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

H. Jagathsena Gunasekara,
"Ridee Rekha",
Aturugiriya.

C.A. Appeal No.1026/99(F) **Plaintiff-Appellant**

D.C. Mount Lavinia
Case No.673/96/L **Vs.**

01. K. Piyadasa Perera (Deceased)
02. M.A. Lili Perera (Deceased)

Defendant-Respondents

Kuruwitage Srimathi Silva
No.9/4, Wijithapura,
Thalawathugoda Road,
Mirihana,
Nugegoda.

Substituted 1A, 2A
Defendant-Respondent

BEFORE : **M.M.A. GAFFOOR J**

COUNSEL : H. Withanachchi for the Plaintiff-Appellant.

Ranjan Suwandaratne PC with
Anil Rajakaruna for the Substituted
Defendant-Respondent.

WRITTEN SUBMISSIONS
TENDERED ON : 26.03.2018 (by both parties)

DECIDED ON : 26.07.2018

M.M.A. GAFFOOR J

The plaintiff-appellant (hereinafter referred to as the plaintiff-appellant) instituted this action on or around August 1996 against the defendant-respondent (hereinafter referred to as the respondents) seeking inter alia for a declaration of title to the property described in the schedule to the plaint and to eject the respondents and all those persons holding under the deceased respondents from the said property.

The appellant claims that he is the owner of the 10 acres land called Pelangahawatta and Dewatagahawatta by virtue of Deed No.1333 dated 27.03.1961. The appellant divided the said land into several allotments by Plan No.614 dated 08.04.1962. After dividing the said land, the appellant entrusted the "House and Property Trades" Company with the sale of the sub divided lots (by word of mouth and no documentary evidence has been produced at the trial or no witness called for HPT). The HPT sold Lot No.14 (in the Plan No.614) to the 1st respondent (deceased) and the deed has been executed. The 1st and the 2nd respondents were husband and wife.

(now deceased) Thereafter, 2nd respondent paid an advance payment of Rs.400/- on 27.02.1963 to purchase Lot No. 15 and further paid Rs.1340/- on 11.03.1963 to the HPT (photocopies of the receipts issued by the HPT marked as V2 and V3.) The 1st respondent stated in his evidence that the 2nd respondent (his wife) settled the due amount of Rs.1260/- during that period and he couldn't remember the exact date.

Pg. 53 "මම ඒ අවසාන මුදල් කොටස ගෙව්වේ අප්‍රේල් මාසේ පමණ"

Pg. 58 "1260 ක් ගෙවන්න තිබුනා. ඒක ගෙවූ කාලය මතක නෑ. මට කාලය කියන්න මතක නෑ"

He further added that the HPT has refused to issue a receipt for that last payment.

Pg. 53 මුළු මුදලින් රු 1260 ක් ඉතිරිවෙලා තිබුණා. මම එය HPT ආයතනයට ගෙව්වා. ඒ මුදල් කොටසට රිසිට් එකක් ඉල්ලූ විට ඔවුන් මට කිව්වා ඔප්පු දෙන්නටයි යන්නේ ඒ නිසා රිසිට් එකක් ඕනේ නැහැ කියලා"

The subject matter of this action is the sale of Lot No.15 of the said Plan No.614 to the 2nd respondent. The respondents entered into the possession of the questioned land plot (Lot 15) in 1963. Until 1993 they possessed the said land on their own. But the respondents

couldn't obtain a deed for Lot No.15. The appellant registered a Caveat for Lot No.15 in the Land Registry of Colombo on 24.12.1993.

Issue No. 1

Applicability of plea of Res Judicata

The appellant had instituted a boundary action against the respondent in the DC. Mt. Lavinia case numbers bearing 390/95/L and 391/95/L. Proceedings of 390/95/L is only available in the brief. Nothing in 391/95/L.

Pg. 37 "නඩුව දැම්මේ පොදු මායිම් නිරීක්ෂණය කර ගන්න කියලා"

Pg.50 "391/95/L කියන නඩුවේ ඉඩම් මට අයිතියි කියා කියන්නේ. මෙම නඩුවට අදාල ඉඩම් කට්ටි අංක 15 මායිමක් ස්වාධීන කර ගත්තා. ඒ ඉඩම මගේ කියන හැඟීම නිසා එහෙම කලේ"

The appellant claimed the title of the said land described in the 2nd schedule to the plaint (A0, R3, P35) and right of the way to the said land in the aforementioned action. Pg.110-111.

Pg.110 "2 වන උපලේඛනයේ ඇති ඉඩමේ අයිතිකරු පැමිණිල්ල බවට ප්‍රකාශ කරන මෙන් පාරේ අවහිරය ඉවත් කරන මෙන්"

The judgment dated 24.07.1996 that the learned District Judge decided the said matter 390/95/L in favour of the respondent and

dismissed the application with cost. Pg.117. The learned District Judge observed in his judgment that the respondent acquired a prescriptive title to the said land and stated as "විත්තිකරුට අනුව මෙම අවහිරය කර තිබුණේ 1963 වෂර්යේ දීය. විත්තිකරු මෙම බිම් කොටසට ද කාලාවරෝධී අයිතිය කියයි. පැමිණිලිකරුට දිනයක් ප්‍රකාශ කිරීමට නොහැකි වීමට හේතුව මෙම අවහිරය පැමිණිල්ලේ දිනයට අවු 10 කට පෙර සිදුකර තිබීමේ හේතුව මතයි" Pg.116

Therefore, the learned District Judge dismissed the said action 390/95/L due to non-compliance with the provisions set out in Section 40(d) of the Code of Civil Procedure. The appellant didn't appeal against the said judgment. But he has instituted the original action 673/96/P in the District Court of Mt. Lavinia on 19.08.1996. That the respondents raised a plea of Res Judicata in its answer dated 21.03.1997 stating that the matter in issue in Case NO.391/95/L and the original court action is almost identical in nature although the purported relief claimed are slightly different from each other. Therefore, 391/95/L operates as Res Judicata against the original court action filed by the appellant against the respondent relating to the same property and among same parties. Schedule of the boundary Case No.390/95/L and the partition matter 673/96/P are different in content. But the questioned Lot No.15 is the same. Land action 390/95/L dismissed due to a

technical error. Respondents raised the plea of res judicata as the determining Issue No.16. That the respondents had failed to produce evidence of the questioned Case No.391/95/L at the District court trial, they cannot take a plea of Res Judicata. Therefore, Plea of Res Judicata has no application in this matter.

"මෙම නඩුවේ නඩු නිමිත්තට අදාලව මෙම අධිකරණයෙ මෙම පාර්ශවකරුවන් අතර අංක 391/95/L දරණ නඩුව තීරණය වීම පාර්ශවකරුවන් අතර මෙම නඩුවට එරෙහිව විනිශ්චිත කරුණක් ලෙස බලපාන්නේ ද?" Pg.32

The burden of proving shifts to the party who claims the plea of Res Judicata. But the respondents had failed to produce evidence of 391/95/L at the trial but only produced evidence of 390/95/L. Therefore, that the learned District Judge stated in her judgment that the respondents had failed to prove the plea of Res Judicata. Pg.73. Therefore, Res Judicata has no application in this action.

Relevant case laws;

Rev. Moragolle Sumangala v. Rev. Kiribamune Piyadassi -NLR [1955] 322 of 56

Two important tests must be applied whenever a plea of res judicata is raised:

(1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel is raised, and, if so,

(2) whether the parties to the later litigation are the parties or the privies of the parties to the earlier decision.

Issue No.2

Whether the respondents can claim the prescriptive title against the appellant to the questioned land plot (Lot No.15)

The respondents came into the possession of the said land (Lot No.15) in 1963 and possessed it undisturbed and uninterrupted until 1993. That the respondents bona fide believed that they owned the said portion of land. That the HPT functioned as an agent of the appellant regarding the sale of the land and no documentary proof was produced at the trial. But both parties (the appellant and the respondents) admitted the fact/issue at the commencement of the trial. The respondents do not know about the original owner of the said land until he came out suddenly and claimed his title in 1993 when the financial crisis starts in HPT. The appellant testified that he knew that the HPT sold that Lot No.15 to the respondents.

Pg.34 "ඉඩම් කට්ටි 15 HPT එක විකිණුවා. ඒ ගොල්ලන්ගේ ගාස්තුයි තවත් සුළු ප්‍රමාණයක් දී රිසිට් ලබාගෙන තිබෙනවා."

Q – තමන් ඒක දන්නවා ද?

A – එහෙමයි.

The appellant stated in his plaint dated 19.08.1996 that the respondents had failed to settle the full amount of the value of the questioned land as the ownership/title was not transferred to the respondents. (Pg.19) The appellant further stated in his plaint that the respondents had built a fence preventing the entrance to the questioned land for a period of 5 years and they are forcibly occupying in the said Lot. 15 (Issues No. 8 and 10 of the said Plaint. Pg.19) But the appellant or HPT never take any steps to eject the respondents from there, even the appellant didn't pay a visit to the questioned land until 1993.

Pg.38 "නැහැ මම මේකට ගියේ 93. මට අවශ්‍ය වුනේ නැහැ යන්න."

Q – ඇයි ඒ ඉඩමට ගියේ නැත්තේ?

A – HPT එකට භාර දී තිබුණ නිසා ....

In the cross examination the appellant states as

Pg. 41 Q – 1993 තමන් එම ඉඩම් HPT එකට භාර දුන්නේ?

A – ඔව්.

Q – එම භාර දුන්න කාලයේ සිට 1993 වෙනකම් තමන් අවුරුදු 30 ක් පමණ මේ දේපල බුක්තිය ගැන දන්නේ නැහැ?

A – පුද්ගලිකව 1963 සිට 1993 වෙනකම් බලන්න ගියේ නෑ.

Q – තමන් HPT එකෙන් කැඳවන්නේ නැහැ?

A – නැහැ.

The appellant testified that he got to know in 1994 that the HPT didn't execute a deed to the questioned Lot No.15.

Pg. 47

Q – තමන් කවද ද දැනගන්නේ මේ ඉඩම් කැල්ල HPT සමාගම ඔප්පු දීලා නෑ කිව්වා?

A – 94 ගිහින් මුණ ගැසුනා ඒ ගෙදර නෝනා මහත්තයා. ඒ නෝනා මහත්තයා කිව්වා ඔප්පුවක් නැහැ කියලා. මම මුල ඉඳලා දැනගෙන හිටියා මම අත්සන් කලේ නැහැ.

Considering all the evidence placed before the court that the learned District Judge stated in her judgment dated 15.07.99 that the respondents had undisturbed and uninterrupted possession in the said land since 1963.

Prescription in the law refers to either acquisitive prescription or extinctive prescription. Acquisitive prescription refers to the acquisition of ownership in property belonging to another by the simple fact of long continued possession. Extinctive prescription refers to the extinction of legal rights by the lapse of specified period

of time. Though a person has been in undisturbed and uninterrupted possession of the land and has satisfied the terms of Section 3 of the Prescription Ordinance in all respect, and considers himself to have acquired ownership of the land by prescription. And that the person must wait till his possession is threatened or interrupted by a third party and then institute an action in court against such third party and get a declaration by the Court that he has acquired a title by prescription. When a person has a deed or document of title as an owner, he is presumed to have had possession of the land. The onus is therefore on the person who claims a prescriptive title against such owner to prove by evidence that the person who has the documentary title as owner had no possession fact. It was held in the case of ***Perera v. Pemawathie*** 74 NLR 302 –

The question was whether A, who claimed title to the land under an unregistered deed, had acquired prescriptive title as against B who claimed that land under a subsequent deed which had been duly registered. The Court held the onus was on A to prove that he had acquired a prescriptive title.

Karunadasa v. Abdul Hameed 60 NLR 352

In ***Alwis v. Perera*** NLR [1919] 321 of 21

Where a person transferred MB lands to certain family connections, but continued in possession till date of action (sixty years), the

Supreme Court held (in the circumstances) that the possession was not permissive, but that it should be presumed to have become adverse,

In ***Tillekeratne v. Bastian*** [(1918) 21 NLR 12] followed.

Semble, even apart from this presumption, a vendor, who after sale remains in possession, should be considered as possessing adversely to the purchaser.

In ***Sirajudeen and Two Others v. Abbas*** - SLR 365, Vol. 2 of 1994

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed that 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. One of the essential elements of the plea of prescriptive title as provided for in Section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as it incompatible with the title of the owner.

In ***Siman Appu v. Christian Appu*** NLR [1895] 288 of 1

Withers, J – "Possession" of a land must be continuous, peaceful and for a certain period.

Possession is interrupted if the continuity of possession is broken by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party prescribing is not in occupation.

In ***Jane Nona v. Gunawardene*** NLR [1948] 522 of 49

Appellant mortgaged an undivided half share of a field which was sold in execution and purchased by M. Order for delivery of possession was issued and the Fiscal reported that he was unable to trace the co-owners and that the purchaser failed to attend to receive possession. The Fiscal then purported to act under Section 288 of the Civil Procedure Code and deliver possession to the purchaser. Appellant continued in possession of the field.

Held,

(i) that a judgment debtor who continues in adverse possession after a sale in execution can acquire title by prescription;

(ii) that symbolical possession by a purchaser at a court sale is not interruption of such possession. There must be an interruption of actual physical possession.

In ***Lucia Perera v. Martin Perera Et Al*** - NLR [1951] 347 of 53

A bought an undivided one-fourth share in a land at the request of his daughter

B who had paid the purchase price, but, contrary to his mandate, he obtained from the vendor a conveyance in which A, and not B, was named as the purchaser. Shortly thereafter, B, under the belief that she was the absolute owner, went into occupation of a divided allotment which represented the undivided share and remained in occupation of it for over 19 years on the basis that she was entitled to possession in her own right. During that period A, whenever he was requested by B to execute a fresh conveyance in her favour, promised to do so. Subsequently, however, A, without the knowledge of B, conveyed the one-fourth share to C who was, in fact, a bona fide purchaser for value without notice of the trust.

Held, that B had acquired prescriptive title to the land before the date on which the share was conveyed to C and, therefore, her rights were completely protected. The requests of B that A should give her a conveyance of the property did not constitute an acknowledgment of A's rights so as to interrupt B's possession un dominus.

Considering the aforementioned evidence, it is evident that the respondents acquired a prescriptive title under Section 3 of the Prescription Ordinance.

Therefore, I see no reason to interfere with the judgment of the learned District Judge. For the foregoing reasons, I dismiss this appeal with costs.

JUDGE OF THE COURT OF APPEAL