

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

Thanthirige Somawathie de Silva,
“Wijitha”, Thalpe-East.

Plaintiff-Appellant (Deceased)

Naurunna Palliyage Samadara,
No. 853,

Matara Road,

Bogahawatte,

Talpe.

Substituted Plaintiff-Appellant

CASE NO: CA/180/1994/F

DC GALLE CASE NO: 10042/L

Vs.

Thanthirige Premawathie,

Mihiripenna,

Talpe.

Defendant-Respondent (Deceased)

Galhewage Priyanthi Asokamala,

Mihiripenna,

Talpe.

Substituted Defendant-

Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Razik Zarook, P.C., for the Substituted Plaintiff-Appellant.

Substituted Defendant-Respondent is absent and unrepresented.

Decided on: 01.11.2018

Samayawardhena, J.

The plaintiff instituted this action in the District Court of Galle seeking declaration of title to the land described in the schedule to the plaint, ejectment of the defendant therefrom and damages. The defendant in the answer sought dismissal of the plaintiff's action. At the trial, only the plaintiff and the defendant gave evidence. The learned District Judge by Judgment dated 22.02.1994 dismissed the plaintiff's action. Hence this appeal by the plaintiff.

Despite notice being served, the defendant-respondent never participated in the appeal proceedings.

The defendant is the elder sister of the plaintiff. The mother has gifted the land to the plaintiff by the Deed marked P1 dated 13.06.1968.

Even though the defendant has raised issue Nos. 6-8 to say that the said Deed is a forgery, it has never been pursued, and the learned District Judge has answered those issues in the negative.

Conversely, the learned District Judge, has come to the strong finding that the plaintiff is the owner of the land by the aforesaid Deed marked P1, and answered issue No.1 in the affirmative.

The defendant by way of issue No.9 has taken up the position that she has acquired prescriptive title to the land.

The learned District Judge in the last paragraph of the Judgment¹ has clearly stated that the defendant has not proved possession of the land.

In the Judgment, the learned District Judge, whilst analyzing evidence led by both parties on possession, has categorically stated that the defendant was an untrustworthy witness who gave false evidence on that point.²

Issue No.6 raised on prescription by the defendant has accordingly been answered in the negative.

It is significant to note that there is no cross-appeal against any of those adverse findings by the defendant.

However, quite surprisingly, the learned District Judge has, at last, dismissed the plaintiff's action with costs.

It is trite law that when the paper title is proved by the plaintiff and accepted by the trial Judge, burden shifts to the defendant to prove prescriptive title, if the defendant claims the property on prescription. In other words, once the paper title is proved, there is no further burden on the plaintiff to disprove the

¹ Vide page 141 of the Appeal Brief.

² Vide page 138 of the Brief.

prescriptive claim of the defendant. It is fairly and squarely the burden of the defendant.

As Chief Justice Sharvananda held in *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222: “In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession.” (Vide also: *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289 (PC), *Candappa nee Bastian v. Ponnambalampillai* [1993] 1 Sri LR 184 at 187 (SC), *Wijetunga v. Thangarajah* [1999] 1 Sri LR 53, *Gunasekera v. Latiff* (1999) 1 Sri LR 365 at 370, *Jayasekera v. Bishop of Kandy* [2002] 2 Sri LR 406)

Here the learned trial Judge has held that the possession of the defendant has not been proved and also answered the defendant’s issue on prescription in the negative. In the said backdrop, there is absolutely no room for the trial Judge to dismiss the plaintiff’s action with costs. In that sense, I doubt whether the dismissal of the plaintiff’s action is an accidental slip on the part of the learned Judge!

However, when I carefully read the impugned Judgment, I find that in one place of the Judgment³ the learned Judge has stated that, as the plaintiff has not proved that the defendant has lived elsewhere after 1970, the Court can come to the conclusion that the defendant lived in the house located in the land in suit since 1970. This conclusion is legally untenable. As I stressed earlier, there is no burden on the plaintiff to prove that the defendant did not possess the land.

Right to possession is one of the significant attributes of ownership. There is no requirement in law that the paper title holder must possess the land.

In any event, mere possession over 10 years does not mean prescriptive possession. In terms of section 2 of the Prescription Ordinance, such possession to be considered as prescriptive possession, shall *inter alia* be adverse against the true owner. Who is the true owner of the land? Admittedly, the mother until the Deed P1 was executed in 1968; and thereafter, the plaintiff, subject to the life interest of the mother, by virtue of the Deed P1. Until the mother died in 1979, according to the Admission No.2,⁴ the mother had been in possession of the land. There is no iota of evidence, nor has such a position ever been taken up by the defendant at any stage of the case, that she maintained adverse possession against the mother. Then even assuming without conceding that she maintained adverse possession against the plaintiff from 1979, the defendant has no 10-year possession as this action was instituted in 1982. However, I

³ Vide page 140 of the Brief.

⁴ Vide page 55 of the Brief.

must stress that the defendant never spoke of adverse possession against the plaintiff either—she spoke only of mere possession. What more, according to her evidence, what she wants is her ½ share of the property upon the death of the mother⁵, that is, not on prescription, but by inheritance. This militates completely against the claim of prescriptive possession.

I unhesitatingly set aside the Judgment of the District Court and allow the appeal. Let the District Judge enter Judgment as prayed for in the prayer to the plaint.

Judge of the Court of Appeal

⁵ Vide pages 116-117 of the Brief.