

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

M. Don Nandasiri of
Boralugoda,
Matugama

PLAINTIFF

C.A. 367/1998 (F)
D.C. Matugama 1668/L

Vs.

1. A. A. Amaradasa of
Neluhena,
Meegahathenna.
(Deceased)
- 1A. U. Don Gunawathie Gunasinghe of
Meegahathenna,
Neluhena,
- 1B. C. P. Arumapperuma Arachchi of
Meegahathenna,
Neluhena,

DEFENDANTS

AND NOW

- 1A. U. Don Gunawathie Gunasinghe of
Meegahathenna,
Neluhena,
- 1B. C. P. Arumapperuma Arachchi of
Meegahathenna,
Neluhena,

DEFENDANTS-APPELLANTS

Vs.

M. Don Nandasiri of
Boralugoda,
Matugama

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: R. Farook P.C., R. Deshapriya with H. Kularatne
For 1A & 1B Defendants-Appellants
S. Vithana with N. Mendis for the Plaintiff-Respondent

ARGUED ON: 30.03.2012

DECIDED ON: 29.08.2012

GOONERATNE J.

This was an action for a declaration of title to a land called lot 4 in "Neluwahena Kattiya" as described in the schedule to the plaint in extent of about 18.5 perches and eviction/damages against the Defendant. Action filed in 1992 and at the time trial was taken up in the District Court the

original Defendant was dead. In the answer Defendant has also pleaded for a dismissal of the suit and declaration that the Defendant is the owner and for peaceful possession and damages as in the answer against the Plaintiff-Respondent. Surveyor Ariyaratne's plan No. 432 shows the land in dispute as 'A' in lot 4 marked 'X' and his report X1. Parties have admitted the corpus and proceeded to trial on 11 issues. Defendant-Appellant issue Nos. 7 – 11 refer to prescriptive rights along with its plantation improvements, and damages at the rate of Rs. 500/- per annum as from 18.5.1992. Defendant also claim Rs. 1290/- an amount deposited in court by the Electricity Board after having cut some trees.

Plaintiff-Respondent relies on paper title by deed No. 13123 of 12.8.1983 marked P2 and the Defendant-Appellant seems to contest on the basis of prescriptive title. The learned President's Counsel inter alia submitted to this court as follows:

- (a) having admitted the corpus the toilet and the well situated within the corpus had been continuously used by the Defendant.
- (b) Deed of transfer P2 relied upon by the Plaintiff is an incomplete document and emphasized same referring to the attestation clause.
- (c) Defendant enjoys the plantation
- (d) Complaint P3 where it is stated that Plaintiff does not always come to the land in dispute.
- (e) Refer to the report X1 of Surveyor to emphasis that Defendant is in occupation of the entire land.

- (f) V3 – compensation due to be paid to Defendant.
- (g) Refer to the evidence at pgs. 193/194 of the record to prove possession. Evidence of an independent witnesses.

In a case of this nature once the Plaintiff-Respondent proves title by way of a transfer deed and seek to establish paper title, the burden is on the Defendant to establish superior title by prescriptive rights. i.e to satisfy the requirements of Section 3 of the Prescription Ordinance. I observe that with deed P2 relied upon by Plaintiff-Respondent there is a presumption in law as regards possession of Plaintiff-Respondent. As such it would be important and relevant to consider the available material as to whether ‘ouster’, starting point of adverse possession and the necessary ingredients of Section 3 are established.

The court commission as plan ‘X’ has superimposed plan No. 5647 of 9.4.1954 prepared by one surveyor Collette which was prepared for D.C. Kalutara Case 28080. It is the position of the Plaintiff-Respondent that the learned District Judge has not erred in his judgment and learned Counsel for Plaintiff-Respondent argued on the following points.

- (1) Evidence of witness Julius Arumapperuma. Arachchi (Defendant’s brother) called by the Defendant-Appellant show that a house was built by the Defendant on lot 3 (not lot 4 – disputed lot) in the early 1970. His evidence does not establish forcible occupation by Defendant on lot 4. In fact at Folios 212/213 of the record

this witness confirm that lot 4 not possessed. His father never wrote lot 4 in favour of any one- No overt act established by witness.

- (2) Contradictions of witness Mithrapala called by Defendant (pg. 223)
- (3) Above witness states he never saw Defendant using the toilet referred to above. Unable to state as to who enjoyed the crops.
- (4) Clear date of commencement of adverse possession not borne out from evidence.
- (5) No other witness established prescriptive rights or at least long possession by Defendant – party inclusive of substituted Defendant (wife of Appellant).

When this court consider the entirety of the evidence placed before the Original Court, it is apparent that the Defendant-Appellant had not been able to prove superior title to defeat paper title established by the Plaintiff-Respondent. Isolated items of evidence picked from hear and there cannot prove the required adverse possession in terms of Section 3 of the Prescription Ordinance. I am not convinced of the Appellant's case and as such the learned trial Judge's conclusions should not be unnecessarily disturbed.

Mere possession is no prescriptive possession in law.

In Sirajudeen and others Vs. Abbas 1994 (2) SLR Pg. 365...

Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.

Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the

burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.

A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.

Juliana Hamine Vs. Don Thomas 59 NLR 346...

Held: that when a witness giving evidence of prescriptive possession states "I possessed" or "we possessed", the Court should insist on those words being explained and exemplified.

I have posed the question about the starting point of prescriptive possession. Mere reference to particular year without supporting evidence is not an answer.

In Chelliah Vs. Wijayanathan 54 NLR 337 at Pg. 342...

It was held: when a party invokes of provisions of Section 3 of the Prescription Ordinance to defeat the ownership of an adverse claimant to immovable property the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive of rights.

There was an argument advance by the Appellant to criticize and attack the title deed. P2, and P7 in an attempt to refer to date of registration and the following authorities provide the answers to such an attempt to meet that argument advanced by the Appellant

In Sangarakkitha Thero Vs. Buddarakkitha Thero 53 NLR Pg. 457...

A deed which on its face appears to be in order is presumed to have been duly executed. The mere framing of an issue as to the due execution of the deed followed in due course by a perfunctory question or two on the general matters of execution, without specifying in detail the omissions or illegalities which are relied upon, is insufficient to rebut that presumption.

In Thiyagarasa Vs. Arunodayam 1987 (2) SLR Pg. 184...

It was held: that the essential elements of due execution of a deed as set out in section 2 of the prevention of Frauds Ordinance are:

- (i) The deed must be signed by the party making it.
- (ii) It must be signed in the presence of a licensed notary public and two or more witnesses.
- (iii)The notary public and witness must be present at the same time.
- (iv)The execution of deed must be duly attested by the notary and the witnesses.

In Cooray Vs. Samy and Others 2004 BLR Pg. 28...

It was held:

(a) Section 2 of the Prevention of Frauds Ordinance lays down the formalities required to effect a valid transfer of land. In terms of this section no sale or purchase of land will be of force or avail in law unless the following requirements are satisfied:

- (1) The instrument must be in writing;
- (2) It must be signed either by the party making it or by some person lawfully authorized by such party.
- (3) It must be signed in the presence of the licensed Notary Public and two or more witnesses.
- (4) The Notary Public and two witnesses must be present at the same time.
- (5) The execution of the instrument must be duly attested by such Notary Public and witnesses;

The Notaries Ordinance makes it obligatory on the Notary to append a formal attestation to the deed. Thus in terms of the Provision of Section 2 of the Prevention of Fraud Ordinance, the transfer of land or other immovable property could be made only by means of a notarial conveyance.

- (d) When a deed is an absolute conveyance devoid of precedent conditions, dominium would pass to the transferee immediately on the execution of the deed.

In Jayawardena Vs. Amerasekara 15 NLR 280., Lascellas CJ. held:

that, on the execution of a notarial conveyance the sale is complete and the mere fact that the whole of consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance.

In *Mohamedu Vs. Hussim* 16 NLR 368.. Pereira J. held that:

Where a person obtains a conveyance of property without fraud but afterward fraudulently refuses to pay the consideration stipulated for, the grantor is not entitled to claim a cancellation of the conveyance but his remedy is an action for the recovery of the consideration.

In all the above circumstances I see no basis to disturb the findings of the learned District Judge. I am not convinced of all the arguments put forward by the learned President's Counsel for the Appellant since the ingredients required by Section 3 of the Prescription Ordinance are not proved. There is an absence of overwhelming evidence required to prove prescription that the Defendant not only occupied but also took the produce to the exclusion of the Plaintiff. Mere assertions could be found to that effect which is not sufficient in law. Therefore I affirm the judgment of the learned District Judge and dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL