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

CA 818/96 (F)

DC Kalutara 3755/L

Muthaliff Mohamed Mansoor
Ahamed Ismail
Fathima Naseera
Both of No. 477, Main Street, Kaluthara South.

Plaintiffs-Appellants.

Vs.

Abdul Hameed Marikkar Kuddoos
Umma
Mohamed subair
Mohamed Haris.
Both of No. 96, Malffoor Crescent, Kalutara South.

Defendants-Respondents.

BEFORE: A.W.A SALAM, J.

COUNSEL:

Ifthikar Hashim with Ashique Hassim for the Plaintiffs-Appellants and Lakshman Alwis for the Defendants-Respondents.

ARGUED : 16.11.2011.

DECIDED ON : 11.07.2012.

A W Abdus Salăm, J

This appeal is against the dismissal of the plaintiffs' action and granting relief to the defendants, in a declaration of title suit. On a chain of title which dates back to the year 1917, the plaintiffs asserted ownership to it.

The defendants vehemently resisted the claim and the issues were somewhat complex and multifaceted. The mistakes made by the defendants in resisting the claim are manifold and would be discussed at different stages of this judgment.

The defendants denied the ownership attributed to Kalutara Urban Council, urging categorically that Kalutara Urban Council never possessed the subject matter. They maintained that the plaintiffs are not entitled in law to have and maintain the action. Further, they pleaded that the subject matter of the action was partitioned in case No 5746 and lots 6, 10 were allotted to Naina Lebbe Maikkar Patumma and Ahamed Lebbe Marikkar Abdul Hameed.

The 2nd plaintiff is the wife of the 1st plaintiff. The 2nd defendant is the son of the 1st defendant. Ummu Razeena is a sister of the 1st defendant. Ahamed Lebbe Marikkar Abdul

Hameed is the father of the 1st defendant and Ummu Razeena. Naina Lebbe Marikkar Pathumma is mother of the 1st defendant and Ummu Razeena. The husband of Ummu Razeena and father of the 2nd plaintiff is I L M Ahamed Ismail who was the owner of the subject matter at one point of time.

The subject matter of the action was originally owned jointly by Ahamed Lebbe Marikkar Abdul Hameed and Naina Lebbe Marikkar Pathumma, the parents of the 1st defendant and Ummu Razeena.

Undisputedly, by virtue of the final decree entered in case No 5746, in the year 1917, the land in suit was originally owned by the father and mother of the 1st defendant. The learned district judge has lost sight of P 40 (deed No 847) by which the said father and mother of the 1st defendant have transferred their rights to Ahmedu Lebbe Marikar Abdul Hameed who in turn has transferred it to Saiadhu Jumma Saiadhu Hameed who by No Deed No. 707 dated 23-08-1930 (P 41) has transferred it to Jainul Abdeen. When the said Jainul Abdeen remained the owner of the subject matter, the Urban Council has purchased the same, as is evident from the Certificate of Purchase (P26) dated 16-06-1933, issued in favour of Laurie De Silva, Revenue Inspector, Urban Council, Kalutara, for non-payment of assessment taxes by the then owner.

Thereafter, the title to the land in suit had passed hands from Kautara Urban Council to W.M.Mohamed and from him to M H M Haniffa and then to I L M Ahamed Ismail (husband of

Razeena Umma and father of the 2nd plaintiff). The said I L M Ahamed Ismail having died intestate, his children born in two separate lawful wedlocks had transferred all their rights to the 1st and 2nd plaintiffs. 2nd plaintiff incidentally is a daughter of I L M Ahamed Ismail. Thus the plaintiffs have obtained paper title to the subject matter on a clear chain of title.

The plaintiffs have transferred the land on a conditional transfer and later regained title. Thus, a striking feature in the chain of title is the conditional transfer made to Kusumawathie by the plaintiffs in 1982, barely 5 years after the termination of the Conciliation Board proceedings. It would therefore be seen that the plaintiffs having become the owners of the premises described in the 2nd Schedule to the plaint, on deed No 1397 in 1967, sold it to Kusumawathie in the year 1982 on deed No 1617 and repurchased their rights on 8.2.1983 by deed No 3378. This clearly shows that the plaintiffs and their predecessors in title on a clear chain of title from the year 1917 right up to 1983 had remained the owners of the subject matter in question. The period during which they have maintained paper title aggregates to almost seven decades.

