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

K.P.Sumanawathie
Hathe Kanuwa, Kiripedda,
Karandeniya
**1st Defendnt-Appellant**

**Vs**

**C.A.NO.830/98 (F)**
**D.C.BALAPITIYA CASE NO.1273/L**

Nilenti Sirisena
25, Runwapura Mawatha
Kiripedda, Karandeniya
**Plaintiff-Respondent**

**Vs**

H.N.Ariyadasa
Kiripedda, Karandeniya

D.Ranasinghe
Kiripendda, Karandeniya
**2nd & 3rd Defendant-Respondents**

**BEFORE** : **K.T.CHITRASIRI, J.**

**COUNSEL** : Mohan Walpita with D.Bandara for the 1st Defendant-Appellant

A.Kaluphana with T.Wijegunawardena for the Plaintiff-Respondent

**ARGUED ON** : 20TH JANUARY 2014

**WRITTEN SUBMISSIONS FILED ON** : 23rd July 2013 by the 1st Defendant-Appellant
: 17th February 2014 by the Plaintiff-Respondent

**DECIDED ON** : 10th MARCH 2014

**CHITRASIRI, J.**

Plaintiff-Respondent (hereinafter referred to as the plaintiff) in his original plaint filed in the District Court of Balapitiya sought inter alia to have a judgment declaring that he is entitled to the land referred to in the First Schedule thereto. However, pursuant to a return of a Commission obtained by the plaintiff, he filed an amended plaint which is dated 21.10.1991 and in that amended plaint too he sought that he be declared entitled to the land referred to in the First Schedule to the amended plaint which is identified as lot "H". In that plaint, he also moved to have the 1st defendant-respondent (hereinafter referred to as the 1st defendant) evicted therefrom and also sought to have damages from the 1st defendant until the plaintiff is placed in possession of the land that he claims.

The 1st defendant in her amended answer, having stated that she had been in possession of the aforesaid land referred to in the First Schedule to the plaint since the year 1954, sought to have the amended plaint of the plaintiff dismissed. However, it must be noted that she has not prayed for a declaration of title to the land in question though she has pleaded longstanding possession for the same. The 2nd and the 3rd defendant-respondents were added as parties to the action consequent upon the return of the Commission obtained by the plaintiff. Those two respondents have not claimed the land referred to in the First Schedule to the plaint. Their claim is in respect of the land identified as lot "C" to which neither the plaintiff nor the

1st defendant has made a claim. Therefore, the issue in this case is to determine whether the plaintiff is entitled to the land morefully described in the First Schedule to the amended plaint as opposed to the rights claimed by the 1st defendant to that land.

It is fundamental in law that a person who comes to the District Court seeking for a declaration of title to a land must prove his title to that land or in other words it is the burden of the person who claims title to a land to establish his title in order to have a judgment in a *rei vindicatio* action. This proposition in law has been upheld in numerous occasions including in the cases referred to below.

In **D. A. WANIGARATNE** Vs **JUWANIS APPUHAMY et al.**, **[65 NLR 167]** it was held thus:

> ***"It has been laid down now by this Court that in an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action.*** *The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title."*
>
> [emphasis added]

In the case of **LOKU MENIKA AND OTHERS Vs GUNASEKARE [1997 (2) SLR 281]** it was decided as follows:

> *(i)* ***The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant.***
>
> *(ii) A Court cannot grant any relief to a plaintiff except on what he has pleaded and proved to the satisfaction of Court.*
>
> *(iii) A defendant should not be called upon to meet a new case or a new position taken by the plaintiff after he has already closed his case.* [emphasis added]

In that decision DR. Ranaraja J has specifically stated thus:

> *"The jus vindicendi or the right to recover possession is thus considered an important attribute of ownership in the Roman Dutch Law (Voet. 6.1.2) -* ***Senanayake v. Silva [1986 (2) SLR 405]. The owner of immovable property is entitled, on proof of his title to a decree in his favour*** *for the recovery of property and for the ejectment of the person in wrongful occupation,* ***Pathirana v. Jayasundera [56 N L R 166 at 172]. Where, in an action for declaration of title to land,*** *the defendant is in possession of the land in dispute,* ***the burden is on the plaintiff to prove that he has dominium. Abeykoon Haminey v. Appuhamy [52 N L R 49], Peiris v. Savunhamy [54 N L R 207].*** *In an action for a declaration of title and for restoration to possession of land from which a plaintiff alleges he has been forcibly ousted, the burden of proving ouster is on the plaintiff.* ***Kathiramathamby v. Arumugam [38 C L W 27]. The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must,***

***in Court, prove that title against the defendant in the action. The defendant need not prove anything, still less, his own title. Wanigaratne v. Juwanis Appuhamy.***[65 N L R 118]

[At pages 282 and 283 in the judgment]

In the case of **LEISA AND ANOTHER Vs SIMON AND ANOTHER [2002 (1) SLR at page 151]** it was held that:

*"In a rei vindicatio proper* ***the owner of immovable property is entitled, on proof of his title, to a decree in his favour*** *for the recovery, of the property and for the ejectment of the person in wrongful occupation. 'The plaintiff's ownership of the thing is of the very essence of the action'. Maasdorp's Institutes (7th ed.) vol 2, 96."* [emphasis added]

In **D. R. KIRIAMMA Vs J.A.PODIBANDA and 8 others [2005 B L R at 09]** The Supreme Court held thus:

*"Onus probandi 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 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 Prescription 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."***

[emphasis added]

As decided in the foregoing judicial pronouncements, it is clear that the primary duty of the trial Judge in this instance too, is to ascertain whether the plaintiff has discharged the burden casts upon him by proving his title to the land (lot "H") referred to in the 1st schedule to the amended plaint dated 21.10.91.

The case for the plaintiff is briefly as follows. Consequent upon the decree entered in the case 15756/P filed in the District Court in Galle, one Rosalin de Silva became entitled to Lot "G" referred to in the decree entered in that case. Rosalin de Silva's entitlement had devolved to Nissanka Wijeratne and he has transferred this Lot "G" to Thesin Fernando. Said Thesin Fernando has transferred the land to Gnanawathie and she has transferred it to the plaintiff, namely Nilenti Sirisena. The aforesaid chain of title to lot **"G"** has not been disputed by the 1st defendant.

The plaintiff has produced title deeds marked P1 to P6 in evidence to show that he became entitled to lot **"G"** and not to lot **"H"** though he claims claims title to lot **"H"** in this case. However, the plaintiff has taken up the position that his predecessors-in-title had possessed Lot "H" even though his

entitlement is to the lot "G". Hence, his position is that his predecessors in title had possessed lot "H" instead of lot "G" to which he became entitled by executing the aforesaid deeds commencing from the decree entered in 15756/P.

Indeed, the case of the plaintiff has proceeded basically on the issue No.2, where he has claimed title to the disputed lot **"H"** on the basis of prescription and not to lot **"G".** In the circumstances, the issue in this case is to determine whether the plaintiff has established prescriptive title to Lot **"H"** in terms of Section 3 of the Prescription Ordinance which provision in law entitles a person to acquire title to immovable property. Said Section 3 requires to have undisturbed and uninterrupted possession, for a period of 10 years or more adverse to the rights of the others who claim rights to the land in order to claim prescriptive rights.

Then the issue is to determine as to the kind of possession that is necessary or as to the manner in which the possession had been held by a person who claims prescriptive rights under Section 3 of the Prescription Ordinance. This issue had been dealt with in many cases including that of:

**SIRAJUDEEN AND TWO OTHERS Vs ABBAS [1994 (2) S L R 365]**

**And**

**M. RASIAH Vs I. SOMAPALA [Court of Appeal] [2008 B L R at page 226]**

In the case of SIRAJUDEEN AND TWO OTHERS v. ABBAS [supra] G. P. S. DE SILVA, C.J. said;

*"As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period 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 has to be decided thereupon by Court."*

In RASIAH Vs SOMAPALA [supra] it was held:

*"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 as to 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 has to be decided thereupon by Court."*

Having referred to the law as to the possession that is necessary to claim prescriptive rights, I will now turn to consider whether the plaintiff was

successful in bringing such evidence in this instance to claim rights under Section 3 of the Prescription Ordinance.

The plaintiff has purchased this property by the deed bearing No.32427 marked P6 on 15.02.1985, which date show that his entitlement to the land became into existence, only about one and half years before the filing of this action. Subsequent to the purchase of the land by the plaintiff in the year 1985, there had been an application made under Section 66 of the Primary Court Procedure Act filed by the O.I.C. of the Elpitiya Police on 20.10.1986, referring both parties to Court on a dispute arose affecting the land in question. It shows that there had been disruptions to the land been possessed by the plaintiff shortly after he bought the land. The said application made to court under Section 66 of the Primary Court Procedure Act has been marked as P9 in evidence. Thereafter another dispute has arisen between the parties when the plaintiff attempted to build a house on the land and it has resulted filing this action.

Therefore, it is seen that there had been clear disturbances to the possession of the land been possessed by the plaintiff from the time he purchased this property. Those incidents would definitely be a bar to claim undisturbed possession of the plaintiff which is a *sine qua non* in terms of Section 3 of the Prescription Ordinance.

However, the plaintiff in his evidence has stated that his predecessors-in-title had been in possession of this land over a period of 10 years. [*vide proceedings at page 232 in the appeal brief*]. Accordingly, he claimed that he is entitled to have the possession of his predecessors be reckoned in deciding the period of possession.

Even though, he has merely stated that he and his predecessors were in possession of the land, he has failed to show the manner in which they held possession of this land. He has not stated as to any plantation that he or his predecessors in title has made even though the land presently consists of cinnamon plantation and paddy cultivation. In short, no evidence is forthcoming as to the way in which he possessed the land.

His immediate predecessor-in-title namely, Gnanawathie who resides far away from the place where the land in question is situated has stated in her evidence-in-chief that one Thesin Fernando had been working on her behalf on this land. Once again, the manner in which the possession was held either by her or by Thesin had not been explained. She also has failed to state that the type of work Thesin had been doing on the land. Gnanawathie under cross-examination has stated that Thesin was her *ande* cultivator and has also stated that he is alive at the time of her giving evidence. However, Thesin was not called to give evidence. In the circumstances, it is clear that

the evidence as to the possession of the plaintiff to this land is very much inadequate to claim prescriptive title.

Moreover, as opposed to the evidence recorded on behalf of the plaintiff, the 1st defendant in her evidence has stated that she had been in possession of this land since the year 1959. The house found on this land where she lives had been built in the year 1954. She has further stated that she was in possession of the all three Lots marked H1, H2 and H3 in the Plan bearing No.460 drawn by C.T.de.S.Manukulasuriya, Licensed Surveyor without being disturbed by anybody since the year 1959. [*vide proceedings at pages 320 & 321 in the appeal brief*]. The said evidence of the 1st defendant had not been contradicted. Hence, such evidence also should have been considered when determining the claim of the plaintiff.

In the circumstances, it is clear that the plaintiff has failed to establish continuous and uninterrupted possession for over 10 years to claim title to the land referred to in the 1st schedule to the amended plaint. Therefore, it is my opinion that the plaintiff is not entitled to claim rights under Section 3 of the Prescription Ordinance.

At this stage, it is necessary to note that the learned District Judge seems to have misunderstood the law by heavily relying upon the title deeds of the plaintiff to decide prescriptive rights claimed by him. Such a contention is evident by the following paragraph found in the impugned judgment.

" කෙසේ නමුත් පැ.1 දරණ අවසාන තීන්දු ප්‍රකාශයෙන් එසේ විකිණීමට අයිතියක් රොබට් ද සිල්වා යන 2වැනි විත්තිකරුට ලැබී නොමැති හෙයින් එකී රොබට් ද සිල්වාට එසේ විකිණීමට නෛතික අයිතියක් නොමැති බැවින් පැ.3 හා අංක 1919 දරණ ඔප්පුවෙන් විකිණීමට නෛතික අයිතියක් නොමැති බව පළවැනි විත්තිකරු වෙනුවෙන් දක්වා ඇත. "

[*Vide proceedings at page 391 in the appeal brief*]

Furthermore, the learned District Judge was of the view that the plaintiff is entitled to claim prescriptive rights when he holds title to the land. [*vide proceedings at page 392 in the appeal brief*].

Therefore, it is seen that the learned District Judge in this instance has failed to correctly identify the issue and the applicable law thereto. Also, he seems to have completely disregarded the duty casts upon the plaintiff to prove his case. Also, it is seen that the he has imposed a duty on the 1st defendant to prove her possession though she has not claimed prescriptive title to the land. His view on this aspect is as follows:

" කාලාවරෝධී බුක්තියක් ඔප්පු කිරීම සඳහා හුදෙක් මම මේ කාලය බුක්ති වින්දේ වශයෙන් ප්‍රකාශ කිරීම පමණක් ප්‍රමාණවත් නොවේ. එසේ බුක්ති විඳි බවට තහවුරු කිරීමේ සාක්ෂි තිබිය යුතු අතර, අයිතිකරුගේ බුක්තිය පිණිස ප්‍රතිවිරුද්ධ බුක්තියක් ඔප්පු කළ යුතු වේ. **නමුත්, එසේ කිරීමට 1 වැනි විත්තිකාරියට**

**නොහැකි වී ඇත.** ඇයගේ සාක්ෂියේදී ඇය කියා සිටියේ **1953** සිට අඛණ්ඩව බුක්ති වින්ද බවයි."

[*Vide proceedings at page 395 in the appeal brief*].

In the circumstances, it is seen that the learned District Judge has misdirected himself as to the law in relation to the burden of proof in a *rei vindicati* action. As mentioned hereinbefore, clearly there is no sufficient evidence to establish long standing physical possession of the plaintiff for him to claim prescriptive title to this land under Section 3 of the Prescription Ordinance.

For the aforesaid reasons, the judgment dated 26.03.1988 of the learned District Judge of Balapitiya is set aside. The amended plaint dated 21.10.1991 of the plaintiff is to stand dismissed. Learned District Judge, Balapitiya is directed to enter decree accordingly.

The 1st defendant is entitled to the costs of this appeal. However, since no evidence is available to award damages to the 1st defendant she will not be entitled to the reliefs that she has prayed for in her amended answer dated 04.05.1992.

*Appeal allowed.*

JUDGE OF THE COURT OF APPEAL