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

01. Roslin Nona
02. B. Manamperi
03. D. Manamperi, "Chandrika Niwasa", Meegahakiula.
04. Gunapala Rajapakshe, "Kumudu Niwasa", Jagulla, Haliela.
05. Imali Prabodha Manamperi, "Kumudu Niwasa", Jagulla, Haliela. (appearing by her next friend 4th Defendant)

Plaintiffs

CA 1162/99 (F)

D.C. Badulla L/469/93

Vs.

01. D.M. Sudumanika
02. T.M. Dawithsingho

Both of Town Gedara, Meegahakiula.

Defendants

And Between.

03. D.M. Sudumanika
04. T.M. Dawithsingho

Both of Town Gedara, Meegahakiula.

Defendant-Appellants.

06. Roslin Nona
07. B. Manamperi
08. D. Manamperi, "Chandrika Niwasa", Meegahakiula.
09. Gunapala Rajapakshe, "Kumudu Niwasa", Jagulla, Haliela.
10. Imali Prabodha Manamperi, "Kumudu Niwasa", Jagulla, Haliela. (appearing by her next friend 4th Defendant)

Plaintiff-Respondents.

BEFORE : A W A SALAM,J
COUNSEL : P. Abeykoon with Ms. Abeywickrama for the Defendant-Appellant and W. Dayaratne PC with Ms. Sakunthala for the Plaintiff-Respondent.

ARGUED ON : 11.07.2012

WRITTEN SUBMISSION TENDERED ON: 14th & 19th September 2012.
DECIDED ON : 17.01.2013.

A W A SALAM, J

The facts relevant to this appeal briefly are that the plaintiff-respondents (plaintiffs) instituted action against the 1st and 2nd defendant-appellants seeking a declaration of title to the subject matter of the action described in the 2nd schedule to the plaint and ejectment of the defendants therefrom. In addition, the plaintiffs also sought damages at the rate of

Rs.500/- per month until vacant possession of the subject matter is handed over to them. The positions maintained by the plaintiffs' was that by reason of the blood relationship between Samarakoon (husband of the 1st defendant) and the father of the 1st plaintiff, the former was permitted to occupy the premises as a licensee and the defendants continue to occupy the same in such capacity even after the demise of the said Samarakoon. The 1st defendant admittedly is the widow of Samarakoon who is the paternal uncle of the 1st plaintiff. The 2nd defendant is the son-in-law of the 1st defendant.

There was no dispute to the relationship between the parties as averred by the plaintiffs. In regard to the dispute ownership to the land the defendants maintained that they have acquired a prescriptive title to the premises in question and hence the plaintiffs are not entitled to the declaration sought by them. The prescriptive claim made by the 1st defendant and the 2nd defendant materially differ from each other as to the basis of the claim, commencement of the prescriptive period and the length of prescription. The 1st defendant claimed prescription by reason of having possessed the property over a period of 35 years and the 2nd defendant claimed prescription independent of the 1st defendant. The prescriptive claim of the 2nd defendant as presented at the trial extended to a period of around 10 years.

On a clear chain of title the plaintiffs established their title to the property in question and the learned district judge held inter alia that the plaintiffs are the owners of the subject matter and the defendants were unsuccessful in establishing their alleged prescriptive title. This appeal has been preferred by the defendants

challenging the propriety of the said findings, judgement and decree entered by the learned district judge.

Rosalin Nona, the 1st plaintiff is a daughter of the original owner of the land described in schedule 2 of the plaint. In arriving at the conclusion favourable to the plaintiffs' the learned district judge attached much importance to document marked as P4. The document marked P4 is a written undertaking given by the 1st defendant in the presence of the Assistant Government Agent of Meegahakiwula. The undertaking given in P4 was to the effect that the 1st defendant on or before 30.07.1990 i.e within a period of five years from the date of the execution of P4, would hand over vacant possession of the subject matter to Rosalin Nona and her children. In P4 the 1st defendant has unequivocally admitted the title of the plaintiffs. The learned district judge has accepted P4 as a document duly signed by the 1st defendant in the presence of the Assistant Government Agent. The 1st defendant did not seriously dispute the contents of P4. The contents of P4 negate any possibility of the 1st defendant prescribing to the subject matter of the action unless she commences adverse possession by resorting to an overt act for a period of 10 years from 30.07.19990.

