved title** to the property and that the **Defendant had failed to discharge the burden of proving prescriptive title.** The question in hand is whether prescription over 10 years was proved by the Defendant. It is trite law in our country that prescriptive possession by any Defendant has to be adverse to the Plaintiff and uninterrupted by the Plaintiff.

Section 3 of the Prescription Ordinance reads as follows:-

“Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those 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 acknowledgement 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. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of land or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs."

The Defendant never challenged the title of the Plaintiff to the particular property. The person named Asena Marikkar Naina Mohamed Hajjiar had transferred the property to Abdul Rahuman Ayesha Umma by Deed 3794 dated 02.01.1970. The said Ayesha Umma had got the Plan number 3103 dated 03.03.1971 done by Licensed Surveyor John de Silva and got Lot D marked therein. The said Lot D was purchased by the Plaintiff from the said Ayesha Umma by Deed **No. 269** dated **30.11.1984** and attested by Thaha Mohamed Farook Notary Public.

In January, 1996, the Defendant had quarrelled with the Plaintiff when she was walking on the land in question according to the complaint made by the Plaintiff to the Police. As she had complained to the Police and when the Police filed action before the Primary Court under Sec.66 of the Primary Courts Act, the Court had granted possession to the Defendant. It is only after the Primary Court granted him possession that the **Defendant had fenced the land against the wishes of the Plaintiff and had started to build on the land.**

The Plaintiff had complained to the Police at first when the Defendant had tried to build on the land. After the Primary Court decision to hand over the land to be possessed by the Defendant, the Plaintiff had soon thereafter filed the re vindicatio action and also obtained **an injunction against the Defendant staying the process of building** and fencing etc.

The Plaint contained two Schedules. The prayer was to declare that the land described in the Second Schedule is part and parcel of the land described in the First Schedule. The First Schedule is the land to which the Plaintiff had obtained

legal title, by way of properly executed title deeds. Her boutique was built on a small area of the said land. The land covered by the Second Schedule was possessed by the Defendant. When the District Judge issued a Commission to a Surveyor to survey the land, the Surveyor H.P.P.Jayawardena made the Plan No. 2664 dated 21.11.1998 showing the allotment of land marked as D2 depicted in Plan No. 3103 dated 03.03.1971. He showed two allotments of land marked Lot A and Lot B. Lot A was the area the Plaintiff had built the boutique on, containing in extent 01.54 Perches. Lot B was the area containing in extent 15.56 Perches, which was part of Lot D2 in Plan No. 3103 as aforesaid. This is the area of land the Defendant was in possession.

The Plaintiff filed amended Plaint dated 09.09.2002 and the Defendant's counsel, Faizal Rasheen had mentioned in open court that he has no objections to the amended Plaint on 21.01.2003, according to the journal entry number 42 of the District Court brief which is before this Court. The case had got fixed for trial and trial had commenced on 08.09.2003. Trial ended and written submissions and documents had been filed by both parties. Judgment was delivered on 05.02.2008. The District Judge's judgment was quite long and he had analysed the evidence given by each and every witness. It is contained in 24 type written A4 size pages.

The District Judge **had issued a commission** on the Surveyor and Plan No. 2664 dated 21.11.1998 was made by Licensed Surveyor H.P.P. Jayawardena and Lot B in the said Plan indicated the area which was possessed by the Defendant. The extent of the Lot B was indicated as 15.56 Perches. Lot A on which the Plaintiff's boutique was situated was shown to be of an extent of 1.54 Perches. The report of the surveyor at page 306 of the brief submits that the water tank and the roofless toilet and a small boutique on the Lot B had been built by the Defendant **by force against the objections of the Plaintiff** and an old toilet which was falling apart was claimed to have been built by the Plaintiff but the Defendant also had claimed to have built that as well.

