

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

C.A. 1199/96 (F).  
D.C. Horana: 4246/L

H.Don Nimalasena  
Perera, 32/3, Central Road,  
Thalpitiya  
North, Wadduwa  
(deceased-appellant.

H.Don Dilup Chandranimal  
Kumara Perera,  
32/3, Central road,  
Thalpitiya  
North, Wadduwa

**SUBSTITUTED-PLAINTIFF-  
APPELLANT**

Vs.

Nawagamuwage Chitra  
Iranganie Mallika of  
Rerukana temple,  
Rerukana, Bandaragama  
and others

**DEFENDANT-  
RESPONDENTS**

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BEFORE: A W A SALAM, J

COUNSEL: M/s I.R.Rajapakse with M/s S.Amarakoon for substituted plaintiff-appellant and J.P. Gamage for defendant-respondents.

Written-submissions tendered:24.4.2012

DECIDED ON: 12.06.2012

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**A.W.A. Salam, J.**

This appeal arises from the judgement dated 7 November 1996 of the district judge of Horana, dismissing the action filed by the plaintiff-appellant (plaintiff) against the 1<sup>st</sup> and 2<sup>nd</sup> defendant-respondents (1<sup>st</sup> and/or 2<sup>nd</sup> defendant/defendants) for a declaration of title to the land in suit and ejectment. The facts briefly are that the plaintiff filed plaint asserting ownership to the land in suit by right of purchase and prescriptive possession. There was no major controversy as to the identity of the corpus. The plaint described the land in suit as one depicted in plan No 698 of 28.11.1927 (P1) made by Lucus H.De Mel, L.S.

The plaintiff attributed original ownership of the land to one Devakauaratchige Engohamy who had died leaving as her heirs husband Pablis and six children namely, Podinona, Babunnona, Helanahamy, Elpinona, Alice and Johanahamy. The said six children by deed No's 754 dated 1 November 1936, 977 dated 18 January 1937 and 1475 dated 26 June 1937 attested by P Chas Dias, Notary Public of Kalutara had transferred an undivided share of 4/9, 2/9 and 1/9 respectively to Tudor Perera Kulatunga, reciting

title by parental inheritance. The said Tudor Perera, thus having become entitled to an undivided 7/9 shares from and out of the subject matter, transferred his rights to the plaintiff, on deed No 2313 dated 19 June 1944 attested by Herman Leo Perera, Notary Public of Panadura. The position of the plaintiff is that having thus become entitled to an undivided 7/9 shares, he possessed the entire land and thereby acquired a prescriptive title to the balance 2/9 shares.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants in this case are husband and wife. The 2<sup>nd</sup> defendant (husband) having died pending the action the children had been substituted in his room. The 7<sup>th</sup> defendant has been added to the caption as an intervening party in terms of section 18 of the CPC. She claims that she has purchased rights in the subject matter from the 1<sup>st</sup> defendant. On this basis, if the 1<sup>st</sup> defendant is not entitled to any rights in the subject matter the 7<sup>th</sup> defendant derives no rights.

The 1<sup>st</sup> defendant Nawagamuwage Chitra Irangani Mallika claims that she is entitled to the land in question by virtue of a deed of gift bearing No. 1079 dated 27.2.1979 attested by Piyasena Amarasinghe Notary Public of Bandaragama.

At the commencement of the trial, parties agreed on the following issues. The issues thus agreed among the parties and the answers given to them by the learned district judge are reproduced below...

1. Is the plaintiff entitled to an undivided 7/9 shares from and out of the land described in the schedule to the plaint? No
2. Did the 1st and 2nd defendants enter the land wrongfully and unlawfully on 18.3.1990? No
3. Did the 1<sup>st</sup> and 2<sup>nd</sup> defendants possess the land from 18.03.1990? No. (They were in possession much prior to that date)
4. After the death of the 2<sup>nd</sup> defendant, is 1A defendant alone in possession of the subject matter? No
5. If the above issues are answered in favour of the plaintiff, is the defendant entitled to a declaration of title in respect of the subject matter of the action, against the defendants?
6. What damages are recoverable from the defendants with effect from 18.3.1990?
7. Can the defendants and all those holding under them be ejected from the land in suit?
8. Is the land described in the schedule to the answer, the subject matter of the action?
9. Is the said land is owned by the 1st defendant as set out in the answer?
10. Has the 1<sup>st</sup> defendant possessed the land from 27. 2. 1979 being the date of deed No 1079 and acquired a prescriptive title to the land?
11. If issues 9 and 10 are answered in the affirmative and the plaintiff obtained judgement?

In the course of the trial the following issues were raised by the 1st defendant.

12. Has the 1st defendant Nawagamuwage Chitra Irangani Mallika by deed No 6907 dated 4.12. 1988 attested by S P D Somasiri Chitrasiri, Notary Public transferred an undivided 1/2 share of the subject matter to the added defendant Dailin Gunawathie?
13. If so, is the added defendant entitled to an undivided 1/2 share of the 1st defendant, if she is declared entitled to the whole land?
14. Was deeds marked as 3D1 executed as a result of the trust reposed to between the parties?
15. If so, should the added defendant hold the subject matter as a constructive trust for the 1st defendant?

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Significantly the 1<sup>st</sup> defendant claims rights from Dona Johanahamy who is a daughter of Devakauaratchige Engohamy and Pablis. The said Johanahamy has transferred her rights on deed No. 977 dated 12.01.1937 to Tudor Perera Kulathunga.

The learned district judge has not considered the fact that the said Johanahamy has previously transferred her rights and subsequently for the second time transferred the same to the 1<sup>st</sup> defendant. In the circumstances, the question of ouster by an overt act should have been considered by the learned district judge in coming to the conclusion whether the 1<sup>st</sup> defendant has in fact prescribed to the land as opposed to the title pleaded by the plaintiff.

Even as regards the question of prescription of the plaintiff, the learned district judge has been unduly influenced by the fact that the land had not been cultivated by him. Therefore,

he came to the conclusion that the plaintiff could not have prescribed to the land in question. As has been urged by the learned counsel for the appellant, there has been several instances where the learned district judge has misdirected himself ultimately ending up in a miscarriage of justice. In the circumstances, the appeal preferred by the plaintiff appellant appears to me as quite convincing and the impugned judgement cannot be allowed to remain. As such, this appeal is allowed, and the case sent back for retrial.

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Judge of the Court of Appeal

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