

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

1. K. R. Jayawardena,
 2. K. Magilin
- Both of Padinnoruwa, Wachawila

PLAINTIFFS

C. A. Appeal No. 1362/99 (F)

D. C. Galle, Case No. 10121/L

VS.

M. H. Alahakoon of Wanchawala
Watta, Wanchawala, Kalahe.

DEFENDANT

AND NOW BETWEEN

K. R. Jayawardena of Padinnoruwa,
Wanchawala. (*Deceased*)

PLAINTIFF-APPELLANT

Harsha Ranaweera Jayawardena of
Padinnoruwa, Wanchawala

**SUBSTITUTED PLAINTIFF-
APPELLANT**

VS.

M. H. Alahakoon of Wanchawala
Watta, Wanchawala, Kalahe.
(*Deceased*)

DEFENDANT-RESPONDENT

Mudalige Rasika Wasanthi
Alahakoon of
No. 175, Wanchawala Watta,
Wanchawala, Kalahe.

**SUBSTITUTED DEFENDANT-
RESPONDENT**

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

COUNSEL : J. A. J. Udawatta for the Plaintiff-Appellant
S. Gamage with I. M. Gunasiri for the Defendant-Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 08.11.2016 (by the Plaintiff-Appellant)
20.02.2018 (by the Defendant-Respondent)

DECIDED ON : **25.10.2018**

M. M. A. GAFFOOR, J.

The Plaintiff-Appellant (hereinafter referred to as the 'Appellant') instituted the above styled action against the Defendant-Respondent above named now deceased (hereinafter referred to as the 'Respondent') by his amended Plaint dated 27th February 1985, prayed inter alia for a declaration of title to Lot 2 of the land called "Wanchawala Addara Kumbura" depicted in Survey Plan No. 618 dated 28th July 1984, made by Gamini Samarasinghe, Licensed Surveyor.

In the amended Plaint, the Appellant stated that the title to the land he claimed commenced in the year 1901 by one Don Bronis De Silva Amarasinghe and as per his pedigree recited in the amended Plaint became the owner to the land under and by virtue of Deed of Transfer No. 2380 dated 22th July 1961. It was averred by the Appellant that his predecessors in title have possessed the land for the past 50 years.

It was also arrived by the Appellant that the Respondent who is the reputed owner to the land known as "Wanchawala Watta" which forms the Western boundary of the Appellant's field, on or about 7th March 1982 had encroached

portion of his land from the Western boundary which portion is depicted as Lot 2 of the Plan No. 618.

The Respondent by his answer dated 27th September 1989, whilst denying the averments contained in the Plaint and stated inter alia that:

- a) The land depicted as Lot 2 in Survey Plan No. 618, forms a part of his land which is known as "Wanchawala Watta";
- b) In any event, he has prescribed and obtained to the said Lot 2 in the Plan No. 618 is the Lot B in Plan No. 1148 dated 28th February 1989 made by G. H. A. A. De Silva, Licensed Surveyor.

Therefore, the Respondent prayed for a dismissal of the Appellant's action with Costs.

The Respondent further averred that he and his predecessors in title have possessed the lots A and B in Plan No. 1148 for more than 10 years prior to the date of the action and had prescribed to the land.

The District Court trial commenced on 13th September 1991 on eight issues raised on behalf of the Appellant and seven issues raised on behalf of the Respondent.

The Appellant himself, Licensed Surveyor Samarasinghe who prepared the said Plan No. 618 and the Grama Niladhari of the area gave evidence on behalf of the Appellant and documents marked 'P1' to 'P8' were tendered on behalf of the appellant, whilst the Respondent and Surveyor De Silva who prepared Survey Plan No. 1148 on a Commission issued on application of the Respondent, gave evidence and documents marked 'V1' to 'V4' were tendered on behalf of the Respondent.

The Learned Additional District Judge of Galle delivered judgment on 6th December 1999, dismissing the action of the Appellant with Costs.

Being aggrieved with the said judgment dated 6th December 1999, this appeal preferred by the Appellant seeking to set aside the District Court judgment.

In the District Court trial, it was the evidence of the Appellant that prior to 7th March 1982 Lots 1 and 2 in Plan No. 618 were the paddy lands of the Appellant and on 7th March 1982 the Respondent filled the Western boundary of the paddy land with sand and stones up to 20 feet length and that he complained to the Grama Niladhari and the Commissioner General of the Agrarian Services.

Appellant also gave evidence and stated that prior to 1982 there had been some minor incidents. Also it was the contention of the Appellant that although there had been minor incidents, on or about 7th March 1982 the Respondent built the stony wall in his paddy land encroaching a portion.

However, I observed that, in the cross examination the Appellant has admitted that the land of the Appellant is low land and Respondent's land is about 5 feet above the paddy field. It is also admitted that he himself showed the boundaries to the Surveyor Samarasinghe and they were shown in black (*vide pages 107, 111 and 113 in the appeal brief- District Court Proceedings dated 16th July 1992*). Further, the Appellant has admitted that the land possessed by him was not in conformity with the superimposed Plan (*vide page 114 in the appeal brief*).

Furthermore, Counsel for the Respondent has brought an important point to the attention of this court that when the Appellant was questioned regarding the possession of the land, Appellant was unaware of the land marks and construction standing on the questioned area (Western boundary) – *vide pages 96, 116 in the appeal brief*.

In contrast, the Respondent gave evidence to prove his title to Lots 14 and 15. For this, he produced deeds marked V2, V3 and V4. And he stated that he possessed Lot B along with Lot A during his father was alive and he further stated that the well standing on in Lot 2 in plan No. 618 was used by his family from old days. He also answered when cross examined that the stony bund had been there when his father was alive and when he was questioned that in 1975

he removed the stony bund built by his father and re built it again by cement. Also he stated that he never encroached and possessed Appellant's land but he only possessed the land as per his partitioned Plan. Thus the Respondent submitted that he was in undisturbed possession of the questioned land more than 10 years prior to the institution of the present action.

Here, the Respondent must prove his averment with section 3 of the Prescription Ordinance, Act No. 02 of 1889. According to said section the following requirements are necessary:

1. Undisturbed an uninterrupted possession
2. Such possession to be independent or adverse to the claimant and
3. Ten (10) years previous to the bringing of such action.

Therefore, in order to initiate a prescriptive title, it is necessary to show a change in the nature of the possession and the party claiming prescriptive right should show an ouster.

In **Sirajudeen and Two others vs. Abbas** (1994) 2 SLR 365, G. P. S. De Silva, C. J. held that.

*"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.**"*

"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 is incompatible with the title of the owner."

In **Chelliah vs. Wijenathan** 54 NLR 337, at page 342, Gratiaen, J. held that:

“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 a starting point for his or her acquisition of prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognized by Section 13, prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established, the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years.”

In **De Silva vs. Commissioner General of Inland Revenue**, 80 NLR 292, Sharvananda, J. clearly and deeply observed that:

“The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession...” (Pages 295 and 296)

Applying these principles to the present case, I take the view that the Respondent has proved the specific facts regarding his possession; and enjoyment of the property for ten years before the action was instituted.

In the above mentioned legit reasons, I am of the obvious view that the learned District Judge had carefully analyzed the entire facts and evidence placed before him.

Therefore, I affirm the District Court Judgment dated 6th December 1999; and dismiss this appeal with cost.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL