

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

S.C. Appeal No. 51/2011

SC/HCCA/LA 406/2010

WP/HCCA/Mt/129/07 [F]

D.C. Mt. Lavinia No. 998/98/L

In the matter of an Application for Leave
to Appeal.

Nurun Anberiya Hanifa, No. 10, 4th Lane,
Rajagiriya.

Plaintiff

Vs.

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.
2. Weliweriya Tholka Mudalige Kulasiri [deceased], No. 1173, 3rd Maradana, Borella, Colombo 8.
- 2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants

And

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.
- 2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants-Appellants

Vs.

Nurun Anberiya Hanifa, No. 10, 4th Lane,
Rajagiriya.

Plaintiff-Respondent

And Between

S.C. Appeal No. 51/2011

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.
- 2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants-Appellants-Petitioners

Vs.

Nurun Anberiya Hanifa, No. 10, 4th Lane, Rajagiriya.

Plaintiff-Respondent-Respondent

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S.C. Appeal No. 52/2011

SC/HCCA/LA 415/2010

WP/HCCA/Mt/130/07 [F]

D.C. Mt. Lavinia No. 998/98/L

Mohammed Faizal Subiyan of No. 56/16, Dharmarama Road, Colombo 6.

Plaintiff

Vs.

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.
2. Weliweriya Tholka Mudalige Kulasiri [deceased], No. 1173, 3rd Maradana, Borella, Colombo 8.
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Mawatha, Mirihana, Kotte.

Defendants-Appellants

Vs.

Mohammed Faizal Subiyan of No. 56/16,
Dharmarama Road, Colombo 6.

Plaintiff-Respondent

And Between

1. Mahapatunage Thilak Perera, No. 45/12,
Swarna Road, Colombo 6.
- 2A. Muttettuwage Violet Perera, No. 24/4, Janatha
Mawatha, Mirihana, Kotte.

Defendants-Appellants-Petitioners

Vs.

Mohammed Faizal Subiyan of No. 56/16,
Dharmarama Road, Colombo 6.

Plaintiff-Respondent-Respondent

BEFORE : **TILAKAWARDANE.J**
DEP. P.C. J &
WANASUNDERA. P.C. J

COUNSEL : Rohan Sahabandu, P.C., with Ms. Hasitha Amerasinghe for the 1st
and 2A Defendant-Appellant-Petitioner-Appellants.
Farook Thahir with A.L.N. Mohamed for the Plaintiff-Respondent-
Respondent-Respondent.

ARGUED ON : 11.09.2013.

DECIDED ON : 18.02.2014

TILAKAWARDANE.J

Leave was granted on 02.05.2011 on the questions of law set out in paragraph 16 [a], [b], [c] and [d] of the Petition of the 1st and 2A Defendant-Appellant-Petitioner-Appellants dated 13.12.2010. However, at the commencement of arguments, the parties agreed that the only issue that they wished to make submissions on was regarding the question of whether the Defendant-Appellant-Petitioners had established their claim of prescription to the corpus.

The Plaintiff-Respondent-Respondent [hereinafter referred to as the Respondent] instituted action seeking a Declaration of Title to the lands described in Schedules 2 and 3 of the Plaintiff dated 25.02.1998, and a further order of ejectment.

This case (S.C. Appeal No. 51/2011) relates to a block purchased by the Plaintiff-Respondent, an adjacent block of land was purchased by her brother who was the Plaintiff-Respondent-Respondent in S.C. Appeal No. 52/2011 and both lots were depicted in Plan No. 3434 prepared by P. Sinnathamby, Licensed Surveyor dated 08.07.1983, and had been produced as P5 in evidence. The lots claimed by the Plaintiff-Respondent had been depicted as Lot A2, in Plan 3434 and Lot 2, in Plan No. 3424 prepared by P. Sinnathamby dated 22.06.1983. The brother, the Plaintiff Respondent in SC Appeal 52/2011 also claimed Lot A1 in the Plan 3434 and Lot 1 in the Plan 3424, and both further sought damages as set out in prayer [c] of the aforesaid Plaintiff. Parties agree that as the only ground for Appeal was on prescription, and as the relevant facts were identical, the decision given in S.C. Appeal No. 51/2011 would bind the case S.C. Appeal No. 52/2011.

The Plaintiff Respondent in this case claimed Lot A2 and Lot 2. During the proceedings, the Counsel conceded that there was no dispute with regard to the identity of the corpus which is referred to as "Wella Ambalanwatte" which was in extent 5.45 Perches and referred to as Lot A2 in Plan No. 3434 dated 08.07.1983 prepared by P. Sinnathamby, Licensed Surveyor and Lot 2 in Plan No. 3424 prepared by P. Sinnathamby, Licensed Surveyor on 22.06.1983 in extent 7 Perches. It is to be noted that though the question of the identification of the corpus

was taken up in the original Court, these arguments were not pursued in this Court, and in any event, upon a perusal of the Deed No. 2389 [P1] attested by M.A.M. Faizal dated 06.03.1990, the Deed from which the Plaintiff obtained the title had not been challenged.

The case of both the Respondents in the two cases was that; in Case No. 51/2011, the claim was by Deed No. 2389 dated 06.03.1990 attested by M.A.M. Faizal, Notary Public, one Luxman Panditharatne who had sold and transferred the two allotments described above and contained in Schedules 2 and 3 of the Amended Plaintiff. It is also pertinent to note that subsequently a Deed of Rectification bearing No. 3742 dated 01.06.1995 attested by M.A.M. Faizal, Notary Public of Colombo was also executed in respect of Lot A2 more fully described in the 2nd Schedule to the Plaintiff. In S.C. Appeal No. 52/2011, by Deed No. 1935 dated 24.04.1985 attested by C. Ranjith Kumara, Notary Public, Luxman Perera Panditharatne had sold and transferred the two allotments of lands to one Nazeer Mohamed Aziz, who in turn, by Deed No. 2278 dated 07.10.1989 attested by M.A.M. Faizal, Notary Public, had transferred the two lands described in the 2nd and 3rd Schedules to the Respondents. It is significant to note that during the trial, the 2nd Defendant – Appellant - Petitioner's predecessor in title, the father-in-law, died and his mother-in-law was substituted for the deceased party.

The 1st Defendant – Appellant - Petitioner claimed his prescriptive rights from his father, Mahapatunage Elaris Perera, who claimed to have been in possession of the land from 1971 for more than 10 years, and he further stated that after the death of his father in 1989, the 1st Defendant – Appellant – Petitioner had been in uninterrupted possession by a Deed of Declaration bearing No. 3683 dated 06.12.1992 attested by D. H Liyanage, Notary Public. He therefore claimed that from 1971, that is, from the time of his father Elaris Perera's possession, up to the time of the action, he had been in exclusive uninterrupted and adverse possession of the land. He also claimed that his rights set out in the Deed of Declaration which was written on 06.12.1992 was gifted by him to his father-in-law who was the 2nd Defendant – Appellant - Petitioner in the original case, by Deed of Gift bearing No. 23 dated 01.05.1993 attested by S. V. G. Guruge. It is noteworthy that when the trial was proceeding, several issues were raised, but two of the issues, namely, Issues 18 and 19, were not

accepted by the Judge who was hearing the case, and therefore, such issues were struck off, and the District Judge made an Order on 25.11.2004 stating that it was not clear as to what land was purported to have been claimed by the 1st and 2nd Defendants, that is, the 1st and 2A Defendant – Appellant – Petitioners, hereinafter referred to as the Appellants in this case.

First and foremost, there is no doubt in this case that the pedigree upon which title was claimed by the Respondents in this case had been clearly established and the corpus had been identified. No objections had been raised with regards to the Deeds that were admitted in evidence.

It is then pertinent to ascertain whether possession can be proved for the period of time the Appellants allege that they have been in possession. In this case, it is noteworthy that when Luxman Panditharatne, who was a witness called by the Appellant in the case, gave evidence, he categorically stated that when he sold the lands to the Respondents it was a bare land and at the time the land was handed over after the execution of the deed, exclusive possession was given to the Plaintiff-Respondent. The Appellants in their evidence clearly stated that Mohamed Faizal Subain, the Respondent in S.C. Appeal No. 52/2011, had inspected the property and there were no buildings on the land at the time and that the Respondent in S.C. Appeal 51/2011, had inspected the land in 1991, and at that time the land was visited, nobody had been on the property. It appears that the delay in taking over possession had arisen due to the Appellant in S.C. Appeal 52/2011 being informed by her younger brother that she was receiving threatening calls, which at the time, she had taken very seriously as one of their brothers was murdered earlier over a land dispute. The evidence of the Plaintiff Respondent in this case was that in 1992, when the Respondent in S.C. Appeal No. 52/2011 had gone to visit the land, he had noticed that there was a hut made out of asbestos sheets and that he had been threatened that if he came inside the property, he would be murdered. He had subsequently made a complaint to the Wellawatte Police Station on 06.11.1992 with regard to this incident.

Tilak Perera, the 1st Defendant – Appellant Petitioner in this case, sought to claim the land by

pursuing a prescriptive claim to the corpus. However, when he gave evidence he had to concede that the Deed of Declaration was in 1992 and that he was not in possession of the land prior to that but as previously noted, claimed purported possession of the said land by his father Elaris Perera from 1971. It is important in this context that when one considers the evidence of Malkanthi Ranaweera who was a Chief Assessing Inspector of the Colombo Municipal Council, when she was shown V1 which was Deed No. 3683 dated 06.12.1992, she asserted that at that time, the premises had not been assessed. It is significant to note that though the Appellants claim that their predecessors in title had been on the premises bearing Assessment No. 45/12, Swarna Road, the rates had been only paid by them from 1992 and that prior to 1992 no payments had been made. Furthermore, the marriage certificate produced in the case of the 1st Defendant - Appellant - Petitioner discloses another address and militates against the parties having been residents of the premises at the time of their marriage. These factors do not support the contention of the Appellants as the payment of rates alone does not establish that they had been in possession for well over 10 years. It is clear that the Appellants' predecessor in title, his father, had never paid any rates for the land and that therefore, this Court holds that he would have been a licensee who had merely been in occupation of the land.

Another witness, Kankanamlage Nishantha, who was an officer from Elections Office in Rajagiriya, has stated that the electoral register shows that they had been registered to this address only from 1992 and therefore, the documents marked D14 to D19 would not in any way prove or support the claim for prescription made by the Appellants. Indeed, the documents merely prove that the 1st Defendant – Appellant - Petitioner had been registered as a voter at the premises bearing No. 45/12, Swarna Road for the first time in 1994. What is more significant is that prior to that date, he and his family, including his sister, had been registered as voters in some other premises bearing No. 16/6, Athula Place, Kirulapone.

Another document marked D20 was strongly relied upon by the Appellants to show that their father had been in possession of the disputed land. The document was a letter dated 22.06.1981 and it refers to the sale of two cows by Elaris Perera of No. 45/12 Swarna Road,

Colombo 6. However the witness was unable to state as to whether Elaris Perera was a permanent resident and in continuous occupation of the disputed land and if not, in which capacity he was there, except to say that the cows were feeding on the grass of the land. The contention of the counsel who appeared for the Respondents were that there was no permanent residence or occupation by Elaris Perera but that he merely kept his cows from time to time to graze on the land.

Three other documents, marked V27, V28 and V29 that were produced by a Veterinary Physician, were presented in evidence, but the documents were not challenged as they did not contribute to establishing the capacity in which Elaris Perera was in occupation of the said land. Indeed, it is significant that the 1st Defendant – Appellant – Petitioner himself was unable to say with certainty in which capacity his father had come into occupation, nor was he able to say how or the exact date on which such occupation commenced. Therefore, from 1971 to 1989, had the father been in occupation of this land as its owner, in order to prove adverse possession, there should have been some official documents to show that he was occupying the said land in the capacity of an owner.

The 1st Defendant – Appellant - Petitioner could only produce a Deed of Declaration bearing No. 3683 dated 06.12.1992 and this Deed did not set out the manner in which such title was obtained by him. The Plaintiff-Respondents clearly led the evidence of the purchase of 2 blocks of bare lands which was corroborated by the Notary Public who sold this land. In 1992, they had realized that somebody had put a hut on that land and this problem had arisen. Thus, if at all, the 1st Defendant – Appellant - Petitioner-Appellants could claim prescription only after 1992, after having allegedly surreptitiously entered the land. The case was filed in 1998 and therefore, in the time frame from 1992 to 1998, they have not been in possession for a period of 10 years. Hence, this evidence accrues to the benefit of the Plaintiff-Respondent-Respondent.

When all the above evidence is considered cumulatively, this Court finds that the Appellants have been unable to establish their claim on prescription.

Under these circumstances, both Appeals [S.C. Appeal No. 51/2011 and 52/2011] are dismissed with costs in a sum of Rs. 50, 000/- to be paid by each of the 1st and 2A Defendant-Appellant-Petitioner-Appellants to the two Plaintiff-Respondent-Respondents and the decisions of the District Judge and Judges of the Appellate High Court of Mount Lavinia are affirmed.

Sgd.

JUDGE OF THE SUPREME COURT

DEP. P.C. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

WANASUNDERA. P.C.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

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