The Defendant had marked a Deed in his evidence as V 12 and he had bought the land of an extent of 02.75 Perches on which he also has set up a boutique. The Defendant claims title to this small block of land which is covered by his boutique. **Anyway that portion of land does not belong to the corpus in question**. He claims that he had been in possession of this Lot B in Plan 2664 for a length of time. He himself stated that he had been occupying the land in question knowing that it

belonged to others. He has in his evidence said that he **' just commenced possessing the land'.** One of his witnesses, a Grama Niladari said that he was on the land from 1986 to 1993, which I observe as possession for only seven years. The Defendant's position is that he had been in possession for a long time. **He did not give a specific year or date or against whom he was possessing the property.**

The Plaintiff's position was that the Defendant started quarrelling in 1996 **and until then the Plaintiff was in possession.** However the evidence before the District Court had not shown any overt act done by the Defendant at any particular time or month or year against the owner's rights. The Defendant had been unable **to set up a date of commencement of uninterrupted and undisturbed possession** with any person's evidence or any documents.

The Plaintiff had proved her title by way of deeds. The Defendant had failed to prove uninterrupted and undisturbed possession over 10 years against the Plaintiff. The facts were analyzed by the District Judge quite well and the learned High Court Judges did not interfere with the findings of fact by the District Judge.

The Defendant's Counsel , in his submissions has cited ***Theivanapillai Vs Arumugam 15 NLR 358, Cadija Umma Vs Don Manis Appu 40 NLR 392, Tillekaratne Vs Bastian 21 NLR 392*** and argued that the parenthesis clause in Section 3 of the Prescription Ordinance has a clear bearing on the meaning of the words "adverse possession" and the Defendant in the case in hand " had not performed any act as an acknowledgement of a right existing in another person **within the period of his possession**". In his further written submissions filed after the oral submissions made in Court by the Defendant's counsel, it was heavily argued that the possession of the Defendant should be calculated with the possession by his predecessors like his father and his grandfather and that the Defendant had been on the land for a very long time but there was no evidence to the particular portion of the land having been possessed by the predecessors of the Defendant, either.

The argument of the Counsel for the Defendant was that the whole law regarding prescriptive title is contained in Section 3 of the Prescription Ordinance. Accordingly, the Defendant had been in undisturbed and uninterrupted possession for a long time. The Counsel had quoted a number of authorities in that regard. When he made submissions on " title adverse to or independent of that of the

Plaintiff", the counsel had quoted only one authority, namely, ***Fernando Vs Wijesooriya 48 NLR 320.*** The said Counsel had quoted Canekeratne J. thus:
" there must be a corporeal occupation of land attended with a manifest intention to hold and continue it and when the intent specifically 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 adverse possession." The Counsel argued that the Defendant's possession fits into this statement of Canekeratne J.

Taking that argument, for the moment, as correct, one can ask the question if the owner of a land goes abroad or goes to a far away area to live, leaving the land, then, person B who starts possessing the said land , knowing that it belongs to A, just goes into occupation thereof and stays there for a length of time, and without the knowledge of the owner, can person B state that he gets prescriptive title just by only continuing to be on the land with just an intention to possess it as his own and claim prescriptive title against the true legal owner, person A ? Does Section 3 of the Prescription Ordinance recognize that possession as "adverse possession".

It is to be noted that in the case in hand, the Plaintiff is running a boutique on part of the land she is praying for a declaration of title and in the adjoining land which is only 2.75 Perches and legally owned by the Defendant, the Defendant is running another boutique. The part of the land in question, according to the way it is situated, is placed, right behind the Defendant's boutique. The situation can be well seen according to the survey done by the court commissioner. The Defendant *only states* that he has been in possession for *a long time*. The time is not specified.

However, I fail to see what the "period of possession" that the Defendant is pointing at.

I am of the opinion that, in any action where the Defendant makes an attempt to prove "uninterrupted and undisturbed adverse possession", **firstly**, the Defendant should identify the person/owner against whom he claims adverse possession. The Defendant cannot take a stand to say "well, I have been in possession against the rights of all the owners who could have held ownership from the time I entered the land and held it as the possessor". It should be **specifically adverse possession against the owner who also has to be specified**. **Secondly**, the Defendant should

demonstrate that he had never been interrupted by the owner who has title to the land or that he had **never been disturbed by the owner**. The burden of proof is on the Defendant to prove these ingredients if he claims prescription for over ten years against the owner.

The Counsel for the Defendant has quoted from the judgment of the District Judge who had in his judgment referred to ***Sirajudeen Vs Abbas 1994, 2 SLR 365*** in which the then Chief Justice G.P.S. de Silva had stated at page 370 to read " 1st Defendant has failed to establish a starting point for his acquisition of prescriptive title." The President's Counsel for the Defendant argues that the Chief Justice is wrong in having stated so in the said case. He argues that Sec. 3 of the Prescription Ordinance does not specify the time in that manner and further submits that the mere fact of having been in possession for a long time is enough to get prescriptive title.

I find that the Counsel challenging Chief Justice G.P.S.de Silva's views in the said judgment , does not stand to reason because for 'any person on earth to be held to have possessed any land without any disturbance or interruption' does not come under "adverse possession" as in Sec. 3 of the Prescription Ordinance. The meaning of 'adverse' is equal to 'opposed to'. 'Opposed to whom', has the Defendant been possessing the land to which he claims to have prescribed to. It has to be understood as 'not opposed to the whole world' but 'opposed to the legal owner.'

The President's Counsel has argued on behalf of the Defendant regarding the parenthesis clause in Sec. 3. It is the clause within Sec. 3 which reads as " that is to say a possessor unaccompanied by payment of rent or produce or performance…… from which an acknowledgment of a right existing in other person would fairly and naturally be informed." He submitted that the Defendant in the case in hand can claim refuge under the parenthesis clause as there was no evidence forth coming to prove any of the acts/services/statements – in the parenthesis clause. He submitted that the words in this clause is not placed therein by the legislator to mean "as for example" but as a "definition" of the phrase 'adverse possession'.

To my mind, the words in the parenthesis clause is quite clearly showing an example. How can it be interpreted to be a definition simply because, it describes

a situation where the Defendant was earlier paying rent or produce or performance by way of action such as that, to be in possession of the land under the ownership of the legal owner and then there would have arisen a particular point of time when the Defendant stops/refuses/does not comply with any action of accepting or recognizing the ownership of the Plaintiff. That is the time and point at which the adverse possession commences. It is an example. It is not a definition. In the case in hand the Defendant had never been paying rent or produce or performance to the owner. How can such a person claim refuge on the parenthesis clause. I fail to understand that argument as a valid argument at all. I hold that the parenthesis clause explains how the number of years of adverse possession should be calculated.

Further more I have given consideration to all the cases enumerated below given in support of the Defendant's case as claimed by the Counsel :-

1. Fernando Vs. Wijesooriya 48 NLR 320.
2. Terunnanse Vs Manike 1 NLR 200.
3. Perera Vs Ranatunga 66NLR 137.
4. Cadija Umma,et al Vs Don Manis Appu 40 NLR 392(PC)
5. Perera Vs Premawathie 74 NLR 302.
6. Simon Appu Vs Christian Appu 1 NLR 288.
7. Jane Nona Vs Gunawardane 49 NLR 422.
8. Lucia Perera Vs Martin Perera 53 NLR 347
9. Appuhamy Vs Goonatilake 18 NLR 469.
10. Charles Vs Ramaiya 2 NLR 235.
11. Emonis Vs Sadappu 2 NLR 261.
12. Fernando Vs Wijesooriya 48NLR 320.
13. Nonis Vs Petha 73 NLR 1.
14. Raki Vs Lebe 16 NLR 138.

I hold that in the case in hand, the Defendant has failed to prove prescriptive possession as included and provided for, in Sec. 3 of the Prescription Ordinance, according to the evidence led at the trial before the District Court. He is not entitled to get prescriptive title under Section 3 of the Prescription Ordinance.

I answer the questions of law as aforementioned in favour of the Plaintiff Respondent Respondent and against the Defendant Appellant Appellant. I affirm

the judgment of the Civil Appellate High Court dated 21.07.2011 and the Judgment of the District Court dated 05.02.2008.

The Plaintiff is entitled to the reliefs prayed for in the Plaint and to take out writ to eject the Defendant from the land.

The Appeal is dismissed with costs of suit in all courts.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ.
I agree.

Judge of the Supreme Court