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

In the matter of an Appeal under Section 5C of the High Court of the Provinces (Special Provision) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC/Appeal No. 58/2019
SC/HCCA/LA No.52/2017
HCCA/GPH/72/2010 (F)
DC. Gampaha Case No. 766/L

Hemal Ashmore Peiris,
No. 10, Austin Place,
Colombo 08.

PLAINTIFF

vs

Hewage Lionel Gunarathne,
Sirideranawatte,
No. 48/20, Randawana Road,
Yakkala.

DEFENDANT

And Between

Hewage Lionel Gunarathne,
Sirideranawatte,
No. 48/20, Randawana Road,
Yakkala.

DEFENDANT-APPELLANT

vs

Hemal Ashmore Peiris,
No. 10, Austin Place,

Colombo 08.

PLAINTIFF-RESPONDENT

And Now Between

Hewage Lionel Gunarathne,
Sirideranawatte,
No. 48/20, Randawana Road,
Yakkala.

DEFENDANT-APPELLANT-PETITIONER

vs

Hemal Ashmore Peiris,
No. 10, Austin Place,
Colombo 08.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE : Janak De Silva, J.
Achala Wengappuli, J.
M. Sampath K. B. Wijeratne, J.

COUNSEL : Manohara De Silva, PC with Hirosha Munasinghe instructed by Anusha Perusinghe for the Defendant-Appellant-Appellant.

Sunil F.A. Coorey with Nilanga Perera instructed by Sithara Jayasundara for the Plaintiff-Respondent-Respondent.

ARGUED ON : 26.09.2025

DECIDED ON : 06.03.2026

M. Sampath K. B. Wijeratne J.

Introduction

The Plaintiff-Respondent-Respondent (hereinafter referred to as 'Plaintiff-Respondent') instituted this action against the Defendant-Appellant-Appellant (hereinafter referred to as 'Defendant-Appellant') seeking a declaration of title to lot 5 depicted in Plan 1105 dated July 02, 1984 ('P2') more fully described in the sixth schedule to the plaint, a declaration that the Defendant-Appellant'had fraudulently taken possession of the said lot and thereby had unjustly enriched himself, and damages.

The Defendant-Appellant in his answer sought dismissal of Plaintiff-Respondent's action on the ground that he had acquired prescriptive title to the aforesaid lot 5 in plan marked 'P2' by his undisturbed and uninterrupted adverse and independent possession for over ten years.

After trial, the District Court delivered the judgment in favour of the Plaintiff-Respondent, granting all the reliefs prayed for in the Plaint. The Defendant-Appellant thereupon appealed to the Provincial High Court, where the learned judges of the High Court affirmed the judgment of the learned District Judge, subject to the variation that the derogatory words *'නෑණාව මුල්කරගෙන'* being deleted and substituted with the word *'සිතාමතාම'* to bring consolation to the Defendant-Appellant. Being dissatisfied with the said judgment, the Defendant-Appellant preferred the instant appeal to this Court.

Accordingly, this Court granted leave to appeal against the judgment of the Provincial High Court on the following question of law;

> *"Did the learned judges of Provincial High Court and the learned District judge have both erred by failing to hold that the Defendant had prescribed to the land described in the schedule to the answer"*[1]

[1] Journal entry dated 01.03.2019.

Facts of the Case

The land more fully described in the 1st schedule to the Plaint was gifted to the Plaintiff-Respondent by his father by deed of gift bearing No. 1481 dated October 26, 1969. The devolution of title to the subject matter pleaded by the Plaintiff-Respondent was never contested. The Plaintiff-Respondent has thereafter caused the said land to be surveyed and sub divided into several lots upon plan No. 1105 dated July 20, 1984 with the intention of selling some of the lots. Accordingly, Lots 1, 2 and 3 depicted in the said plan bearing No. 1105 were sold to the Defendant-Appellant by three separate Deeds; No 482, 483, and 484 all dated November 10, 1984 ('P3', 'P4' and 'P5') attested by R.K.S. Suresh Chandra, Notary Public whilst entering into an agreement to sell Lot 4 ('P6') which he eventually did by executing Deed No. 528 dated May 05, 1985. ('P7'). The said lots 1,2,3 and 4 are described respectively in the 2nd, 3rd, 4th and 5th schedules to the Plaint.

In 2003, when the Plaintiff-Respondent re surveyed the land, it was revealed that lot 5 depicted in Plan No. 1105 more fully described in the 6th schedule to the Plaint was also in the possession of the Defendant-Appellant in addition to the Lots 1, 2, 3 and 4 those which were actually transferred to the Defendant-Appellant.

The Plaintiff-Respondent promptly informed the Defendant-Appellant who was working abroad at the time through email communications that lot 5 which is actually belonging to the Plaintiff-Respondent has been mistakenly fenced off together with Lot 4 which is adjacent to Lot 5. The Defendant-Appellant while acknowledging that he only bought four Lots namely lots 1-4 from Plaintiff-Respondent, assured Plaintiff-Respondent that if a mistake has in fact been made with regard to the boundaries, he would take necessary steps to resolve the issue amicably once he returned to Sri Lanka. The Defendant-Appellant also expressed his willingness to buy from Plaintiff-Respondent if extra block is included in the land that is possessed by him. The Plaintiff-Respondent thereafter informed the Defendant-Appellant that he does not wish to sell Lot 5 and requested Defendant-Appellant to dismantle the outhouse, which is encroaching on Plaintiff-Respondent's premises and rebuild it within his own premises. Subsequently, as no amicable settlement could be reached between the parties, this action was instituted.

Analysis

Since this is a *rei-vindicatio* action, once the Plaintiff-Respondent establishes his paper title to the portion of land in question the burden shifts onto the Defendant-Appellant to prove his entitlement to possess the same. Thus, the crux of the matter in the instant case is whether Defendant-Appellant effectively discharged his burden of proof of prescriptive title under which he claims to be entitled to possess Lot 5.

Defendant-Appellant to succeed in his claim for prescriptive tittle, the onus is on him to satisfy all ingredients set out in section 3 of the Prescription Ordinance No. 22 of 1871-as amended. Section 3 of the Prescription Ordinance reads as follows;

> Section 3- "*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 […] for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. […]"*

In the instant case, Defendant-Respondent is the owner of the land adjoining to the Plaintiff-Appellant. It was only in 2003, when a resurvey was conducted by the Plaintiff-Appellant, that it was revealed that Defendant-Appellant had encroached into some portion of Lot 5 owned by the Plaintiff-Appellant, which was not sold to the Defendant-Respondent. Defendant-Respondent's position is that though he has not paid any consideration for Lot 5, he was in possession of the said Lot 5 together with Lot 1 – 4 as a portion of land that he purchased and accordingly, has acquired prescriptive title. In the light of the said facts the character in which the Defendant-Appellant entered into the possession of Lot 5 *prima facie* appears to be that of a trespasser or a complete stranger as it is clear that he was never in possession of said Lot on leave and license as claimed by the learned Counsel for Plaintiff-Respondent but rather encroached into Plaintiff-Respondent's portion of land without his knowledge.

In such circumstances, the real question that arises is as to the point at which the prescriptive period commences to run, and whether the Defendant–Appellant can be said to have perfected title by way of adverse possession? In my view, the period during which the prescription commences to run depends on the character in which one enters into the possession of an immovable property. For example, if a person enters to a land of another in the character of licensee or agent of the owner, such a person cannot acquire prescriptive title to that property unless there's some '*overt act*' which demonstrates that such a person has set aside his subordinate character and is possessing the property adverse to or independent of the owner of the property. In the case of ***Maduanwela vs Ekneligoda***[2] Bonser C.J. thus observed, *"A person who is let into occupation of property as a tenant or as a licensee must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation."*. Similarly, in ***Jayaneris vs Somawathie***,[3] Weeramantry J. stated, *"The adverse aspect of his possession cannot in other words remain a mere concept in the recesses of the agent's mind but must so manifest itself that those against whom it is urged may see in it a challenge to their claims. Even as possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner, so also is possession through an agent incapable of being affected adversely by an uncommunicated attitude or mental state existing in the mind of that self-same agent."* If one is a co-owner, in order to establish prescriptive possession, stronger evidence would be required to prove adverse possession, the time from which he started to possess the *corpus* in a way that is incompatible with the rights of other co-owners. Thus, in ***Corea vs Appuhamy***,[4] it was held that, "*A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result*". Hence, an inclusive possession of a co-owner alone would not grant him a prescriptive title unless there are proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some point, ten years prior to the bringing of the action.

