

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

C.A 1063/1998 (F)
D.C. Kegalle 4629/L

N. Neelakanthi alias Baby
Wanduradeniya,
Damunupola.

PLAINTIFF

Vs.

N. Balasuriya
Wanduradeniya,
Damunupola.

DEFENDANT

AND NOW

N. Balasuriya
Wanduradeniya,
Damunupola.

DEFENDANTAPPELLANT

Vs.

N. Neelakanthi alias Baby
Wanduradeniya,
Damunupola.

PLAINTIFF-RESPONDENT

BEFORE; Anil Gooneratne J.

COUNSEL; Priyantha Alagiyawanna for the Plaintiff-Respondent
Gamini Hettiarachchi for the Defendant-Appellant

ARGUED ON: 06.06.2012

DECIDED ON: 27.09.2012

GOONERATNE J.

This was an action filed in the District Court of Kegalle for a declaration of title to the land described in the schedule to the plaint and ejectment/damages against the Defendant-Appellant as prayed for in the plaint. Trial Judge entered judgment in favour of Plaintiff on or about in May 1998. Defendant-Appellant seems to contest this case on prescriptive rights. It was admitted at the trial that the original owner was one 'Balaya'. Parties proceeded to trial on 21 issues, and recorded two admissions. The other important admission was that 'Balaya' became entitled to the land in dispute by partition decree bearing case No. 12628 (P1) which is shown as lot 6 in plan No. 2651 (P2) of L.B. Baddewela licensed Surveyor. As such there is no dispute on the corpus and it's identity.

Plaintiff's documents had been marked at the trial without any objection. As such it becomes evidence for all purposes of the case and in law. The partition decree P1, indicates that the said Balaya was the 7th Defendant and one Unga was the 10th Defendant in the partition case. Both

Balaya and Unga had got title according to the evidence of Plaintiff in that action by deed No. 29 of 1946 (P4). By partition plan P2 Balaya became entitled to lot 6 of P2 as per deed P4. There is also evidence that Balaya had leased the property to the Plaintiff-Respondent and her husband during 14.10.1971 to 11.10.1978 (P11 & P11a). There is also evidence that apart from the lease documents P11 & P11a, there is reference to lease document P12, No. 5031 where Emalin Jayaratne had leased lot 6 to Plaintiff for 10 years from 30.10.1990. However having obtained the above lease agreements, on or about 1988 November the Defendant-appellant had wrongfully and forcefully entered the property in dispute. The police complaint P13 of 14.11.1988 confirm such position by Lionel Abeysekera who was a heir of Balaya who transferred the property to Plaintiff.

Plaintiff also contend that the above-named Balaya died leaving an estate below the value to administrate. It was the position of the Defendant-Appellant that Balaya died issueless. Based on this position Appellant attempt to disprove the Plaintiff's case. However the evidence led at the trial support the Plaintiff case and prove that Balaya was survived by his heirs who executed deeds (P8, P8a & P9), in favour of Plaintiff-Appellant. I would prefer to incorporate an extract from the judgment of the Trial Judge which would clarify the position in it's simplest way.

බාලයා මය ගොස් ඔහුගේ අයිතිය ලයනල් අබේසේකර නැමැති තැනැත්තාට හිමි වී ඇති අතර එකී ලයනල් ඇතුළත් සේඩ් බාලයාගේ පුතෙකු බවට සාක්ෂි දී ඇත. ඒ බව සනාථ කිරීමට ලයනල්ගේ උප්පැන්න සහතිකය පැ 7 වගයෙන් ලකුණු කර ඇත. එකී උප්පැන්න සහතිකයේ උපත දැනුම් දුන් තැනැත්තා ඇතුළත් සේඩ්ගේ බාලයා වගයෙන් සහ උපත දැනුම් දෙනු ලැබුයේ පියා වගයෙන් බවටද සඳහන්ව තිබේ.

එකී ලයනල් අබේසේකර පැ 8 වගයෙන් ලකුණු කර තිබෙන අංක 5018 සහ 1990.10.27 වෙනි දින දරන ඔප්පුව යටතේ එම දේපල මෙම නඩුවේ පැමිණිලිකාරිය වූ නුවර පක්ෂයේ නිලකාරිනි නොහොත් බේබි නැමැත්තියට පවරා දී තිබේ. පැ 8 ඔප්පුවේ මුල් පිටපත පැ 8 අ වගයෙන් ලකුණු කර ඇත.

1992 සහතික කරනු ලැබූ අංක 7397 දරණ ඔප්පුව පැ 9 වගයෙන් ලකුණු කර තිබේ. එකී ඔප්පුව යටතේ ලයනල් අබේසේකර නැමැති අයම නුවර පක්ෂයේ නිලකාරිනි නැමැත්තියට ඔප්පුවක් දී තිබේ. පැ 8 වගයෙන් ලකුණු කර තිබෙන ඔප්පුවේ දිමනාකරුවන් වගයෙන් ඇතුළත්ගේ සිරිසේන සමරවිර එමගේ සරත් රත්නවිර එමගේ සෝමපාල එමගේ පියල් ගුණසේකර සහ එමගේ ලයනල් අබේසේකර යන අයවලුන්ගේ නම ඇතුළත් වී තිබේ.

පැ 8 ඔප්පුවෙන් පැමිණිලිකාර බේබි මෙම දේපලම රුගෙන තිබියදී නැවත වතාවක් පැ 9 දරණ ඔප්පුවෙන් ලයනල් අබේසේකර නැමැත්තාගේ පමණක් මෙම දේපල සම්බන්ධයෙන් ඔප්පුවක් ලබාගෙන තිබෙන්නේ ඇයි යන ප්‍රශ්නයට සාක්ෂිකාරිය පිලිතුරු දී තිබේ. ඇය එකී පිලිතුරෙන් කියා තිබෙන්නේ ලයනල් අබේසේකර හැර සෙසු දරුවන් බාලයාගේ දරුවන් නොවන බවට විත්තිකරු තර්ක කරන බවයි. මේ හේතුව නිසා පැ 9 ඔප්පුවෙන් ලයනල් අබේසේකර නැමැත්තාගෙන් ලබාගත් බවත්ය. නමුත් පැ 8 ඔප්පුව දිමනාකරුවන් වන ඇතුළත් සේඩ්ගේ සිරිසේන සමරවිර එමගේ සරත් රත්නවිර එමගේ සෝමපාල එමගේ පියල් ගුණසේකර එමගේ ගුනදාස සහ එමගේ ලයනල් අබේසේකර යන අයවලුන් ඇතුළත් සේඩ්ගේ උංගා සහ බාලයා යන දෙදෙනාගේම දරුවන් බවට අංක 12848 සහ 1956.01.28 වෙනි දින දරන ඔප්පුව සාක්ෂි දරයි. එකී ඔප්පුවේ දිමනාකරුවන් වන්නේ ඇතුළත් සේඩ්ගේ උංගා සහ එමගේ බාලයා යන

දෙදෙනාය. එහි සඳහන්ව තිබෙන්නේ තමන්ගේ ආදරණීය දරුවන් වන ඇතුගල් ජේඩ්ගේ සිටිසේන සමරවිර එමගේ සරත් රත්නවිර එමගේ සෝමපාල එමගේ ගුනදාස සහ එමගේ ලයනල් අබේසේකර තනාග දුන් බවයි. එම ඔප්පුව පැ 10 වශයෙන් ලකුණු කර තිබේ.

මේ අනුව මෙම තැනැත්තන් බාලයා සහ උංගාගේ දරුවන් බවටත් ඔවුන් එකට පීච් වූ බවටත් සැකයක් මතු වන්නේ නැත.

This court has no hesitation in holding that the Trial Judge has carefully considered the evidence of witnesses, and expressed views supported by oral and documentary evidence, in a chronological sequence. This court fully agrees with the submissions of learned counsel for the Plaintiff-Respondent, where the Appellant attempted to take two positions. i.e in the original court and at the hearing before this court. In the original court by raising issue No. 15 stating that persons named in paragraph 4 of the amended plaint are not the issues of Balaya. Respondent met that point with Birth Certificate P7 of Lionel Abeysekera and by the evidence led at the trial which the Trial Judge has considered and contained in the above extract from the judgment that deeds executed in favour of Plaintiff were of the children of 'Balaya' and 'Unga' who were living together. In the appeal Appellant urged that the Respondent had not taken a deed from one of the heirs Jayaratne and that the Respondent was only the owner of 5/6th share of

the property. These are two misleading positions which a party should not approbate and reprobate. 20 NLR at 124.

The learned counsel for Plaintiff-Respondent also cited the following authority.

In Thilak Karunaratne Vs. Sirimavo Bandaranaike 1993 (2) SLR 100 at 120...

I will now proceed to consider the plea of approbation and reprobation which was placed in the forefront of the submissions made by Mr. de Silva. The principle is that a person cannot both approbate and reprobate. A person is not allowed to accept a benefit and rejected the rest....

The petitioner cannot be permitted to take up inconsistent positions. In short, he cannot be permitted to approbate and reprobate. This principle is a bar to his attacking the validity of the competence of the Central Committee, in an endeavour to avoid the consequences of his expulsion by the Central Committee.

The position in appeal and the District Court no doubt will offend the rule contained in Section 150 explanation 2 of the Civil Procedure Code.

“The case enunciated must reasonably accord with the party’s pleading i.e. plaint or answer as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent’s pleadings.”

In Y.M.B.A. Kurunegala Vs. A.M.S.H. Abdul Azeez and another 1977 Bar Association Law Journal pg. 34.

G.P.S. de Silva C.J...

“It would be wholly unreasonable to take the view that the averments in the plaint, the content of P2 and the oral evidence adduced on behalf of the Plaintiff, are all the result of a “mistake”, P2 in particular contained a clear and categorical statement that Meera Rawther was a tenant. In this connection Explanation 2 to section 150 of the Civil Procedure Code is of intense relevance. It is in the following terms “the case enunciated must reasonably accord with the party’s pleading... And no party can be allowed to make at the trial a case materially different from that which he has placed on record...””

Plaintiff-Respondent derives title from ‘Balaya’ who has good title from a partition decree which is operative and recognized and conclusive against all others. The effect of the decree is considered in Section 48 of the Partition Law. Defendant-Appellant allege mere possession on his behalf which is not sufficient to establish prescriptive rights in terms of Section 3 of the Prescription Ordinance. “I possessed” or “we possessed” or “we took the produce” would not confine themselves merely to recording words, but would insist on those words being explained and exemplified. *Alwis Vs. Perera* 21 NLR at 326. Plaintiff’s ownership of property is the very essence of a *rei vindicatio* action. On proof of ownership of property Plaintiff is entitled to a decree in his favour to eject a person in unlawful occupation. See *Pathirana Vs. Jayasundera* 58 NLR 169

at 177. The moment the title is proved the right to possess it, is presumed. See 2002 (1) SLR 148. Defendant-Appellant has not proved the required ingredients in Section 3 of the Prescription Ordinance. In all the above circumstances of this case. I affirm the judgment of the learned District Judge and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL