

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

U. D. Tulin Perera
No. 155/5, Mohideen Mazjeed Road,
Maradana.

PLAINTIFF

C.A. 14/1998 (F)
D.C. Colombo 4677/ZL

Vs.

1. Eric Kannangara
No. 151, Mahawatta Road,
Colombo 13.
2. D. J. M. S. Kannangara
No. 17/1, Negombo Road,
Wattala.

DEFENDANTS

AND BETWEEN

1. Eric Kannangara
No. 151, Mahawatta Road,
Colombo 13.
2. D. J. M. S. Kannangara
No. 17/1, Negombo Road,
Wattala.

DEFENDANTS-APPELLANTS

Vs.

U. D. Tulin Perera
No. 155/5, Mohideen Mazjeed Road,
Maradana.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: A. Rajapaksa for Defendants-Appellants
Mahanama de Silva with R. de Silva
for the Plaintiff-Respondent

ARGUED ON: 14.5.2012 & 25.5.2012

DECIDED ON: 03.10.2012

GOONERATNE J.

Plaintiff-Respondent filed action on or about February 1984 in the District Court of Colombo for a declaration that he is entitled to possession of the land described in the schedule to the plaint and for an order for restoration of possession/damages as prayed for in the plaint. Defendant-Appellants filed answer denying Plaintiff's case and pleaded inter alia that their father was the owner of the land by deed No. 146 of 11.2.1959 and became co-owner to the property in dispute

by intestate succession. Plaintiff's position was that he was in possession for over 30 years and the Appellants took possession from him illegally on or about 25.1.1984.

The material contained in the original court record shows that when the case was taken up for trial and an issue suggested by Plaintiff was objected by the Defendants, the trial Judge upheld the objection. At that stage Plaintiffs had moved to amend the plaint and such application was refused by the District Judge. Thereafter the learned District Judge had proceeded to decide the case on the remaining issues and had dismissed Plaintiff's action on the basis that the plaint does not disclose a cause of action, by his judgment of 19.2.1985. Plaintiff-Respondent preferred an appeal to the Court of Appeal and this court had on a technical matter the appeal had been rejected but the Appeal Court exercising it's powers of revision had set aside the judgment of the District Judge dated 19.2.1985 and sent the case back to the District Court and permitted Plaintiff to amend the plaint. However Defendants thereafter moved for leave to appeal to the Supreme Court on the order of the Court of Appeal, but Supreme Court refused leave.

At the trial parties proceeded to trial on 12 issues. It was the Plaintiff-Respondent's position that the Plaintiff was evicted illegally from the property in dispute based on a complaint (issue Nos. 2 & 3). The Defendant-Appellants raised issue Nos. 5 to 12 and took up the position that the Plaintiff was ejected by means

of a lawful order of the Magistrate's Court in case No. 40353/4/89. At the hearing before this court learned counsel for Appellants inter alia submitted that ejectment of the Plaintiff was in consequence of a lawful order of a court of law. Learned counsel for Plaintiff-Respondent argued otherwise and maintained the position that the eviction was unlawful and that Defendants could not prove that eviction was as a result of valid/lawful order of a court of law.

In the written submissions filed of record and in the oral submissions learned counsel for the Defendant-Appellants urged that Plaintiff was ejected and put into possession on 25.1.1984 by the Registrar of the Magistrate's Court pursuant to the order dated 24.1.1984 in Magistrate's Court case No. 40353/4. Learned Counsel also submitted that the Plaintiff was dispossessed by process of law, and Plaintiff cannot maintain a possessory action under Section 4 of the Prescription Ordinance.

Section 4 reads thus:

It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title:

Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

The learned counsel for Appellants invited court to consider paragraph 2 of the plaint and amended plaint which state that Plaintiff and

members of his family were in uninterrupted possession and occupation up to 25th January 1984. reference is also made to paragraph 11 of the amended plaint. Again in the oral submissions learned Counsel drew the attention of this court to petition and affidavit V1 & V2 which again refer to a date favourable to the Appellants.

The Appellant fault the judgment of the trial Judge and emphasis that the District Judge failed to consider the evidence led at the trial. The learned District Judge held that in the absence of the order of the Magistrate Court being produced or evidence of the execution of the order of the Magistrate by the Fiscal, Defendant's position is not acceptable. Appellant argues that the absence of such order cannot affect his client's position and that a case was filed under Section 66 of the Primary Courts Act was filed and the Magistrate made Order to evict and put the Defendant in possession. Which evidence was available which are also supported by the documents V1 & V2 and the reference made in the plaint and amended plant.

At this point of my judgment I would consider the judgment of the learned trial Judge and refer to the salient feature in the judgment as follows:

- (a) By document P8, payment of rates from 1966 was produced, by Plaintiff, and corroborated by a Clerk from the local authority. Defendant was not able to demolish the above item of evidence.
- (b) By document P9 being a ration card for the year 1977/78 produced by Plaintiff to indicate Plaintiff was resident at the given address during that period.

- (c) Evidence of Ariyawathi on behalf of Plaintiff indicates that they were occupying the premises in question from 1953. Cross-examination of above Plaintiff's witness, could not demolish the position of long years of possession of Plaintiff.
- (d) 1st Defendant's evidence that possession was from 1950 not corroborated by any other evidence.
- (e) Police complaint marked P10, does not reveal that Defendant resided in the premises in dispute. As such based on a balance of probability, Plaintiff was in possession until being dispossessed, for an year and 1 day of clear possession of property.
- (f) Plaintiff's case had not been demolished by the Defendant.
- (g) No documentary evidence placed by Defendant to prove title of the property in dispute.
- (h) Defendant had not produced the relevant Magistrate's Order (in case No. 40353/4/83). Nor did the Defendant produce Fiscals report etc. for recovery of possession. On this aspect I would incorporate the trial Judge's views from an extract from his Judgment.

(චන්තියෙන් කර ඇත්තේ එම නඩුවේ නියෝගයට එරෙහිව පැමිණිලිකරුවන් ඇපැල් අධිකරණයට ඉදිරිපත් කළ පෙත්සම සහ දිවුරුම් පෙත්සම (වි. 1 සහ වි. 2) ඉදිරිපත් කර එහි පැමිණිලිකරුට අදාළ දේපලින් අධිකරණ නියෝගයක් මත එම ස්ථානයෙන් හෙරපා දැමූ බවට පැමිණිල්ලක් කර ඇති බවට සඳහන් (වි. 1අ සහ වි. 2අ) ඉදිරිපත් කිරීමයි. නමුත් පැමිණිලිකරු එවැනි නියෝගයක් ලැබූ බව ප්‍රතික්ෂේප කර ඇත. එනම් එකී වි. 1 සහ වි. 2 දරණ ලියවිලි වල සඳහන් ප්‍රකාශය සහ පැමිණිලිකරුගේ සාක්ෂිය පරස්පර විරෝධතාවයක් ඇත. මෙම පරස්පර විරෝධතාවය මත පැමිණිලිකරුගේ සාක්ෂියේ විශ්වාසනීයත්වය බිඳ දැමීමට හෝ චන්තියේ චන්තිවාචක තහවුරු කිරීමට ආදාල නියෝගයේ පිටපත හෝ පිස්කල් වාර්තාව අධිකරණය හමුවේ ඉදිරිපත් කිරීමෙන් කළහැකිව තිබුණි. එහෙත් චන්තිකරු එම වගකීම පැහැර හැර ඇත. ඔහුට සිය චන්තිවාචකය ද රඳා පවතින එම කිරීම පිළිබඳව නිසඬව ඇතිවා පමණක් නොව එම නියෝගය ඉදිරිපත් කළ නොහැකි තත්ත්වයක් ව නම් ඒ මන්දැයි යන්නවත් අධිකරණයේ ගෙනහැර දක්වා නැත. මෙම කරුණු චන්තියේ සාක්ෂියේ විශ්වාසනීයත්වය බිඳ හෙලීමට සමත්වී ඇතැයි මම තීරණය කරමි.

- (i) Plaintiff's evidence reveal that police had attempted to arrest him and he evaded arrest. At that time police report marked P3 shows that Plaintiff's house had been demolished by the Defendants and that Plaintiff was evading arrest.

P 3 not challenged by the Defendants.

- (j) P3 confirms that Plaintiff left the property in dispute by 11.9.1983. This aspect of evidence confirmed by Ariyawathy's evidence and P3. Further Plaintiff's daughter and son in law was taken into custody.

The trial Judge has given cogent reasons as to why he does not accept the date (25.1.1984) claimed by the Defendant party to show that the Plaintiff was lawfully evicted by a court order in his last paragraph of judgment at folio 295 of the original record. That would be the most acceptable position in the circumstances of the case. Eviction of Plaintiff unlawfully had taken place on 11.1.1983. The material contained in 'a' to 'j' above in its entirety support the Plaintiff's case to demonstrate unlawful/illegal eviction from the premises in dispute. Material contained therein along with the several documents produced by the Plaintiff party no doubt fortify Plaintiff's case (P1 – P10). The two cases cited by learned counsel for Defendant-Appellant to establish that the best evidence rule has no application cannot possibly be extended to the case in hand, though the two cases may be relevant in a different context. I do not want to make the already prolix judgment and add more material to interpret the cases namely *King Vs. Peter Nonis* 49 NLR 16 & *Vanderbona Vs. Justin Perera* 1985 (2) SLR 62 in a different manner to demonstrate that those cases have no application to the case in hand. There is more than sufficient material that was placed before the trial Judge to hold in favour of the Plaintiff-Respondent.

The possessory remedy is available by statute to persons evicted otherwise by a due process of law. Akbar J. in Sadirisa Vs. Attadasi Thero (1936) 38 NLR 308 held though Roman – Dutch remedies referred to are no more in vogue, yet Roman Dutch Law has been read into the provisions of the statute wherever it became necessary. The categories of person who could bring a possessory action are not exhaustive. Any person who has sufficient interest in the property could move court would be entitled to an order in his favour. This would be a speedy remedy and difficult question of title cannot be tried in such actions. Fernando Vs. Fernando 13 NLR 164. The applicant only need to prove;

- (a) He had possession
- (b) He possessed quietly and peacefully
- (c) He had done so for a year and a day
- (d) There was ouster or disturbance for a year before the action is brought (positive disturbances was not necessary. It is possible to prove apprehended disturbance.

Plaintiff has satisfied the above elements required by law in a possessory suit. I affirm the judgment of the learned District Judge. Appeal dismissed. In the circumstances of this case I make no order for costs.

Dismissed.

JUDGE OF THE COURT OF APPEAL