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

Pramachandra Ediriweera

Seenimodara

Plaintiff- Appellant

Case No: CA 107/99 (F)

Vs.

DC Tangalle Case No: 2637/P

1. Somawathi Ediriweera (dead)

Warakanatta,Mawella

1(A)Siridasa Abraham

Galappatthi

Near the Bridge, Seenimodara

Nakulugamuwa

1(B) Eminona Abraham

Galappatthi

Near 18th Mile post,

Seenimodara, Nakulugamuwa

1(C) Suneetha Abraham

Galapatthi

Near 18th Mile post,

Seenimodara, Nakulugamuwa

1(D) Vinnei Abraham

Galappatthi

Wijerama Road, Warakanatta

Mawella, Nakulugamuwa

1(E) Sherline Beauty Abraham

Galappatthi

184, Janajayagama ,Bolawalana,

Negambo

1(F) Malinie Abraham
Galappatthi
Near 18th Mile post,
Seenimodara,Nakulugamuwa.
1(G) Bimal Ranjan Abraham
Galapatthi
L -03, Thelulla Janapadaya,
Ethiliwewa
1(H) Ancy Abraham Galappatthi
Gurugodella,Seenimodara,
Nakulugamuwa.

2. Amaraseeli Lokugamhewa
(Dead)
Seenimodara
2(A) Shanthimala Ediriweera
"Ranga",Paluwatta, Deniyaya
2(B) Kaviraj Gemunu Ediriweera
No.30 /251, Sudugodellawatta,
Horempella, Minuwangoda
2(c) Chamal Shantha Raj Ediriweera
No.20, Dolewatta, Horempella,
Minuwangoda
2(D) Padma Kanthie Ediriweera
Near 118th Mile post, Seenimodara,
Nakulugamuwa

Substituted Defendants – Respondents

3. Shanthimala Ediriweera
Seenimodara
4. Gemunu Ediriweera
Seenimodara
5. Chamal Ediriweera
Seenimodara
6. Padma Kanthie Ediriweera
Seenimodara

Defendants – Respondents

7. Leelawathei Ediriweera (Dead)
Uduwila,Tissa

7(A) Pushpa Ranie Abraham Galappatthi
"Amaragiri"Uduwila, Tissa
7(B) Athula Wasantha Abraham
Galappatthi
"Amaragiri"Uduwila ,Tissa
7(C) Renuka Kusum Kalyanei Abraham
Galappatthi
"Amaragiri" Uduwila, Tissa
8. Aluthpatabendige Podinona alias
Punchnona (Dead)
8(A) Sumanawathie Kodituwakku
"Bo- Sevana"Moraketiara,
Nakulugamuwa.
Substituted Defendants – Respondents
9. Bhadrani Kodituwakku
"Bo- Sevana"Moraketiara
Nakulugamuwa.
10. Sumanawathei Kodituwakku
"Bo- Sevana "
Moraketiara, Nakulugamuwa
Defendants - Respondents

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Saman Galappaththi for Plaintiff-Appellant

S. Kumarasingam for 9th and 10th Defendants-Respondents

Written Submissions tendered on:

Plaintiff-Appellant on 17th May 2017 and 23rd October 2017

9th and 10th Defendants-Respondents on 9th October 2015 and 24th October 2017

Argued on: 4th October 2017

Decided on: 11th January 2018

Janak De Silva J.

The Plaintiff-Appellant (hereinafter referred to as "Plaintiff") filed the above styled action in the District Court of Tangalle seeking to partition the land called Bogahakella containing in extent 1A. 0R. 17P. situated at Moraketiyara in South Giruwa Pattu in the District of Hambanthota.

The parties did not dispute the identity of the corpus. It was admitted that the corpus is depicted as lot A in plan no. 416 prepared by licensed surveyor D.G. Karunadasa.

The 1st to 7th defendants did not dispute the pedigree pleaded by the Plaintiff. The dispute on the title was between the Plaintiff and 8th to 10th defendants-respondents (hereinafter referred to as "8th to 10th Defendants"). The 8th to 10th Defendants pleaded prescriptive title to the corpus.

The learned District Judge of Tangalle held that the 8th to 10th Defendants had established prescriptive title to the corpus and dismissed the action with costs. Hence this appeal by the Plaintiff. The Plaintiff moves that the judgment of the learned District Judge dated 10th November 1998 be set aside and judgment be entered as prayed for in the plaint.

In *D.R. Kiriamma v. J.A. Podibanda and 8 others*[1] Udalagama J. adverted to some important points to be borne in mind in considering a claim of prescriptive title:

> "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. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that 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 title adverse to an independent to that of a claimant or plaintiff. "[2]

[1] 2005 B.L.J. 9
[2] Ibid. 11

Plaintiff contended that one A.P. Don Davith, the father of the 8th Defendant, had entered the corpus as a licensee of Don Davith Ediriweera, the father of the Plaintiff, 1st and 7th Defendants. This position was admitted by the said A.P. Don Davith somewhere in 1926 in D.C. Tangalle case No. 2364/P wherein a larger portion of land, including the corpus in this case was partitioned. The relevant admission is recorded and was marked as එ7.5 in this action. The Plaintiff contended that thereafter the said A.P. Don Davith and his successors continued to occupy the corpus as licensees.

The learned District Judge rejected this position and held that although initially possession was as a licensee it had later become adverse possession due to an "overt unequivocal act or acts". He further held that the 8th to 10th Defendants and their predecessors had, due to long and undisturbed possession, acquired prescriptive title by the application of the counter presumption stated in *Tillekeratne et al. v. Bastian et al*[3].

It is an established principle of law that a person who has entered into possession of land as a licensee is presumed to continue to possess it in the same capacity.[4] Where a licensee claims that his original possession has later become adverse, he must prove of the manifestation of his intention to possess adversely to the true owner by what is sometimes referred to as an "overt unequivocal act" and this burden is both definite and heavy. [5]

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 fairly and squarely on him to establish the starting point for his or her acquisition of prescriptive rights.[6]

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[3] 21 N.L.R. 12
[4] Ibid. page 19
[5] Ibid.
[6] Gratiaen J. in *Chelliah v. Wijenathan* 54 N.L.R. 337 at 342

This "overt unequivocal act" relied upon by the learned District Judge should have occurred between 1926, when the admission as to the status of licensee was made, and 1975 as this action was filed in 1985. The learned District judge relied on the fact that the 8th Defendant had constructed a house on the land. In *Siriyawathie v. Alwis et al*[7] the Court of Appeal considered building extensions to a house as circumstances giving rise to the presumption of ouster. The Plaintiff under cross-examination stated that there was an old house on the land which had been broken and renovated. He also said that there was a new house on the land which had been built by the 10th Defendant about 12 years before the action was filed in 1985. It was his position that a complaint was made to the then Grama Sevaka about this construction. In order to corroborate this position, the Plaintiff called W.K. Gamage Sirisena who was the Grama Sevaka of the area between 1966 and 1972. He corroborated the fact that a complaint was made about the unauthorized construction and that he visited the land and warned the parties to settle the dispute in courts. In view of this evidence the learned District Judge correctly concludes that at the latest construction of a house began in 1972, 13 years before the action was filed.

The learned Counsel for the Appellant contends that this evidence is insufficient to establish adverse possession and that evidence must show that the construction proceeded after the intervention of the Grama Sevaka. The preliminary survey report indicates that there are seven buildings on the land of which two are completed houses where the 8th and 10th Defendants reside. Section 18(2) of the Partition Law states that the survey report may, without further proof, be used as evidence of the facts stated therein. Only the 8th to 10th Defendants had claimed these buildings during the preliminary survey. The necessary conclusion based on the preliminary survey report is that the construction which was sought to be stopped by the complaint to the Grama Sevaka was continued and completed. Furthermore, the 10th Defendant during her cross-examination denied the suggestion made on behalf of the Plaintiff that they had not built the house but had only renovated it. She asserted that they had constructed a house.

[7] (2002) 2 Sri.L.R. 384

The evidence of David Abraham Galappaththi, brother-in-law of the Plaintiff, is also relevant on this issue. He accepted under cross-examination that the 8th Defendant had built a new house on the corpus. Another witness called by the Plaintiff, Punchisingho Muthumala, also accepted under cross-examination that the 8th Defendant had constructed a new house about 35 years prior to him giving evidence in 1995.

Furthermore, the evidence shows that at least two tombs of family members of the 8th to 10th Defendants are found on the land. The Plaintiff admitted that the husband of the 8th Defendant, Kodituwakku, was buried on the land about 12 years prior to the date he was been cross-examined which was 1993. It was also admitted by the Plaintiff that no permission was sought from him before the burial and the construction of the tomb.

The learned Counsel for the Appellant submitted that the 8th to 10th Defendants cannot depend on the evidence of the witnesses called on behalf of the Plaintiff and that in order to succeed in their claim of prescriptive title, the 8th to 10th Defendants "must prove the facts necessary for establishing that prescriptive title actually exist". He relied on Sections 3, 101 and 103 of the Evidence Ordinance and the decision in *The King v. James Chandrasekera*[8]. He further submitted that an adverse inference should be drawn against the 9th and 10th Defendants for their failure to give evidence.

In addressing the argument made by the learned Counsel for the Appellant, it is important to appreciate the distinction between what is referred to as "legal burden" and "evidential burden" in English law. Legal burden is where the law puts on a party the burden of proving a fact in issue as a condition of giving him judgment.[9] Evidential burden is the burden of adducing or introducing evidence as to a fact relied on. This does not involve the actual proof of a fact but the introduction of evidence as to a fact.[10]

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[8] 44 N.L.R. 97

[9] Coomaraswamy E.R.S.R.; *The Law of Evidence (with special reference to the Law of Sri Lanka)*; Vol. II (Book 1), 248

[10] Ibid. page 246

In *The King v. James Chandrasekera*[11] the majority of the Court took the view that "burden of proving" in section 105 of the Evidence Ordinance places on the accused the burden of proof as to the applicability of an exception and he cannot merely adduce evidence or merely create a reasonable doubt in the minds of the jury. The term "burden of proof", therefore in our law, unlike English law, means the legal burden and not the evidential burden and the term is used only in one sense. But both concepts are relevant to our law and a party may have to accept the burden in both senses in order to succeed, **unless the evidence led by the other side might prove what a party has to prove**.[12]

In this case it is the 8th to 10th Defendants who pleaded prescriptive title. The burden of proving such title was on them.[13] But in fulfilling this burden, they can rely on the evidence elicited from the Plaintiff and the witnesses called by him through astute cross-examination. This evidence was also before the trial judge and he was correct in considering that evidence in deciding whether the 8th to 10th Defendants had proved their claim of prescriptive title. Section 3 of the Evidence Ordinance states that a fact is said to be proved when, **after considering the matters before it**, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exits. Matters include evidence obtained through cross-examination of the witnesses of the opposing party. In the light of the above circumstances, there was no need to draw any adverse inferences against the 9th and 10th Defendants for their failure to give evidence.

In *Siriyawathie v. Alwis et al*[14] the Court of Appeal also considered planting the corpus with coconuts, king coconuts and other plantations as further circumstances giving rise to the presumption of ouster. The preliminary survey report in this case indicates inter alia that the Plaintiff claimed praveni rights only in relation to 18 coconut trees more than 75 years old and 02 jak trees more than 10 years old. However, the 8th Defendant denied the Plaintiff's claim and claimed ownership to them. The preliminary survey report further indicates 10 coconut trees

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[11] 44 N.L.R. 97

[12] Coomaraswamy E.R.S.R.; *The Law of Evidence (with special reference to the Law of Sri Lanka)*; Vol. II (Book 1),249

[13] *Alwis v. Piyasena Fernando* [(1993) 1 Sri.L.R. 119], *Sirajudeen v. Abbas* [(1994) 2 Sri.L.R. 365]

[14] (2002) 2 Sri.L.R. 384

between 30-35 years old, 02 jak trees about 15 years old, 03 jak trees about 20 years old, 4 mango trees between 15-40 years old situated on the land, all of which were claimed only by the 8th Defendant. Her claim was not challenged by the Plaintiff. Therefore, the learned District Judge was correct in considering this fact as well in concluding that adverse possession had begun at least 10 years prior to the institution of the action.

In *Tillekeratne et al. v Bastian et al.*[15] a bench of three Judges decided that it was open to the Court, from lapse of time in conjunction with the other circumstances of the case, to presume that a possession originally that of a co-owner had since become adverse. The same principle applies to licensees. The learned District Judge further held that the 8th to 10th Defendants had acquired prescriptive title to the corpus by long and undisturbed possession by the application of this counter presumption. In doing so, he took into consideration the fact that the 8th Defendant was 84 years old and had lived her entire life on this land. In *Walpita v. Dharmasena et al*[16] the Court of Appeal applied the counter presumption considering possession of 40 years and other circumstances. Even if one takes 1926 as the starting point of possession, due to the admission of status as licensee, there was 59 years of continuous possession up to the time action was filed.

The learned Counsel for the Plaintiff submits that the learned District Judge erred in applying both tests, i.e. overt unequivocal act and counter presumption to the same facts as they cannot coexist. He argued that one requires an overt act whereas the counter presumption arises when there is no overt act. I am unable to agree. There can be situations where the counter presumption can coexist with an overt act as the counter presumption is employed in conjunction with the other circumstances of the case. For example, where there has been long and undisturbed possession accompanied by an overt act or acts which occur within less than 10 years prior to any action been instituted. In fact, the Court of Appeal in *Siriyawathie v. Alwis et al*[17] applied both the overt unequivocal act and counter presumption in concluding that the 9th Defendant-Appellant in that case had acquired prescriptive title. However, in this case what the

[15] 21 N.L.R. 12
[16] (1980) 2 Sri.L.R. 183
[17] Ibid.

learned District Judge has held is that the 8th to 10th Defendants had acquired prescriptive title by adverse possession begun with overt unequivocal act or if not by the application of the counter presumption.

The Counsel for the Appellant further submitted that in answering issues nos. 3 and 19, the learned District Judge had decided that the 8th Defendant failed to prove that she had demolished the old house and built a new house and therefore her claim of prescriptive title should fail. However, this submission disregards the answer given to issue no. 16.

It appears that the learned District Judge has erred in answering issue nos. 3 and 19 which along with issue no. 16 are reproduced below verbatim with the respective answers given by him:

3. මෙම නඩුවට ගොනුකර ඇති අංක 416 දරණ පිඹුරේ අංක 4 ලෙස පෙන්වා ඇති ගොඩනැගිල්ල මෙම නඩුවේ පැමිණිලිකරුගේ පියා වන දොන් දාවිත් එදිරිවීර යන අය විසින් තනන ලද්දක් ද? ඔව්

16. මෙම විෂය වස්තුවේ අංක 2, 3 සහ 4 වශයෙන් පෙන්වා ඇති ගොඩනැගිලි 8 වෙනි විත්තිකාරිය විසින් සාදන ලද ගොඩනැගිලිද? ඔව්

19. අලුත් පටබැඳිගේ දාවිත් විසින් අයිතිවාසිකම් කී දැනට පැමිනිල්ලෙන් අයිතිවාසිකම් කියන අංක 4 දරණ ගොඩනැගිල්ල මෙම විෂය වස්තුවේ 8 වන විත්තිකරු විසින් පුරාණයේ තිබූ ගෙය කඩා වැටීමෙන් පසු එම ස්ථානයේම සාදන අලුත් ගොඩනැගිල්ලක් ද? ඔප්පු කර නැත.

The learned District Judge in answering issue no. 16 in the affirmative accepted that building No.4 was built by the 8th Defendant. As adverted to earlier, this was clearly established by the evidence of the Plaintiff and the witnesses summoned by him. Therefore, the learned District Judge erred in answering issue no. 3 in the affirmative and issue no. 19 as not proved. The answers to the said issues are amended as follows:

3. මෙම නඩුවට ගොනුකර ඇති අංක 416 දරණ පිඹුරේ අංක 4 ලෙස පෙන්වා ඇති ගොඩනැගිල්ල මෙම නඩුවේ පැමිණිලිකරුගේ පියා වන දොන් දාවිත් එදිරිවීර යන අය විසින් තනන ලද්දක් ද? නැත

19. අලුත් පටබැඳිගේ දාවිත් විසින් අයිතිවාසිකම් කී දැනට පැමිනිල්ලෙන් අයිතිවාසිකම් කියන අංක 4 දරණ ගොඩනැගිල්ල මෙම විෂය වස්තුවේ 8 වන විත්තිකරු විසින් පුරාණයේ තිබූ ගෙය කඩා වැටීමෙන් පසු එම ස්ථානයේම සාදන අලුත් ගොඩනැගිල්ලක් ද? ඔව්

For the foregoing reasons, subject to the amendment made to the answers to issue nos. 3 and 19 above, I see no reason to interfere with the judgment of the learned District Judge of Tangalle. Accordingly, I dismiss the appeal with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal