

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

M. M. Jimmy Banda of  
Yalegama, Napawala,  
Avissawella.

**PLAINTIFF**

C.A. 390/1997 (F)  
D.C. Avissawella 18410/L

Vs.

M. M. Dolyhamu of  
Yalegama, Napawala,  
Avissawella.

**DEFENDANT**

**AND NOW BETWEEN**

M. M. Jimmy Banda of  
Yalegama, Napawala,  
Avissawella.

**PLAINTIFF-APPELLANT**

Vs.

M. M. Dolyhamu of  
Yalegama, Napawala,  
Avissawella.

**DEFENDANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Rohan Sahabandu with Jeewani Bandara  
for the Plaintiff-Appellant

J. M. Wijebandara with Kaushalya Perera  
for the Defendant-Respondent

**ARGUED ON:** 23.05.2012

**DECIDED ON:** 02.10.212

**GOONERATNE J.**

The Plaintiff-Appellant filed action for a declaration of title and eviction of the Defendant from the land described in the schedule to the plaint. Plaintiff and Defendant happened to be brother and sister of the same family. The extent of the land is about 37.25 perches. Parties proceeded to trial on 5 issues. Plaintiff claim to be owner of the land in dispute according to paragraphs 2/3 of the plaint and allege that on or about 12.10.1991, Defendant unlawfully and by force entered the property in dispute and had cut trees and started to construct a house and caused to interfere with Plaintiff's rights. Defendant-Respondent has pleaded prescriptive rights to the property in dispute. The Plaintiff's position is that by virtue of partition

decree in case No. 5192/P lot B was allotted to one Podimenika and 9 others. All those persons had by deed No. 5969 (P2) of 3.5.1991 transferred the land in question to Plaintiff as averred in the plaint.

The Defendant-Respondent to an extent support the judgment of the learned District Judge who dismissed the plaint and state that the dispute is more or less a boundary dispute between parties who are in the adjoining lands and state the boundaries are uncertain. The Respondent has drawn the attention of this court to the judgment in his written submissions indicative of uncertain boundaries and Plaintiff's failure to prove possession and certain weaknesses of Plaintiff's evidence (though an extract has been included there seems to be some error in the way it is recorded). However certain weaknesses in the Plaintiff's case had been mentioned.

On the other hand the Appellant refer to several lapses in the judgment. It is apparent that Plaintiff has acquired title by deed of transfer marked P2. As such Plaintiff has good paper title. Defendant may not be in a position to dispute paper title since by issue No. 4, Defendant-Respondent relies on prescription. The trial Judge was in grave error by stating Plaintiff has paper title but not prescribed to the land in dispute. Trial Judge's observation of paper title is correct but not the rest which is strictly not in order for an action rei vindicatio. Once title is proved the burden shifts to the

Defendant to prove the legal capacity of his possession i.e prescription 52 NLR 289 when title is proved the right to possess it, is presumed, court to have arrived at a decision in an action re-vindication, is whether Plaintiff had dominium. As such, proving paper title is sufficient once paper title is undisputed the burden shifts to the Defendant to prove independent right as prescriptive rights. Pathirana Vs. Jayasundera 58 NLR 169 at 177. The contest in an action of this nature is between the right of dominium of the Plaintiff and the declaration of adverse possession amounting to prescription by the Defendants.

This court observes that the judgment has certain lapses, by not examining the very basic issues required to be examined in a case of this nature. Nevertheless the following extract based on evidence cannot be faulted – re illegal or unlawfully entering the premises in dispute (to prove issue No. 2, answered as not proved).

පැමිණිලිකරුගේ මෙම සාක්ෂිය 1991.10.12 දින හෝ ආසන්න දිනක විත්තිකාරිය මෙම නඩුවට අදාළ ඉඩමට බලහත්කාරයෙන් ඇතුළු වූ බව තීරණය කිරීමට ප්‍රමාණවත් නොවේ. ඔහු සඳහන් කරන්නේ විත්තිකාරිය විසින් කපා දමා තිබූ බව තමන්ට ආරංචි වූ බවත් පමණි. විත්තිකාරිය කැපු බව තමන් නොදුටු බව ඔහු පැහැදිලිව ප්‍රකාශ කර ඇත. වෙනත් කිසිදු සාක්ෂියක් මගින් විත්තිකාරිය 1991.10.12 වන දින නඩුවට අදාළ ඉඩමට බලහත්කාරයෙන් ඇතුළු වූයේ යන ස්ථාවරය සනාථ කිරීමට පැමිණිලිකරු උත්සාහගෙන නැත. එසේනම් පැමිණිලිකරු පවසන ලෙසට විත්තිකාරිය එදින උණගස් කැපූ බව තමාදුටු සිද්ධියක් නොව

ආරංචියක් පමණි. එහෙයින් 1991.10.12 වන දින හෝ ආසන්න දිනක සිට විත්තිකාරිය මෙම ඉඩමෙහි හුක්තියට බලහත්කාරයෙන් ඇතුළු වූයේ යන්න ඉදිරිපත් වූ සාක්ෂි මත තීරණය කල නොහැකිය.

මිලගට සලකා බැලිය යුත්තේ පැමිණිලිකරුගේ හුක්තිය පිළිබඳව ඔහු දී ඇති සාක්ෂියයි.

මූලික සාක්ෂියේදී ඔහු ප්‍රකාශ කලේ මුලින් තම පුර්වගාමී නැන්දණියද තමන් ඉඩම මිලයට ගත් පසු තමන් ද මෙම ඉඩම හුක්ති වීදී බවයි.

එහෙත් වරෙක “මේ ඉඩමේ වෙනත් ගස් කපල තිබුනද? යන ප්‍රශ්නයට ඔහු පිළිතුරු දෙමින් වෙනත් ගස් ගැන මට දැනගන්නට ලැබුණේ නැහැ. නැන්දලාගේ කාලයේ කැපු එකක් දන්නේ නැහැ. උණගස් හැර වෙනත් ගස් කැපුවද දන්නේ නැහැ. විත්තිකාරිය ගස් කපනවා මම දැන්නේ කැහැ. කපල තියෙනව මම දැක්කේ නැහැ. උණ ගස් කැපු එක විතරයි මම දන්නේ.” යනුවෙන් පිළිතුරු දී ඇත.

එම පිළිතුරෙහි “උණ ගස් හැර වෙනත් ගස් කැපුවද දන්නේ නැහැ” යනුවෙන් සඳහන් කිරීමෙන්ම පැමිණිලිකරු මෙම ඉඩමෙහි හුක්තිය පිළිබඳව ස්ථාවර කරුණු දැන නොසිටි බව පැහැදිලිවේ.

In answering the issue pertaining to prescriptive rights, it appears to this court that provisions dealing with Section 3 of the Prescription Ordinance need to be carefully handled and approached. I think there is something lacking in establishing the ingredients required under

Section 3 of the Prescription Ordinance. On the other hand there appears to be some uncertainty regarding the boundaries of the land in dispute. All issues need to be adequately addressed by court, in arriving at a final decision. Therefore I make order to set aside the judgment of the learned District Judge and send the case back for trial denova. Parties need to be advised by their respective counsel to adopt the best course of action according to law.

Judgment set aside.

Case sent back for re-trial.

JUDGE OF THE COURT OF APPEAL