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

Uduma Lebbe Marikkar Mohomad Nizar (deceased),
55/1, Hirimbura Cross Road,
Galle.
1st Defendant-Appellant-Appellant

Mohamed Sakeen Mohamed Zahi Zindan,
105/1, Cross Road, Hirimbura,
Galle.
Substituted 1st Defendant-Appellant-Appellant

**SC/APPEAL/235/2016**
**HCCA/GALLE/111/2006 (F)**
**DC GALLE 8324/L**

Vs.

Mutha Merenne Parakrama
And 5 Others,
61/2, New Lane 1, Dangedera,
Galle.
Substituted Plaintiffs-Respondents-Respondents

2B. Mohomad Hafeel Pathuma Risniya,
(New Legal representatives of the deceased 2nd defendant)
And another
2B & 3A Defendant-Respondents-Respondents

Before: Hon. Justice P. Padman Surasena
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Navin Marapana, P.C. with Saumya Hettiarachchi for the Substituted 1st Defendant-Appellant-Appellant.

Johnson Peiris for the Plaintiff-Respondent-Respondent.

Argued on: 01.07.2024

Written Submissions on:

By the Appellant on 19.07.2024
By the Respondent on 15.07.2024

Decided on: 28.10.2024

**Samayawardhena, J.**

**Introduction**

The plaintiff filed this action in the District Court of Galle on 27.06.1974 seeking a declaration of title to, ejectment of the three defendants from, the land described in the schedule to the plaint, and damages. As evidenced from issue Nos. 24 and 35 raised at the trial, the 1st defendant claimed prescriptive title to the land, while the 2nd and 3rd defendants asserted that they came to the land with the leave and licence of the 1st defendant's father. After trial, the District Court dismissed the 1st defendant's prescriptive claim and entered judgment for the plaintiff. This was affirmed by the High Court of Civil Appeal of Galle by judgment dated 19.05.2015. Hence this appeal by the 1st defendant to this Court.

This Court has granted leave to appeal on two questions of law:

(a) Did the High Court of Civil Appeal err in law in failing to consider that the plaintiff's action is prescribed in law?

(b) Did the High Court of Civil Appeal misunderstand the interim settlement reached in case No. LN 6699?

**Was the plaintiff's action prescribed in law?**

The first question of law, in my view, is misconceived in law, as there is no time period within which an owner of land should come before the District Court seeking a declaration of title and ejectment of trespassers from the land. In other words, extinctive prescription has no application to *rei vindicatio* actions. Once the action is filed, it falls upon the defendant to establish acquisitive prescription, should he wish to rely on such a claim. There is no burden on the plaintiff to prove that the defendant did not prescribe to the land. Prescriptive possession serves only as a shield of defence, not as a sword of attack (*Terunnanse v. Menike* (1895) 1 NLR 200 at 202). However, these observations will not result in the dismissal of the appeal. The second question of law addresses the core issue in the case. The second question of law on which leave to appeal was granted by this Court is whether the District Court and the High Court of Civil Appeal erred in law in rejecting the prescriptive claim of the 1st defendant by misconstruing the interim settlement reached in case No. LN 6699.

**Was the adverse possession proved?**

In order to succeed in a claim of prescriptive title, section 3 of the Prescription Ordinance No. 22 of 1871, which delineates the mode of acquiring such title, requires proof of undisturbed and uninterrupted possession, under a title adverse to or independent of that of the owner of the immovable property, for a period of ten years.

*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. 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 lands 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 herein before 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:*

*Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.*

There is no dispute that in paragraph 13 of the last amended plaint dated 02.09.1987, the plaintiff averred that the defendants have been in forcible and unlawful possession of the land since 15.10.1962. In terms of section 58 of the Evidence Ordinance, there is no necessity to prove admitted facts. If this averment is taken in isolation, in general terms, the 1st defendant's prescriptive claim must succeed.

However, the plaintiff contended that the 1st defendant's possession was not adverse since 16.01.1963, as the defendants on that date acknowledged the rights of the plaintiff in the land as evidenced by the settlement recorded in the previous abortive case No. LN 6699. This contention was accepted by both Courts below. It is on this basis, the prescriptive claim of the 1st defendant was rejected.

**Was there an acknowledgement of the rights of the plaintiff in the land?**

It is undisputed that adverse possession is a *sine qua non* for succeeding in a claim of title by prescription. In *Nonis v. Peththa* (1969) 73 NLR 1, the Privy Council stated at page 3 that the parenthetical clause found in section 3 of the Prescription Ordinance—namely, "*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*"—constitutes the definition, rather than merely an illustration, of the phrase "adverse possession".

However, in *Cadija Umma v. Don Manis Appu* (1938) 40 NLR 392, the Privy Council correctly pointed out at page 396 that "*While, however, 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. A phrase [adverse possession] having been introduced and then defined, the definition prima facie must entirely determine the application of the phrase; but the definition must itself be interpreted before it is applied and interpreted, in case of doubt, in a sense appropriate to the phrase defined and to the general purpose of the enactment. Thus in a case where A's possession has been on behalf of B or has been the possession of B (whether by reason of agency or co-ownership) it seems impossible to apply this definition clause as between B and A so as to defeat the rights of B.*"

Adverse possession, as interpreted in the parenthesis, may encompass "*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*" but this does not represent an exhaustive depiction of what constitutes adverse possession.

Whether adverse possession existed for ten years prior to the commencement of the action, and whether there was any acknowledgment of a right in the plaintiff during that period, are questions of fact that must be determined by considering all the facts and circumstances of the case, rather than focusing on one or two isolated incidents.

In *Silva v. De Zoysa* (1931) 32 NLR 199 at 201-202, Macdonell C.J. eloquently explained this requirement as follows:

> *To answer this question [whether an inference of acknowledgment of right in another can be drawn] it is necessary to take all the facts relevant thereto. The section No. 3 of Ordinance 22 of 1871 speaks of an "act…from which the acknowledgment of a right existing another person would fairly and naturally be inferred", so we must ascertain what the "act" was before we can say whether or not a certain inference "fairly and naturally" arises from it, which is simply another way of saying that we must know and take into account all the component parts of that "act", for if we do not, if we simply take one isolated fact apart from its surroundings, we would not be giving weight to those words in the section which say that the inference of acknowledgment of right in another must be one that arises "fairly and naturally".*

The proceedings of 16.01.1963 in case No. LN 6699, spanning five pages, were marked as P8 at the trial. It is impractical to reproduce the entire proceedings here. However, upon reviewing those proceedings, it becomes clear that the plaintiff had obtained an *ex parte* enjoining order restraining the defendants from appropriating produce and constructing on the land pending the said action. Upon service of the enjoining order, the defendants' counsel raised several technical objections, as noted in the proceedings. It was in this context that the aforementioned settlement was recorded, which reads as follows: "*At this stage it is agreed that the 2nd defendant will pluck all the nuts from the land in this case, appropriate the produce and build, if he so desires, all at his risk.*" After this was recorded, as per P8, the enjoining order was discharged.

Learned counsel for the plaintiff submits that this conduct reflects that of an individual of subordinate character agreeing to a settlement in fear of a full-blown interim injunction that might be granted against him. When perusing the proceedings, I am unable to accept this submission. The settlement appears to have been suggested by the plaintiff, not by the defendants, in view of a potential refusal of the interim injunction in toto. This is what the plaintiff stated in his evidence in chief while marking P8: "මෙම නඩුවේ විත්තිකරුවන් භුක්තියේ සිටින්නේ බලහත්කාරයෙන් ඇතිකරගන්නා ලද පදිංචියක් මත. ඊට පසුව එල් එල් 6699 දරන නඩුවේදී තහනම් නියෝගය සම්බන්ධයෙන් සමතයක් ඇතිවුනා. ඒ සමතය නම් තහනම් නියෝගය සමග දිවරුම් ප්‍රකාශයක් ඉදිරිපත් නොකිරීම නිසා එතනදී සමතයකට පැමිණ තිබෙනවා."

As I stated previously, the plaintiff's position was that the defendants have been in forcible possession since 16.01.1963. In this backdrop, the plaintiff stated that the 2nd defendant (the 1st defendant in the present action) may enjoy the property, at his own risk. That is, should the plaintiff succeed, the 2nd defendant would be liable for the repayment of appropriated produce and would receive no compensation for any

improvements made. In my view, this settlement cannot be construed as an acknowledgment by the defendants of the plaintiff's rights to the land.

In *Fernando v. Wijesooriya* (1947) 48 NLR 320 at 325, Canekeratne J. (with the agreement of Jayetileke J.) observed that declarations made merely with a view to compromise a dispute are not sufficient to draw an adverse inference against the party in possession that such party acknowledged the rights of the true owner.

> *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 N.L.R.) 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.*

In my view, both the District Court and the High Court failed to interpret the purported settlement from the correct perspective and thereby came to a wrong conclusion.

**Does the institution of an action constitute an interruption of possession?**

Proof of uninterrupted possession for ten years preceding the commencement of the action is another requirement that must be satisfied by the party claiming prescriptive title. On this premise, learned counsel for the plaintiff raised an additional question of law during the course of the argument. He contended that the institution of an action against a party claiming prescriptive title interrupts the course of prescription, regardless of the final outcome of the case. He went to the extent of submitting that *Unambuwe v. Janohamy* (1892) 2 CLR 103, which marks a watershed in the development of the law on this issue, was founded on a mistaken premise and as such should be overruled by this Bench, along with subsequent decisions that have relied upon it. This argument was advanced to defeat the 1st defendant's prescriptive claim due to the previous litigation in case No. LN 6699, which I have already referred to.

The plaintiff filed case No. LN 6699 on 05.10.1962, and that case was dismissed on a technical objection (failure to file the certificate of non-settlement together with the plaint) on 18.09.1973. As previously mentioned, the instant action was filed on 27.06.1974. Accordingly, the argument of learned counsel for the plaintiff was that the 1st defendant did not possess the land for the requisite ten-year period prior to bringing the action to claim prescriptive title.

The old law based on Roman Dutch law was that the institution of an action constitutes an interruption of adverse possession (*Medankara*

*Unnanse v. Haligomua Unnanse* Ramanathan's Rep. 1843-1855 at page 54, *Canepady v. Vally* Ramanathan's Rep. 1862 at page 189, *Emanis v. Sadappu* (1896) 2 NLR 261 at 262-263). This was departed from by Withers J. (with Burnside C.J. in agreement) in *Unambuwe v. Janohamy* (*supra*) where it was held that when an action is instituted against a party in possession, the running of prescription is suspended until the case is decided. If the plaintiff is successful, the defendant's possession is deemed to have been interrupted from the date the action was instituted. Conversely, if the plaintiff is unsuccessful, the continuity of the defendant's possession remains unbroken. As stated by Withers J. at page 105:

> *Possession is interrupted, i.e., held in suspense, by an action; and so long as that action subsists, time is not gained by the occupant against his adversary pending the same. But if the action is abandoned or lost, and the defendant remains in possession, the temporary gap of time opened during the proceedings closes again, and the period of interruption by the suit enures to him for whom time and adverse possession are creating a prescriptive tile.*

In the case of *Simon Appu v. Christian Appu* (1895) 1 NLR 288 at 291-292, Lawrie A.C.J. stated "*If the actual physical possession has never been interrupted, it matters not that the possessor has been troubled by lawsuits, or by claims in execution, or by violence; if he has succeeded in holding possession, such attempts to oust him only make it the more certain that he held adversely to those who disputed with him.*"

This matter was revisited in *Emanis v. Sadappu* (1896) 2 NLR 261 before a three-judge Bench comprising Bonser C.J., Lawrie and Withers JJ. The Bench was not unanimous. Lawrie and Withers JJ. followed *Unambuwe v. Janohamy* whereas Bonser C.J. took the view that institution of the action does interrupt the prescriptive possession. However, Bonser C.J.

held this view not because he believed the opinion expressed in *Unambuwe v. Janohamy* was incorrect, but because, in his opinion, the Court lacked the authority to alter established law except through intervention by the Privy Council or via legislative enactment. Bonser C.J. stated at page 264:

> *If it were necessary to express an opinion on this point, I should be content to adopt the view of my brother Withers, whose knowledge of Roman-Dutch Law is so much greater than mine. But in my opinion this question is not open; even if the Court as at present constituted was unanimously of opinion that the original decision was wrong, it would, I conceive, be out of our power to alter the law as laid down by our predecessors. That can only be done by the Privy Council reversing those decisions, or by an enactment of the Legislative Council.*

Lawrie J. declared at page 265:

> *Here the actual possession of the defendant has not been interrupted, it has been continuous. He has been twice sued in the District Court by the plaintiff for the recovery of the lands. In both actions the plaintiff was nonsuited. His possession has therefore been proved to have been on a title adverse to or independent of the plaintiff.*
>
> *When an action to recover lands is brought against a man in possession, the currency of that possession in law, though not in fact, is arrested so long as the action is pending.*
>
> *If the plaintiff be unsuccessful, if the action ends by a decree against him or in a nonsuit, then the defendant is in the same position as if the action had never been brought—his actual possession has not*