[2] 3 NLR 213
[3] 76 NLR 206
[4] [1911] 15 NLR 65

If a person who enters into a land belonging to another person not under leave and license of the owner but as a total stranger/ trespasser, does his possession bear character of adverse possession? I am of the view that if trespasser is to prove adverse possession that entitles him to claim prescriptive title, it has to be exercised openly against the rights of the true owner and only from such time that the true owner becomes aware of such possession or could reasonably be expected to have become aware of such possession that the prescriptive possession could commence to run. It is due to the inaction on part of the real owner, that can extinguish his rights over his own property. If the true owner of the property does not know the fact that another party is possessing it or reasonably could not have been aware based on the facts of the case, it is not logical to concede to the argument that Defendant-Appellant was in possession that is adverse to the true owner of the property. This view has been endorsed by De. Abrew J. in the case of ***Punchiralage Keerala vs Dingiribanda***[5] where his Lordship observed that, *"In fact when a person encroaches upon lands for which he has no title, he acquires status of a trespasser in respect of the encroached area of the land. Trespasser starts possessing lands for which he has no title and continues to possess the land secretly. As I pointed out earlier, to claim prescriptive title in terms of Section 3 of the Prescription Ordinance claimant's possession should be an adverse possession. A person who possesses a land with secret intention cannot claim that his possession is an adverse possession. Possession of a land by a person with secret intention cannot be considered as an adverse possession in terms of Section 3 of the Prescription Ordinance. Thus, a trespasser who violates the law of the land and possesses the land cannot claim benefit of the law of the land."*

Samayawardhene J. in ***Athukoralalage Don Chandrasekera vs Athukoralalage Don Sarathchandra and others***[6] also observed that, *"Mere possession is not prescriptive possession. It should be adverse possession known to the real owner. Adverse possession should continue uninterruptedly for 10 years. For mere possession to become adverse possession there should be an overt act for the real owner and the Court to understand the starting point of prescriptive possession. It cannot be done stealthily. The 10-year period begins to run from that point, not from the mere act of possession, as not every instance of possession qualifies as prescriptive possession*."

[5] SC/APPEAL/188/2011, SC Minutes of 18.07.2018
[6] SC APPEAL NO: SC/APPEAL/30/2016, SC Minutes of 04.07.2024

As held by a number of decisions of the Supreme Court,[7] a prescription is an illegality made legal. Here law does not intend to confer any premium on the wrongdoing of a person in wrongful possession but rather seeks to penalize a person who has slept on his own rights. When boundaries are not demarcated properly, such encroachment can happen intentionally or unintentionally. In the Sri Lankan context, it is a common issue that property owners face. In the instant case, too, it appears that the boundaries had not been properly demarcated at the time of the sale of Lots 1 – 3 and thereafter Lot 4.

The Plaintiff-Respondent in his evidence has stated;

ප්‍ර -එතකොට ඒ මුල් අවස්ථාවේදී මේ 4 වෙනි කොටසයි 5 වෙනි කොටසයි අතරින් වැටක් හරි යම්කිසි වෙන කිරීමක් තිබුනාද?
උ -නැහැ මුකුත වෙන් කිරීමක් තිබුනේ නැහැ. කොටු විතරයි තිබුනේ. වැට ගහද්දී තමයි මේක වෙලා තියෙන්නේ. තමුන කියන්නේ තමුන් ඒ අයට ඉඩම් මුල් අවස්ථාවේදී දෙන කොට මේ 4 යි 5 යි කියන කොටස් දෙක වෙන වෙන්න කිසිම ආකාරයක සලකුණක් අර තමුන් කියන ආකාරයට කෝටු හිටවා හැරෙන්න තිබුනේ නැහැ කියලා?
උ -කොටු විතරයි තිබුනේ.

(page 70 of the brief)

It is even doubtful whether the Defendant-Appellant himself was aware that he has encroached on his neighbor's land as evident in the email communications between the parties., *"If You are 100% sure that some extra block is included in my present block by mistake then please make another deed for that block to my name including my youngest son's name as my last will. Both of us can agree for a reasonable amount and close the transaction. I was planning to leave my house and back land for my youngest son and front for my eldest son. I think this way we can solve this problem."* (page No. 243 of the brief) As I have already observed it is only in 2003, when a resurvey was done, it was detected to the Plaintiff-Respondent and possibly to the Defendant-Appellant as well.

The conduct of the Defendant-Appellant itself casts doubt as to whether an inference of adverse possession could be drawn. I am in complete agreement with the following

[7] *Corea vs Iseris Appuhamy* (1911) 15 NLR 65 at 78, *Kiriamma vs Podibanda* [2005] BLR 9 at 11, *Fathima Naseera vs Mohamed Haris* (CA/818/96(F), CA Minutes of 11.07.2012, *Sumanawathie vs Sirisena* (CA/830/98(F), CA Minutes of 10.03.2014.

observation made by the learned High Court judge, where he has observed that "*The North-Eastern boundary of lot 5 has been marked in red colour which cut and crossed the kitchen of the defendant according to P-9 commission plan. If the defendant was possessing the lot No.5 along with the other lots as one land as show in "V-1" plan, his metal foundation on the North Western boundary as shown in V-2 photograph need not have stopped half way and it could have further extended if the defendant was in fact possessing lot 5 with the firm knowledge and belief that lot No: -5 belongs to none but him."*

Considering the totality of evidence, it cannot be said that the possession of Defendant-Appellant has ripened into a prescriptive possession at any point of time. In such circumstances, the learned President Counsel for the Defendant-Respondent has raised the interesting argument that *ut dominus possession* (possession as one's own) due to a mistaken belief, can give rise to prescriptive title. However, such an argument based on Roman law or Roman-Dutch law is clearly outside the purview of our law, as it is the provisions of the Prescription Ordinance alone that govern the entire gamut of the law relating to prescription. This is succinctly expressed by Bertram C.J. in ***Tillekeratne vs Bastian***[8] where his Lordship stated that, *"The Roman and Roman-Dutch law are only of historical interest, as it is recognized that our Prescription Ordinance constitutes a complete code: and though no doubt, we have to consider any statutory enactments in the light of the principles of the common law, it will be seen that the terms of our own Ordinance are so positive that the principles of the common law do not require to be taken into account"*

Thus, in our law possessor being ignorant of the true ownership of the *corpus* in question or the fact that possessor held the *corpus* similar to possession '*ut dominus'*, is neither sufficient nor necessary to establish a prescriptive title. Professor G. L. Peiris in Law of Property Volume 1, 2nd Edition at page 110 has elaborated this as follows; *"Adverse possession was held at one time to entail possession 'ut dominus', but this view has not found favour in several opinions by the Privy Council, and it may now be taken for*

[8] 21 NLR 12

granted that possession ut dominus is not necessarily required in Sri Lanka for purposes of prescriptive possession."

In the said circumstances, the claim of prescriptive title to Lot 5 by the Defendant-Appellant is not entitled to succeed.

Conclusion

I answer the questions of law upon which leave to appeal was granted in the Negative. The appeal shall stand dismissed. The judgment of the High Court is affirmed. The Plaintiff-Respondent is entitled to costs in all three Courts.

JUDGE OF THE SUPREME COURT

Janak De Silva, J.
I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.
I agree.

JUDGE OF THE SUPREME COURT