A I M Kaleel who is one of the legal heirs of I L M Ahamed Ismail was an attorney-at-law practicing in the same area. Witness Mervin Joseph Setunga, Surveyor and Commissioner of Court had carried out the private survey of the subject matter of the action on 16 March 1967. At the conclusion of his survey, he has prepared plan 196 (P1). The 2nd defendant Haris in his evidence has stated that he is aware of such a survey. As far as the

evidence of Mervin Joseph Sethunga, is concerned there cannot be any doubt as to the truth of his version that a survey was carried out on the instructions of Kaleel in the year 1967. If the 2nd defendant was occupying the premises in question during the relevant period, what made him not to object to the survey remains a mystery. The truth of the matter appears to be that no objection to survey has been taken by the defendants as they occupied the premises as licensees. The conduct of the defendants on this occasion is consistent with the plaintiffs' version and not that of the defendants.

Considering the sequence in which deeds had been written in respect of the land and premises in question, it is improbable to assume that the defendants had possessed the property, as if they were the owners for a period of 10 years immediately preceding the date on which the action was instituted. The plaintiffs have instituted the present action on 26 February 1990. The plaintiffs became entitled to the premises described in the 2nd schedule of the amended plaint and had in fact exercised their right of ownership after the Conciliation Board case, to wit. on 24 September 1982. On 24 September 1982 the plaintiffs have given a conditional transfer of the subject matter to Kusumawathie Fernando and repurchased their rights in 1983. The learned district judge has failed to appreciate the alertness of the plaintiffs in regard to their property rights and the legitimate exercise of the right of ownership by them, before he came to the conclusion that the plaintiffs have lost their rights to the subject matter at the expense of a valid prescriptive title set up by the defendants.

The defendants took up the position that the Urban Council of Kalutara had never possessed the property and there was no plan appended to the certificates of sale. In Nafia Umma V. Abdul Aziz 27 NLR 150 where the Municipal Council had purchased a property put up for sale for non-payment of rates and the Council purchased the property, it was held that the certificate issued under section 146 of the Municipal Council Ordinance is conclusive evidence of the title of the Council to the property and such a certificate cannot be impugned on the ground of any fundamental infirmity.

In Nugawela Vs. Municipal Council, Kandy 40 NLR 166, it was held that in terms of the Municipal Council Ordinance No 6 of 1910 when the property is sold for non-payment of rates and purchased by the Council, the title to it vests in the Council free of all encumbrances despite the fact that the property was subject to certain services to a Dewala. It was emphasised that in terms of section 146 of the Municipal Council Ordinance, the property vests in the Council free from any liability for services.

In the case of G. H. W. De Silva Vs Town Council, Dodanduwa - 73 NLR 265, H. N. G. Fernando, C.J., delivering the judgement with the concurrence of Sirimane, J. and Wijayatilake, J. spelt out the principle in no uncertain language that where, by virtue of the provisions of section 261 of the Municipal Councils Ordinance read with section 169 of the Town Councils Ordinance, immovable property is purchased on behalf of a Town Council at a sale for non-payment of taxes, the validity of the

vesting certificate issued thereafter to the Council under section 263 is not liable to be challenged on the ground that, prior to the sale, the Council did not properly authorise some officer to purchase the property in terms of section 261.

Taking into consideration, the relevant provisions of the Urban Council Ordinance, the decisions on the finality of the certificate of sale and the flawless title that has devolved on Jainul Abdeen, who defaulted in the payment of rates, it is inconceivable that P 26 conferred no title.

Even though the defendants have claimed that they had been in possession of the subject matter of the action for more than 70 years, admittedly no rates have been paid by them to the Urban Council. The defendants have never even attempted to get their names registered in the assessment registers maintained by the Urban Council. Although the defendants have attempted to identify themselves as the owners by right of prescription, they have not even taken the least interest to find out matters regarding payment of rates such as whose name is registered in the registry, who makes the payment of rates to the council etc. Upon a perusal of the document pertaining to the assessment registers maintained by the Urban Council in respect of the premises, it is crystal clear that the name registered immediately prior to the seizure that took place as a result of non-payment of rates, was that of Abdden. Thereafter right up to the time of the institution of the action the successors in title of Abdeen had got their names registered in the rate registers and finally from the

time the 2nd plaintiff's father became entitled to the property his name had been registered. Subsequent to the plaintiff having become entitled to the property their names had been registered at the Urban Council in the rate registers. This clearly shows that the defendants had no intention of possessing the land adverse to the plaintiffs or their predecessors in title.

According to the evidence of Nisthar (a brother of the 2nd plaintiff) there had been a dispute between the parties in the year 1977 which compelled them to go before the Conciliation Board. The dispute having remained unsettled before the Conciliation Board, Kaleel, a brother of the 2nd plaintiff had intervened in the matter and thereafter the defendants were allowed to stay on the land on condition that they would leave the premises, when the 2nd defendant got married. Since they had not left the premises as promised, the plaintiffs have sent P 35 and P 36 (letters of demand) to the defendants. It is common ground that P 35 and P 36 had been sent to the defendants and duly delivered to them. Despite the fact that both letters of demand had been received, the defendants have failed to reply both. When questioned as to why he elected not to reply the letters of demand, the 2nd defendant stated that he did so, fearing a legal suit. (Emphasis is mine) This explanation appears to me as self-explanatory as regards the nature of the possession of the defendants. The election not to reply the letters of demand is suggestive of an intention to hold the property as permissive users than to be in adverse possession.

The learned district judge has failed to address his mind as to the failure to reply important letters, containing serious allegations. P 35 has been sent to the 1st defendant and P 36 to the 2nd defendant. Both in P35 and P36, the plaintiffs clearly stated that the defendants are in occupation of the disputed premises with their leave and licence and without payment of rent. By the same letter the plaintiffs have terminated the permission given to the defendants to continue to stay on the subject matter and put them on notice that legal action would be taken in the event of their faiiure to hand over possession. It is surprising that the defendants who claim to have occupied the premises for more than 70 years have not taken the least trouble to take legal advice on the letters. The allegation made in the letters were such, the gravity of which demanded a reply from any reasonable and prudent man. The learned district judge has failed to take into account the failure to reply the letters of demand.

In Saravanamuththu Vs De Mel 49 NLR 529, the election of the respondent to the Parliament was challenged *inter alia* on impersonation. Rosalin Nona, apparently a supporter of De Mel was imprisoned on her pleading guilty to a charge of impersonation. While being imprisoned, she wrote to R. A. de Mel, stating that she was suffering as she voted for him impersonating another and she referred to Sam Silva, as the one who bailed her out suggesting thereby that Sam Silva was a person whose name would be familiar to the respondent. She recalled in her letter of having been detected at Kanatte polling booth and categorically inquired from De Mel as to whether he

too had not seen her there. Emphasising that she was never jailed before, she appealed to De Mel to help her out. She further added that some of her relatives visited her in jail told her that De Mel would come to see her. The respondent De Mel admitted the receipt of this letter but stated that he was not proficient in Sinhala language to read the letter and was pestered with such letters which compelled him to consign them to the waste paper basket unread. Taking into consideration that the respondent was a public man, elected twice as Mayor of Colombo, the reasons given by the respondent against the failure to reply the letter was considered inconceivable. It was admitted on behalf of the respondent that, it demanded a reply as to whether the contents of the letter were either true or false, had it been read.

Applying the principle so explicitly laid down in the case of Sarawanamuththu (supra), I find it difficult to accept the defendant's explanation, given in respect of the failure to reply P35 and P36. Having given my anxious consideration to the contents of the letter P35 and P36, it is quite safe to think that any reasonable and prudent man would never take the risk of remaining silent after reading them. Therefore, I am compelled to assume that the imputations, assertions and observations made in the said letters have been conceded by the defendants.

Turning to issue of prescription as mode of acquisition of title to immovable property, I would start with the observation that title by prescription is an illegality made legal due to lethargy or inaction on the part of the title holder and vigilance and alertness on the part of the person in occupation of immovable

property. *Vigilantibus non domientibus, Jura subvenient a Roman Law maxim* embraced by equity. The meaning of the maxim is that the law comes to the assistance of those who are vigilant with their rights, and not those who sleep on their rights. 'Broom's Legal Maxims' 10th Edition (page 599) elaborating on the maxim states; "....for if he were negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession; both to punish his neglect *nam leges vigilantibus, non dormientibus jura subvenient and* also because it was presumed that the supposed wrong-doer had in such a length of time procured a legal title, otherwise he would sooner have been sued".

Many important principles touching upon the law of prescription have been succinctly laid down in the celebrated judgment in Corea Vs Iseris Appuhamy 15 NLR 65. This laid down that where a person enters into possession of land in one capacity, he is presumed to continue in possession in that same capacity. The head note of that judgment which applies to licensees reads as follows.... "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".

In the case of Thilakaratna Vs Bastian 21 NLR 12 it was held *inter alia* that where possession of immovable property originally is not adverse, and in the event of a claim that it had later

become adverse, the onus is on him who asserts adverse possession to prove it. Then proof should be offered not only of an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession.

Quite remarkably, overwhelming evidence had been led in the original court pointing to the defendants' possession as being one of leave and licence under the father of the 2nd plaintiff which later continued with the permission of the plaintiffs. The evidence relating to the leave and licence granted to them has not been the subject of a critical analysis. The documents produced at the trial and the evidence given in proof of the plaintiffs' case clearly suggest that the entry of the defendants into the subject matter is nothing but on the invitation of the 2nd plaintiff's father.

The extracts from the electoral registers produced by the plaintiffs are indicative of the type of possession exercised by them over the subject matter. There had been tenants of the plaintiffs occupying the buildings on the land in question. The 1st defendant had attempted to state that the tenants who occupied certain buildings on the subject matter were the tenants of his grandfather. On a reading of the entirety of the evidence of the 1st defendant it appears to me that he was trying to suppress the truth from court to achieve his own selfish ends. In the course of the cross examination he has kept on saying "I do not know" (□□ □□□□□ □□) to many a question that was

put to him. He has not seriously denied that certain buildings on the land had been in the occupation of the tenants of the plaintiffs and their predecessors in title. This evidence completely negates the assertion of the defendants that they were holding the property adverse to the title of the plaintiffs.

The learned district judge has simply analyzed the evidence on the basis that the dispute had arisen in 1977 and that was referred to the Conciliation Board. A settlement over the dispute not having materialized the learned district judge has fixed the commencement of the prescriptive possession of the defendants to that date, assuming that it was an act of ouster by an overt act or something equivalent the nature and come to the conclusion that the defendants have prescribed in law to the subject matter. In the light of the overwhelming evidence led at the trial, I am not in agreement with the finding of the learned district judge that the failure on the part of the plaintiffs to file action within a period of 10 years from the date on which the settlement failed in the Conciliation Board can be taken as circumstances that had given rise to a valid prescriptive title to make the defendants owners of the subject matter.

The necessary extraneous circumstances under which the defendants have come to possess the land have not been discussed by the learned district judge in his judgment. The owner of the property at the time of entry of the defendants into the subject matter was the 1st defendants' sister's husband. Prior to the 1st defendant occupied the subject matter she was residing elsewhere. It is after the 1st defendants' husband

deserted her for the first time arrangements were made by the brother-in-law (owner of the subject matter) for the 1st defendant to occupy the land and premises in question. When the 1st defendant came to occupy the said land and premises she in fact shared the house with the owner and others.

The notices issued in regard to the acquisition of a part of the land for a roadway in 1957, is no proof that compensation had been paid to A.L.Abdul Hameed. He was also the Registered Owner of the said premises at the Urban Council as it appears from (P10), (P11A), (P13), (P14), (P1S), (P16), (P17) and (P18). Since the notices in question, make no reference to compensation having been paid to A.L. Abdul Hameed, the notices cannot be construed to confer title in Abdul Hameed.

The mode of entry of the defendants' into the subject matter, is quite clear. They have entered the same with the consent of the then owner or on his invitation. It is trite law that when a person so enters into occupation, he is precluded from setting up title by prescription without establishing a change of character in which he began his occupation and an overt act or something similar indicating the intention to possess adversely to the owner. This principle of law was laid down in the case of Naguda Marikkar Vs Mohammadu 7 NLR 91 and Orloff vs Grebe 10 N.L.R. 183. It has to be borne in mind that even though the dispute before the Conciliation Board in 1977 was the defendants' unlawful occupation of the premises, such occupation had sprung out from permissive user. Hence, the burden is on the defendants to establish the change of character

in relation to the subject matter followed by an overt act or something similar in nature showing an intention to possess adversely to the owner. The Conciliation Board merely made an unsuccessful endeavour to settle the dispute regarding possession. There is no evidence led at the trial to the effect that the defendants refused to settle the dispute, before the Conciliation Board, based on their prescriptive possession. In the light of the oral and documentary evidence adduced, it is hardly possible to arrive at the conclusion that the proceedings before the Conciliation Board amounts to the commencement of the change of character, providing proof of ouster by an overt act. The reasons being that due to the intervention of Kaleel, the defendants had continued in possession of the property after the Conciliation Board case, on a renewed undertaking to handover the premises after the marriage of the 2nd defendant.. Secondly, the defendants have never even thought of getting their names registered at the Urban Council. On the contrary, it is the plaintiffs who had been paying the rates to the Kalutara Urban Council. Thirdly, the blood relationship of the parties is such which required cogent evidence of prescription and ouster, if the defendants were to succeed in their plea of prescription. The failure to reply to a strongly worded letter of demand which had put the defendants into the fear of legal suit is yet another compelling reason that cries out for the reversal of the impugned judgment. Above all, the plaintiffs have written two deeds in 1982 and 1983 granting a conditional transfer of the property in question to an outsider and thereafter regaining title. In the circumstances, it is inconceivable to that the defendants have prescribed to the subject matter.

The Learned District Judge held the 1st Defendant Kuddus Umma was the only child of Ahmedu Lebbe Marikar Abdul Hameed and Naina Lebbe Marikar Pathuma. This finding of the trial judge is fundamentally erroneous in that both the 2nd defendant and witness Nishtar had admitted that Ahmedu Lebbe Marikar Abdul Hameed and Naina Lebbe Marikar Pathuma had other children, namely Faleela Umma and Ummu Razeena. Consequently, to hold that she had succeeded to the interest of her parents is a misdirection of a very high degree that goes to the root of the dispute.

If the devolution of the title shown by the plaintiffs is accepted based on P26 to P34, the burden of proof should undoubtedly shift on to defendants to justify their occupation of premises No. 96 Mafoor Crescent by establishing prescriptive title to the premises claimed by them and depicted in Plan No. 547 (V5), the extent of it shown as 3R. 15. 75P.

After the unsuccessful attempt to bring about a reconciliation of the dispute between the parties before the Conciliation Board the Defendants had promised to vacate the said house after the marriage of the 2nd defendant and therefore it is quite clear that the plaintiffs have re-permitted the defendants to occupy the said house pending the said marriage of the 2nd Defendant. As the Defendants had failed to fulfil their promise the plaintiffs had dispatched notices to Quit (P35) and (P36) in 1987 to the Defendants terminating their License in respect of the said house.

Taking into consideration the intervention of Kaleel to bring about an understanding between the parties on the disputed question after the unsuccessful attempt to settle the dispute before the Conciliation Board and the failure on the part of the defendants as referred to above indicate that the finding of the learned district judge that the defendants had prescribed to the premises in question based on the failure to institute legal proceedings until 1990, cannot be sustained in law in the light of the evidence led at the trial by the plaintiff and the documents produced.

Another important document that had escaped the attention of the learned district judge is the birth certificate of the 2nd defendant born at No. 52 Main Street, Kalutara. It is quite significant to note that No 52 Main Street Kalutara was the residence of Idroos Lebbe Marikar Ahmed Ismail and her mother Ummu Razeena. They are the father and mother of the 2nd plaintiff. The information regarding the birth of the 2nd defendant on 11 February 1949 (P 39) has been provided by Ahamdu Lebbe Marikkar Abdul Hameed Marikkar, the grandfather of the 2nd defendant. The grandfather of the 2nd defendant was the father of Ummu Razeena, Faleela and Kuddus Umma, 1st Defendant. The said Birth Certificate provides proof of the fact that the said Ahmedu Lebbe Marikar Abdul Hameed was residing at No. 52 Main Street, Kalutara and not at No. 96 Mafoor Crescent the subject matter of this action, in 1949. Therefore, the evidence of the 2nd Defendant on 31-07-1993 that he, his mother and father were residing at No. 96 Mafoor Crescent in 1949 is false when in fact he had admitted that he was born at No. 52 Main Street, Kalutara.

It was contended on behalf of the plaintiffs that the trial judge had erred in law on the question of prescription in that he had failed to appreciate and thereby had misdirected himself in law on the question of burden of proof, failing to realize that the burden was on the Respondent who was claiming Prescriptive Title when the Paper Title of the Appellant had been established.

In this respect it is worthwhile to examine the judgement in the case of Siyaneris Vs De Silva, 52 NLR 298 (Privy Council) in which it was held that in an action for declaration of title to property where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant. If a person goes into possession of a land as an agent of another, prescription does not begin to run until he has made it manifest, that' he is holding adversely to his principal.

