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

In the matter of an application for Appeal to the Supreme Court under and in terms of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

1. Liyanage Siriyalatha Perera
   No. 472/4,
   Wewa Road,
   Averihena,
   Hokandara.

2. Wasantha Oswald Weerasinghe
   No. 472/4,
   Wewa Road,
   Averihena,
   Hokandara.

Plaintiffs

SC Appeal No. 39/2024
SC/HCCA/LA 243/2021
HC Appeal No.
WP/HCCA/HO/84/2017/F
DC Kaduwela Case No. 274/L

V.

Arunodhini Wirasinghe (nee Subasinghe)
Kethumathi,
Sandalankawa.

Defendant

AND BETWEEN

1. Liyanage Siriyalatha Perera
   No. 472/4,
   Wewa Road,

Averihena,
Hokandara.

2. Wasantha Oswald Weerasinghe
No. 472/4,
Wewa Road,
Averihena,
Hokandara.

Plaintiffs-Appellants

V.

Arunodhini Wirasinghe (nee Subasinghe)
Kethumathi,
Sandalankawa.

Defendant-Respondent

AND NOW BETWEEN

Arunodhini Wirasinghe (nee Subasinghe)
Kethumathi,
Sandalankawa.

Defendant-Respondent-Appellant

1. Liyanage Siriyalatha Perera
No. 472/4,
Wewa Road,
Averihena,
Hokandara.

2. Wasantha Oswald Weerasinghe
No. 472/4,
Wewa Road,
Averihena,
Hokandara.

Plaintiffs-Appellants-Respondents

Before	:	**P. Padman Surasena, J** **A. L. Shiran Gooneratne, J** **K. Priyantha Fernando, J**
Counsel	:	Kuwera de Zoysa, PC with Sajana de Zoysa instructed by Jagath Nanayakkara for the Defendant-Respondent-Appellant. Dr. Sunil Cooray with Sudarshani Cooray and Neminda Kariyawasam instructed by Buddhika Gamage for the Plaintiffs-Appelllants-Respondents.
Argued on	:	19.12.2024
Decided on	:	03.03.2025

K. PRIYANTHA FERNANDO, J

The Plaintiffs – Appellants – Respondents (Hereinafter referred to as the Respondents) instituted action in the District Court of *Kaduwela* against the Defendant-Respondent-Appellant (Hereinafter referred to as the Appellant) claiming for a Declaration that the Respondents are the owners of the premises in suit, a permanent injunction restraining the Appellant from obstructing, disturbing or disputing the Respondents possession of the premises in suit, a permanent injunction restricting the Appellant from entering the premises in suit except with the consent of the respondents and damages in a sum of Rs.200,000.

At the conclusion of the trial, the learned District Judge by Judgment dated 28.04.2017 held in favour of the appellant and dismissed the action subject to cost. Aggrieved, the respondents preferred an appeal to the Civil Appellate High Court of the Western province Holden in *Homagama*.

The learned Judges of the Civil Appellate High Court, by Judgment dated 29.04.2021 held that, while the appellant has paper title to the premises in suit, the respondents had acquired

prescriptive title and thereby set aside the Judgment of the Additional District Judge.

Being aggrieved by the judgment of the Civil Appellate High Court, the instant appeal was preferred to this Court by the appellant against the said judgment and leave to appeal was granted by this Court on the following questions of law set out in para 10(e), (f), (g) and (j) of the petition dated 23.06.2021.

10. *(e) Have the learned Judges of the Civil Appellate High Court gravely misdirected themselves in law and in fact in concluding that the Respondents were not privies of the Defendants in DC Colombo Case No. 17819/L, which is against the final adjudication of this matter?*

(f) Have the learned Judges of the Civil Appellate High Court gravely misdirected themselves in law and in fact in concluding that the Respondents were not bound by the decree in DC Colombo Case No. 17819/L, which is also against the final adjudication of this matter?

(g) Have the learned Judges of the High Court gravely misdirected themselves on law in failing to appreciate and apply the law pertaining to res judicata to this case?

(j) Have the learned High Court Judges gravely misdirected themselves in law and in fact in reaching the wholly untenable conclusion that the Respondents had established their claim of prescriptive title to the premises in suit?

At the hearing of the application for leave to appeal, the learned Counsel for the respondents further framed and submitted additional questions of law and sought that these be also considered. Upon due consideration, leave was granted for the inclusion of the following questions of law as well.

1. On the evidence led in the District Court Kaduwela Case No.274/L has the Plaintiffs (Respondents) prove prescriptive title for more than 10 years before this action was brought?

2. Has the Learned Judge of the District Court failed to appreciate that the deed of gift by Mary Perera to the 1st Plaintiff in the present case was prior to the institution of the original action before the District Court of Colombo?

In light of that, the main issues pertaining to the questions of law are, whether the respondents hold title to the property by way of a deed of gift bearing No.3341 [page 1143], whether the respondents have acquired prescriptive rights to the property in suit, whether the respondents are privies to the defendants in District Court Case No.17819/L, and, consequently, whether they are bound by the doctrine of res judicata in the present case.

Objecting to the documents marked X1, X2, X3, X4, X7, X8 and X9 by the appellant, the learned Counsel for the Respondents in his submission states that, the aforesaid documents are not a part of the record in the District Court nor in the High Court in this case, and therefore must be rejected and expunged from the record in the Supreme Court.

The learned Counsel for the respondents in his submission stated that, the 1st and 2nd respondents are not privies to the 1st and 2nd defendants of the D.C Colombo case bearing No. 17819/L and that they are not bound on the principle of res judicata by the Judgment dated 12.06.2009 given in relation to that case. According to the learned Counsel for the respondent, the 1st and 2nd respondents of the instant case had been gifted the western portion of the corpus by the 1st respondents' mother by deed of gift bearing No.3341 [page 1143] and contends that, the said deed of gift was executed prior to the institution of D.C Colombo case No. 17819/L, and therefore, the 1st and 2nd respondents cannot be considered privy to the action.

Further, the learned Counsel for the respondents submitted that, the 1st and 2nd respondents had acquired title by prescription to

the property in suit by the time the appellant instituted that action (D.C Colombo case No. 17819/ L) against the respondents and therefore took the position that the 1st and 2nd respondents have prescribed to the land in suit.

The learned President's Counsel for the Appellant submitted that, by Deed of transfer No.1467 (page 871), the property in suit was transferred to the appellant on 28.08.1994. The President's Counsel further stated that, despite the transfer of property to the appellant, the 1st respondents' parents were in the property unlawfully and after the Judgment in case bearing no.17819/L, in District Court of Colombo the said parents and all persons holding under them were evicted. Thereafter, the respondents had filed an application under Section 325 of the Civil Procedure Code (as amended), however this was dismissed and the Court upheld the eviction by order dated 29.11.2013. The said order was appealed by case bearing number WP/HCCA/COL/32/2013/RA, and this too was dismissed and the judgment was held in favour of the Appellant. The appeal was brought to this Court by case bearing SC / HCCA / LA / 299 / 16 and was dismissed by this Court holding the judgment in favour of the Appellant in the instant application.

The learned Counsel for the appellant contended that, the learned Judges of the Civil Appellate High Court of *Homagama*, have erroneously found that the 1st and 2nd respondents are not privies to the 1st and 2nd defendant as they have been granted possession on a deed of gift which was executed prior to the institution of case bearing 17819/L.

According to the learned President's Counsel for the Appellant, this Deed (no.628) is a Deed of Declaration prepared in 1989 by the donor herself. The learned President's Counsel states that, the learned District Court Judge of *Colombo* in case bearing number 17819/L found that, by Notarially attested agreement bearing number 1460 between the predecessor in title of the Appellant and the 1st Respondent's predecessor in title (1st respondents mother), the mother of the 1st respondent has relinquished all her rights to the said land in 1994 after obtaining

Rs.250,000, and therefore by the time the Deed of Gift No.3341 was executed in 1996, the predecessors in title of the Respondents did not have any rights to gift to the 1st Respondent. Therefore, it is submitted that the fact that the Deed of Gift No.3341 was prior to the institution of case bearing number 17819/L has no bearing to the instant appeal.

Based on the evidence submitted, [page 110 of the brief] it is evident that the 2nd respondent, in his statement, has conceded that his mother- in law did not hold any title to the property in question. The 2nd respondent asserts that the property was transferred to him and his wife as a wedding gift by his mother-in-law in 1988, the year of their marriage. However, it is noteworthy that the property was allegedly transferred to the mother in 1989.11.06, as per Deed No. 628. This raises a significant issue regarding how the mother could have transferred a title she did not hold in 1988 to the respondent.

ප්‍ර : ඔප්පුවෙන් ලැබී තිබෙන්නෙ තමන්ගෙ නැන්දාම්මට පැ.2 දරණ ඔප්පුවෙන් 1989 හරිද, වැරදිද ?

උ : ඔව්

ප්‍ර : 1989 නැන්දම්මට හම්බ වෙලා තමන්ලාට 1988 තෑග්ගක් දෙන්න බැහැ හරිද, වැරදිද ?

(සාක්ෂිකරු නීතීඥ මහතා දෙස බලන අතර මා ඔහුට අවවාද කරමි. නීතීඥ මහතාගෙන් උත්තරයක් නැති නිසා මගේ දිහා බලයි. එකී ප්‍රශ්නයට උත්තරයක් ලබා දෙන ලෙසට අවවාද කරමි.)

උ : 1996 තමා ලැබුනේ

ප්‍ර : මගේ ප්‍රශ්නය තේරුම් ගත්තද ?

උ : ඔව්

ප්‍ර : තමා විවාහා වුනේ 1988 නම් දැවැද්දට තෑග්ගක් ලැබුනේ 1988 නම් නැන්දාම්මට නැති අයිතියක් දෙන්න බැහැ තමාට 1988 දී ?

උ : ඔව්

මම ඔප්පු ලියවිලි දන්නේ නැහැ , බදින කොට නෝනට ලැබුනේ. මම දන්නේ නැන්දම්මගෙ දේපලක් හැටියට

From the above, it is apparent that the mother did not hold the title to the property in the first place, and therefore, could not have legally transferred it to the respondents as a deed of gift.

A vital question that must be considered here is whether the learned Judges of the High Court misdirected themselves in law and in fact concluding that the respondents were not privies of the defendants in the District Court case No. 17819/L. The Learned Judges of the Civil appellate High Court took the position that the 1st and 2nd respondents are not privies because they have been granted possession on a deed of gift which was executed before the case No.17819/L.

In the case of ***Sathuk V Lavaudeen [1960] 63 NLR 25*** it was held that,

> *"The Roman and Roman-Dutch Law concept of " same persons " or " same parties " is not different from the present day concept of privity in res judicata. Privity is a mutual or successive relationship to the same rights. The nomenclature of " privy " is useful in expressing in one word the relationship which makes a decree binding on persons other than those who are named as parties to an action....The rule is that a judgment inter partes raises the estoppel of res judicata against the parties and their privies".*

Based on the above precedent, the daughter and her husband (the 1st and 2nd respondents) can be considered to be privies of the mother who was the defendant of the D.C Colombo case No. 17819/L. It is further important to note that, the learned Judges of the Civil Appellate High Court in case bearing No. WP/HCCA/COL/75/2015/LA dated 16.05.2016, which was instituted by the same respondents praying for similar reliefs have held that the said respondents are privies of the original defendants in case NO. 17819/L. This judgement was upheld by this Court by refusing leave to appeal in case bearing No. SC/HCCA/LA/298/16 and the matter was concluded

accordingly. Therefore, the 1st respondent and her husband cannot make a fresh claim for the entirety of the land as their mother did against the same person based on the principle of Res Judicata.

When considering the issue on prescription, the respondents claim that, they commenced prescriptive possession on 23.10.1996, which was around five months prior to the institution of case bearing number 17819/L by the appellant.

Section 3 of the Prescription Ordinance provides,

> *" 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…"*

Based on Section 3 of the Prescription Ordinance, it is required by the party claiming prescription to show uninterrupted and undisturbed possession for well over 10 years to claim prescriptive title.

In the case of ***Wimalasekere v. Dingirimahatmaya [1937] 39 NLR page 25*** *Maartensz J held,*

> *"I am of opinion, apart from authority, that 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 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."*

Further in the case of ***Fernando V Wijesooriya [1947] 48 NLR 320*** *it was held that,*

> *" 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."*

At the time the previous action [Case no.17819/L] was instituted, the respondents had not been in possession for ten years. That action interrupted the running of prescription, so the period between that action and the institution of the present action cannot be taken into account for the purpose of proving title by prescription. A successful action for declaration of title interrupts prescription and therefore, when the appellant was successful in case 17819/L, by Judgment dated 12.06.2009, the plea of prescriptive title by the respondent fail, as during the pendency of the successful action, the respondents have failed to be in uninterrupted and undisturbed possession for 10 years.

When considering the objection raised by the Learned Counsel for the respondent against the documents marked X1, X2, X3, X4, X7, X8 and X9 by the appellant, one must understand that the Court is entitled to take Judicial notice on the existence and truth of certain facts where necessary. Further, it is observed that the Learned Counsel for the Respondent has not in any place denied the existence of those respective judgments. For these reasons the objection cannot be allowed.

Hence, I'm of the view that the learned District Judge had correctly evaluated the evidence led during trial and accordingly

is right at arriving at the decision that the 1st and 2nd respondents have not prescribed to the land in question.

Based on the above considerations, the questions of law (e), (f), (g) and (j) of para 10 of the petition dated 23.06.2021 are answered in the affirmative, whilst the additional questions of law (1) and (2) framed at the hearing on 29.02.2024 are answered in the negative.

Thus, the judgment of the learned Judges of the Civil Appellate High Court dated 29.04.2021 is set aside and the judgment of the learned District Judge dated 04.28.2017 is thus affirmed.

The Appellant is entitled for costs in this Court, in the Civil Appellate High Court of the Western province Holden in *Homagama* as well as in the District Court of *Kaduwela*.

The appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE A. L. SHIRAN GOONERATNE

I agree

JUDGE OF THE SUPREME COURT