

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

CA. No. 1134/98 (F)

D. C. Kandy No.17854/L

Padmashantha Wickremasooriya
No. 1041 12,
De Mel Rood,
Nawala.

Plaintiff

Vs.

Marimutthu Letchimi
W/o Nayagam,
No. 66/12,
Aniewatte Rood,
Kandy.

Defendant

AND BETWEEN

Marimutthu Lekchimi

Defendant- Appellant

Padmashantha Wickremasooriya
No. 104/12,
De Mel Rood,
Nawala.

Plaintiff - Respondent

Case No. CA 1134/98 (Final)

DC Kandy 17854/L

BEFORE : K.T. Chitrasiri, J.

COUNSEL : C.E. De Silva for the Defendant-Appellant.
Rohan Sahabandu P.C. for the Plaintiff-
Respondent.

ARGUED &

DECIDED ON : 12.02.2013

K.T. CHITRASIRI, J.

Learned counsel for the appellant made submissions in support of this appeal.

The appellant, by this appeal has sought to obtain a declaration, declaring that the defendant-appellant is entitled to the land in dispute but it is without a prayer to have the judgment, by which he is aggrieved of, set aside. However, looking at the petition of appeal it is seen that the appellant is challenging the judgment dated 13.05.1998 of the District Judge of Kandy.

In that judgment learned District Judge made order in favour of the plaintiff as prayed for in paragraphs (¶) and (¶) of the plaint dated 04.07.1994. Learned District Judge refused to grant the other reliefs sought by the plaintiff in that plaint. In terms of the aforesaid prayer (¶) and (¶), the plaintiff was declared entitled to the land referred to in the schedule to plaint and to have the defendant and his agents and those who are holding under him, evicted from the said land in dispute. Simultaneously, learned District Judge rejected the claim of the defendant made relying upon the law of prescription.

Mr. C.E. De Silva is of the view that the learned District Judge misdirected himself when he decided to reject the claim of prescription of the defendant-appellant and made submissions in support of his contention. He submitted that it is only on that ground namely rejecting the claim of prescription that he is arguing this appeal. Therefore, I will now consider whether the learned District Judge is correct when he rejected the claim of prescription advanced by the defendant-appellant.

Admittedly, there had been an earlier action which bears the No. L/8320 filed by the plaintiff in this case making the mother of the defendant in this case, as the defendant in that action. The said action L/8320 had been decided in favour of the plaintiff who is the plaintiff in

this case as well. Consequently, the decree entered in the earlier action had been executed by the fiscal handing over the possession of the land to the plaintiff in this case. Both parties admitted that it is in respect of the same land that both the actions were filed. The fiscal, when he executed the decree in the case of L/8320, had evicted the defendant in that case along with her agents including the defendant in this case who is admittedly the daughter-in-law of the defendant in the earlier action. Accordingly, it is clear that the defendant in this case had been evicted by the fiscal on 18.05.1984 from the land in suit in this case. This fact had not been challenged by the defendant-appellant either.

The plaintiff giving evidence in this case had stated that the defendant re-entered the premises few months after she was evicted on 18.05.1984 (page 89 of the brief). The defendant also has given evidence admitting that she was evicted by the fiscal on 18.05.1984. (page 113 of the brief) Neither the defendant nor the plaintiff had given evidence as to the period that the defendant was not in possession of the land. However, the defendant wanted to include the said period that she was not in possession pursuant to the eviction by the fiscal, when computing the period that is necessary for her to prove prescription. Accordingly, the defendant had moved Court, to include the period that she was not in possession also, as part of the period of actual possession of the disputed land, in order to establish her claim on prescription.

In support of this contention of the defendant-appellant, Mr. C.E. De Silva submitted that the plaintiff-respondent should have taken steps in terms of Section 325 of the Civil Procedure Code in the earlier action, to evict the defendant when she re-entered the premises. The said Section 325 permits a person who is holding a decree in his favour to exercise the rights mentioned therein within a period of one year in order to obtain possession evicting the persons who had re-entered. Accordingly, he contended that the plaintiff having failed to take steps under Section 325 of the Civil Procedure Code cannot be heard to say that continuous possession of the defendant was interrupted though she was not in possession of the land for few months from 18.05.1984.

Section 3 of the Prescription Ordinance is very clear on this point. Accordingly, a claim on prescription can be succeeded only after proving undisturbed and uninterrupted possession by a defendant in any action. In this instance, there is clear evidence to show that the possession of the defendant had been interrupted for few months after she was evicted on 18.05.1984 by the fiscal. This fact had been admitted by the defendant herself while giving evidence in this case. The evidence clearly shows that the defendant had re-entered the land only after few months time after she was dispossessed by the fiscal. Hence, she was not in actual possession of the land in dispute for a

period of few months. Admittedly, the defendant is short of required number of years of possession to claim prescription if the date of re-entry to the land is considered as the date of commencement of her possession of the land. In the circumstances, it is abundantly clear that the evidence led in this case is insufficient to establish the claim of the defendant made relying upon the law of prescription.

I will now turn to consider the argument advanced by the learned Counsel for the appellant on the basis of the failure to take action by the plaintiff-respondent in the earlier action L/8320 under Section 325 of the Civil Procedure Code. However, the learned Counsel for the defendant-appellant submitted that he does not possess with any authority to support his contention. Looking at the circumstances, of the case, it is clear that the plaintiff-respondent without recourse to Section 325 of the Civil Procedure Code had decided to file a fresh action against the defendant. He may have opted to do so probably on the legal advice. Also, it must be noted that there is no prohibition to file a fresh action against a different person, without taking steps under Section 325 of the Civil Procedure Code to evict such a person despite that there had been a judgment against her predecessors. Furthermore, under Section 3 of the Prescription Ordinance, it is a *sine qua non* to prove undisturbed and uninterrupted possession by a defendant in order to claim prescriptive rights. In the circumstances, it is my

considered view that the failure to make an application under Section 325 of the Civil Procedure Code by the plaintiff in his earlier action will not support to include the period that the defendant was not in actual possession to establish her claim on prescription. Accordingly, I am not inclined to agree with the argument advanced by learned counsel for the appellant.

At this stage, I must mention that the learned District Judge also have given thoughts to the dispossession of the defendant and her re-entry to the land when he decided to reject the claim of prescription. The matters mentioned above in this judgment also show that the defendant has failed to establish her claim on prescription.

In the circumstances, I am not inclined to interfere with the decision of the learned District Judge. Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

KRL/-