In the judgment in Kiriamma Vs Podibanda, (Supreme Court) published in 2005 BLR at 09held as follows:

> "Onus *probendi* or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. Considerable circumspection is necessary to recognize prescriptive title as undoubtedly it deprives the ownership of the party having paper title. Title by prescription is an act of illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by a title adverse to and independent to that of a claimant or Plaintiff'. "When a party invokes the Provisions of section 3

of the Prescriptive Ordinance in order to defeat the ownership of an adverse claimant to immovable property the burden of proof rests fairly on him to establish a starting point for his or her acquisition of prescriptive rights".

It is equally important to make a brief reference to the salient points in the judgement of Rasiah Vs Somapala (Court of Appeal) published in 2008 BLR act page 226 which reads as follows..

"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." "As regards the mode of proof of prescriptive possession, mere general statements of witnesses regarding possession 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 should be decided thereupon by Court."

On a perusal of the judgement of the learned district judge, the existence of a clear analytical approach to the evidence of the defendant with circumspection is not to be seen. He has totally forgotten of the close relationship between the parties. They have been living together in a house other than the premises in question at one stage.

The close blood relationship of the parties was such which required the learned district judge to exercise greater care before accepting the evidence to defeat the paper title. An appellate court is obliged to set aside the judgement based on incorrect reasoning. The reasons adduced by the learned district judge for having conferred prescriptive title on the defendants is totally against the evidence led at the trial. Had the learned district judge analysed the evidence in the light of the close blood relationship of the parties and the concept of family unit that had prevailed among them for a long period of time he could not have arrived at the decision that the plaintiffs are not entitled to a declaration of title.

Undoubtedly, the evidence to establish prescription was slender, despite the length of possession. Although the defendants have had possession of the corpus for an uninterrupted period of more than 10 years, such possession, when examined in the light of the circumstances peculiar to this case, cannot be considered as adverse possession. The learned trial judge appears to have misdirected himself and applied the wrong standard or test in order to decide whether the ingredients to constitute adverse possession had been proved. In such a situation, the appellate court is bound to correct the patent errors committed by the learned district judge whilst being mindful of the principle that an Appellate Court should be slow to disturb the finding of a fact by a trial judge who had the benefit of observing the witness herself. However, if according to the correct analysis of the facts, it appears that the trial judge has not diligently addressed his mind to the evidence, then this Court is duty bound to reverse such a finding. The peculiar facts of the instant case must be looked at in the light of the often

quoted words of Daniel Webster that "Justice cannot be for one side alone, but must be for both".

I am not unmindful of the fact that this action has been instituted way back in 1990 and judgment delivered in 1996. The appeal was pending in this court for nearly 16 years. 22 years have lapsed since the institution of the action. The dispute has dragged on for 35 years. Even though the learned district judge has indirectly found fault with the plaintiffs for being lackadaisical in not suing the defendants in time, I think that the settlement promoted by Kaleel after the Conciliation Board matter had ended, made the plaintiffs to wait until the defendants fulfilled their promise. In the circumstances, the plaintiffs cannot be blamed for the long history of the dispute which yet remains unresolved.

This factual background renders it meaningless to refer the case back for a re-trial when the misdirection of law relating to prescription can be conveniently adjusted here. Besides, a re-trial would undoubtedly contribute towards further delay adding insult to injury resulting in the contesting defendants being afforded a second bite of the same cherry in the original court and thereafter in the appellate court. This undoubtedly will result in prolonging the agony. Hence, I am of the view that to cut short matters in the best interest of parties and to mete out justice, the answers to the issues can be revised in the exercise of the appellate jurisdiction.

For reasons stated above, I am of the opinion that the plaintiffs have proved their title and the defendants unsuccessful in establishing prescriptive title. Hence, the impugned judgment of the learned district judge is set aside and the issues are answered in the following manner.

1. Yes. 2. Yes 3. (i) Yes 3 (II) Yes

4. No

5. Yes

6. (i) Yes (ii) yes

7. Yes 8. Yes 9. No (There were other legal heirs) 10. No

11. No

Accordingly the learned district judge is directed to enter judgment for the plaintiffs as prayed for in paragraphs a, b of the prayer to the plaint.

There shall be no damages or costs.

Judge of the Court of Appeal

Nr/-

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I do hereby certify that the foregoing is a true copy of the judgment dated 11.07.2012 of Court of Appeal case No. CA 818/96 (F).

Typed by:

Compared with:

C/Clerk of Court of Appeal.