

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

CA 1419/03
DC Kandy 11560/P

Bopitiya Karalliyadda Marasinghe
Mudiyanselage Podimenike,
155, Colombo Street, Kandy
**SUBSTITUTED 10 A DEFENDANT-
APPELLANT**

-Vs-

1.T.M.P.Peiris
159, Colombo Road, Kandy

1(A) B.R.F.Gunawarnasuriya,
267 D.S.Senanayaka Veediya,
Kandy

1(A)l P.A. Gunawarnasuriya,
267 D.S.Senanayake Veediya,
Kandy

2 S.Dorasamy,
Trincomalee Street,
Kandy
3 Kusuma Dias Seneviratne
153, Trincomalec Street,
Kandy

4 Chandra De Silva,
Refia Office
Colombo

5 U.W.Aariyadasa
130, Ambagamuwa Road,
Gampola

5(A) Malimbodage Chandra Ranasinghe

5(B) Malimbodage Kusuma Dias

5(c) Malimbodage Sriyawathie

5(d) Malimbodage Kanthi Wijeratne

5(e) Malimboduge Wimal Chandrapala

6 Udawatte Vidanalagedara Ceciliya
Ariyadasa
30, Ambagamuwa Road,
Gampola

6(A) Hema Cooray
Sisila Sevana
Katukithula.

6(A)1 S.S.Cooray
Sisila Sevana
Katukithula.

6(A)2 Lal Cooray,
Sisila Sevana,
Katukithula

6(B)E.A.D.Walter Edirisinghe
6(C) Stanly Lionel Edirisinghe
6(d) Flora Edirisinghe
6(E) Felix Ananda Edirisinghe
No. 1 30, Ambagamuwa Weediya,
Gampola

7 Stanley Henry Dias Sumanasckara
7(A) Grace Henry Dias Sumanasekara

8 Abdul Majeed Mohammed Mufeer,
Colombo Street,
Kandy

9 I., Panchabikesan
No. 163, Colombo Road,

11 .A.M.Sencvirutne
No. I/125, Asgiriya,
Kandy

DEFENDATS- RESPONDENTS

Arumugam Sinnakutty
Kandawanam,
No 164, Colombo Road, Kandy
PLAINTIFF-RESPONDENT-

Before : A.W.A. SALAM, J.

Counsel : Daya Guruge for the 10th defendant-appellant, Rohan Sahabandu for the 8th defendant-respondent, P B Raja Karunaratna with V Kulatunga for the 7A defendant-Substituted-respondent A R Surendran PC with N Kandeepan, M Pushparaja and Jude Dinesh for the plaintiff-respondent.

Argued on : 06.12.2010.

Written Submissions tendered on: 07.02.2011.

Decided on: 28.04.2011

A W A Salam,J

In this appeal the deceased 10th defendant-appellant has sought to challenge the judgment and interlocutory decree *inter alia* on the ground that the trial judge had erred in law when he held that the appellant failed to establish an overt act, in order to succeed in his claim of prescription to the portion of the land and premises described in the schedule to his statement of claim.

There is no dispute that the paper title of the subject matter was with the plaintiff, 1st, 4th, 5th, 6th, 7th and 8th defendants.

Accordingly the learned trial judge had entered judgment declaring the following parties as being entitled to undivided shares in the following proportion.

Plaintiff - 25/ 144

1st Defendant - 15/144

(Inclusive of the building bearing No:159 depicted in Plan 'X'.)

4th Defendant - 5/144

5th and the 6th Defendants -54/144

7th Defendant - 30/144

(With the building No: 153 in Plan 'X')

8th Defendant - 15/144

(with the building No:157 in Plan 'X')

In addition the learned district judge also declared 9th defendant to be entitled to tenancy rights in the building Nos; 161 and 163 in Lot 1 in plan X.

Remarkably, the plaint did not disclose the 10th defendant as a necessary party. However, he intervened in the action and was added as the 10th defendant. Pending the determination of the appeal he passed away and 10 A defendant was substituted to prosecute the appeal.

According to the deceased 10th defendant, from the year 1945 he had carried on a business in the building in question along with his father under the name "Madanwala & Sons" in their capacity

as tenants of G S Fernando. This business had been carried on until the year 1958 in the name of the 10th defendant. The business is still registered in the name of the 10th defendant. For purpose of ready reference the relevant averments in the statement of claim of the 10th defendant, are reproduced below...

5. මෙම විත්තිකරු ප්‍රකාශ කර සිටින්නේ, මෙම විත්තිකරු සහ ඔහුගේ පියා විසින් මෙම ස්ථානය වර්ෂ 1945 සිට මෙකී ගොඩනැගිල්ලේ අයිතිකරු වශයෙන් බුක්ති විදි ජී.එස්. ප්‍රනාන්දු යන අයගෙන් කුලියට ගෙන කුලී නිවැසියෙක් ලෙසට මෙහි පදංචිව “මාදන්වල සහ පුත්‍රයෝ” නමින් සිල්ලර බඩු සහ කරවල වෙළඳුම් කිරීමේ ව්‍යාපාරයක් පවත්වාගෙන යන බවයි.

6. 1958 වර්ෂයේදී ඉහත 5 වන ඡේදයේ සඳහන් වෙළඳ ව්‍යාපාරය මෙම විත්තිකරුගේ නමට ලියාපදිංචි කල අතර මෙකී ව්‍යාපාරය ඔහුගේ නමින් අද දක්වාම කරගෙන එමින් මෙකී ස්ථානයේ පදංචිව සිටී.

7. මෙකී ස්ථානයට අදාලව 1961 වර්ෂය දක්වාම ගෙවල් කුලී එකල අයිතිකරු වශයෙන් සිටි ජී.එස්. ප්‍රනාන්දු නමැති අයට ගෙවූ බවද ප්‍රකාශ කර සිටී.

At the commencement of the trial the 10th defendant raised only one point of contest. By raising this point of contest the 10th defendant confined himself to question as to whether he is entitled to the subject matter by right of prescription as pleaded in his statement of claim. The learned district judge having

carefully considered this issue arrived at the conclusion that the 10th defendant cannot succeed in his claim as he had not proved any overt act to qualify himself to commence the type of possession required to be proved by a person who originally entered the building as a tenant.

The finding, judgment and interlocutory decree entered by the learned district judge are quite consistent with the law of prescription and I am unable to see any defect or irregularity in the judgment. In the circumstances, I am not inclined to interfere in any manner with the impugned judgment and interlocutory decree of the learned district judge.

For the above reasons, the appeal of the 10th defendant stand dismissed. Judgment and interlocutory decree affirmed. Appeal dismissed with costs.

Judge of the Court of Appeal

NT/-