As regards the circumstances which led to the signing of P4, the Assistant Government Agent has testified in detail. He appears to be an independent witness and the evidence led through him is undoubtedly impartial and remained uncontradicted until the conclusion of the trial. The learned district judge cannot be faulted for placing reliance on the evidence of the Assistant Government Agent. P4 in fact sheds enough light as to

the mode of possession and the nature of possession of the subject matter by the 1st defendant.

The document marked P5 is a letter of demand addressed to both defendants and sent through an attorney-at-law by registered post demanding that the premises in question be handed over to the plaintiffs as per agreement P4. This important letter has not been replied to by the defendants. The failure of the defendants to reply to such an important letter clearly shows that the position taken up by the plaintiff as regards the nature of the defendants' possession of the subject matter is more probable than the prescriptive claim of the set up by the defendants.

Several 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 judgment laid down the principle that a person who enters into possession of a land in one capacity, is presumed to continue in possession in the same capacity and a co-owner's possession in law tantamount to the possession of his other co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind unless there is proof of nothing short of ouster or something equivalent to ouster.

In the case of Thilakaratna Vs Bastian 21 NLR 12 the Court 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, the defendants in this case have not offered any such proof as contemplated above. On the contrary, on a perusal of the evidence led at the trial it is quite clear that the plaintiffs have adduced overwhelming evidence pointing to the defendants' possession as being one of leave and licence under Ratnayaka Mudianselage Punchibanda. The evidence relating to the leave and licence granted to them has been accepted by the learned district judge after careful scrutiny. When the legal principle set out above is applied to the proved facts in this case, I do not think it can be gainsaid that the possession of the defndants' is referable to any lawful right. By reason of their having commenced possession of the land in question in this manner, it is incumbent to presume that the 1st and 2nd defendants had continued to possess the property in the same capacity in which they took over possession from Samarakoon.

No doubt prescription, as mode of acquisition of title to immovable property is an illegality made legal due to lethargy or inaction on the part of the title holder and vigilance and alertness exercised by the person in occupation of such immovable property. In this respect, it is worthwhile to examine the judgement in the case of Siyaneris Vs De Silva, 52 NLR 298 (Privy Council) where 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.

Quite significantly, in this case the plaintiffs have established their paper title and also the mode of entry and the nature of the possession of the defendants as averred in the plaint. The defendants have not made it manifest that they had commenced their possession of the property holding adversely to the plaintiffs' from a particular point of time.

In the case of Kiriamma Vs Podibanda, the judgement of which was published in 2005 BLR at 09 (Supreme Court) held 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 at 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."

The close blood relationship between the original owner and the husband of the 1st defendant was such which required clear proof of adverse possession by the defendants. The learned district judge in this respect has quite rightly exercised greater care before he rejected the version of the defendants.

Undoubtedly, in this case the evidence to establish prescription was slender, despite the length of possession. Although the 1st defendant has had possession of the corpus for an uninterrupted period of more than 35 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 has applied the law according to the well-

established principles and norms applicable to prescription. In such a situation the Appellate Court cannot interfere with such a decision which points to the absence of any miscarriage of Justice. The learned district judge has had distinct privilege to hear the parties and their witnesses on the disputed question. In such a situation where the credibility of the evidence placed by the parties concerned played an important role in the decision-making process of the learned district judge, an Appellate Court should be slow to disturb the finding of facts by the trial judge who had the benefit of observing the witness.

Let me now refer to the judgment in 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.

For the reasons stated above, I am not inclined to disturb the findings of the learned district judge. Accordingly, the appeal is dismissed without costs.

Judge of the Court of Appeal

NR/-.