> *been interrupted, the claim on which legal interruption was founded has not been sustained.*

While emphasizing that the Roman-Dutch Law doctrine that a civil action interrupts the possession so as to necessitate a fresh possession when the proceedings are terminated for the acquisition of a title by prescription was swept away by Regulation No. 13 of 1822, which continued in force until Ordinance No. 8 of 1834 was passed, Withers J. further explained at page 269 the injustice that would cause if a different interpretation is given:

> *The new [Prescription] Ordinance [No. 8 of 1834] clearly to my mind contemplates by disturbance and interruption a physical disturbance and a physical interruption of possession.*
>
> *To wait for nine years and 364 days and then to file a plaint and serve a summons on the adverse possessor for the purpose of compelling him to maintain possession for another period of ten years would render the new legislation nugatory.*

The majority decision in *Emanis v. Sadappu* was followed by De Sampayo J. in *Appuhamy v. Goonathilleke* (1915) 18 NLR 469.

In *Fernando v. Wijesooriya* (1947) 48 NLR 320 at 325-326, Canekeratne J. (with the agreement of Jayetileke J.) held that "*If the continuity of possession is broken before the expiration of the period of time limited by the statute, the seisin of the true owner is restored; in such a case to gain a title under the statute a new adverse possession for the time limited must be had.*"

If the plaintiff is successful in the lawsuit but possession is not regained by the plaintiff due to some other reason, the defendant must commence adverse possession afresh from the date of the decree. *Wimalasekere v.*

*Dingirimahatmaya* (1937) 39 NLR 25 was an action for a declaration of the title to certain blocks of land, for a decree of possession and ejectment. The plaintiff had instituted another action previously against the same defendants, and had been declared entitled to the block in dispute, but he had omitted to pray for a decree of possession. A subsequent application for an order of possession having been refused, he instituted the second action. The District Judge dismissed plaintiff's action *inter alia* on the ground that the defendants had acquired title by prescription. While setting aside the judgment on that point, Maartensz J. (with whom Abrahams C.J concurred) observed at page 27:

> *[A] successful action for declaration of title is an interruption of possession. The decree forces upon the person against whom it is entered an acknowledgment of title, and if that person continues in possession the possession can only be calculated for the purposes of prescription, from the date of the decree. To hold otherwise would mean that a person who has had adverse possession for say seven years may claim a title by prescriptive possession if he continues in adverse possession for three years after the decree. A proposition which stands self condemned.*

In the Privy Council case of *Tamel v. Anohamy* (1917) 19 NLR 485, it was held that "*An unsuccessful action by an owner of land against a trespasser in possession does not interrupt the running of prescription.*"

This was reiterated by Canekeratne J. (with the agreement of Jayetileke J.) in *Fernando v. Wijesooriya* (1947) 48 NLR 320 at 326:

> *Where there is a contest as regards the title to a land if the claim of the parties is brought before a Court for its decision and there is an assumption that meanwhile the party occupying shall remain in possession, the running of the statute in favour of the defendant is*

> *suspended; otherwise a bar will all the while be running which the plaintiff could by no means avert. If the plaintiff fails in his action there has been no break in the continuity of possession of the defendant. If the plaintiff succeeds the continuity of possession of the one who was keeping the rightful owner out of his possession is broken; the result of the finding of the Court is to restore the seisin of the plaintiff.*

The above dictum was quoted with approval by Wigneswaran J. in *Perera v. Fernando* [1999] 3 Sri LR 259 at 263.

The argument of learned counsel for the plaintiff that *Unambuwe v. Janohamy* is wrongly decided cannot be accepted. The institution of an action *ipso facto* does not interrupt prescription but only suspends it. At the end, if the plaintiff succeeds, the defendant's possession is deemed to have been interrupted from the date of filing the action. If the plaintiff fails, the defendant's possession remains uninterrupted.

**Conclusion**

The second question of law on which leave to appeal was granted is answered in the affirmative, and the judgments of the District Court and the High Court of Civil Appeal are set aside. The plaintiff's action shall stand dismissed as the original 1st defendant has acquired prescriptive title to the land. The appeal is allowed but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court