

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

P. Duraisamy,
Upper Division,
Campion Estate,
Bogawantalawa.
Defendant-Appellant

CASE NO: CA/11/2000/F

DC HATTON CASE NO: DE/111

Vs.

K. Vyapury,
Upper Division,
Campion Estate,
Bogawantalawa.
Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Devika Panagoda with Nelum Wijeratne for the
Defendant-Appellant.

Plaintiff-Respondent is absent and unrepresented.

Decided on: 01.11.2018

Samayawardhena, J.

The plaintiff filed this action seeking ejectment of the defendant from Lot 4 of the Plan marked P3¹ and damages. The defendant sought dismissal of the action. After the trial, the learned District Judge held with the plaintiff and granted ejectment, but not damages. Being aggrieved by the said Judgment, the defendant has preferred this appeal.

The plaintiff-respondent never participated in the appeal proceedings despite notice being served on him several times.

This appeal can plainly be allowed on two basic principles.

The plaintiff and the defendants are estate workers. Both of them state that they were allowed to possess the land by the former superintendent of the estate. There is no dispute that the defendant was in possession of the land at the time of the institution of the action.

The plaintiff, at the trial, produced a photocopy of an Annual Tenancy Agreement marked P1 entered into between the superintendent and the plaintiff to say that the superintendent gave the land to him for cultivation. This was marked subject to proof and the superintendent was not called to give evidence. Be that as it may, this is not a notarially executed document and therefore, in any event, in terms of section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended, is null and void and of no force or avail in law. (*vide Hinni Appuhamy v. Kumarasinghe (1957) 59 NLR 566, Arnolis Perera v.*

¹ Vide Admission No.2 at page 44 of the Appeal Brief.

David Perera (1967) 70 NLR 79 at 82, Pararajasekeram v. Vijayaratnam (1968) 76 NLR 470)

Section 2 of the Prevention of Frauds Ordinance reads as follows:

“No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.”

Hence the great reliance placed by the learned District Judge on P1 to hold with the plaintiff is untenable in law.

As the learned counsel for the plaintiff-respondent himself has correctly pointed out to the learned District Judge in his written submissions: *“This is a possessory action instituted against the defendant by the plaintiff because the defendant was confirmed*

*in possession in the Primary Court of Hatton in case No. 58240.”*²
Hence P1 is, in any event, irrelevant, as the title is outside the purview of the possessory action.

In terms of section 4 of the Prescription Ordinance, No. 22 of 1987, as amended, possessory action shall be brought within one year of the ouster. That section reads as follows:

“It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title: Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases.”

According to the plaint, the defendant has come into forceful possession of the land in June 1991. According to the certified copy of the Primary Court Order referred to above, the said Order, confirming the possession of the defendant has been delivered on 18.02.1992.³

In the instant case, whether reckoning from the date of the ouster (June 1991) or reckoning from the date of the delivery of the Primary Court Order (18.02.1992), the plaintiff has not

² Vide page 96 of the Appeal Brief.

³ Vide page 89 of the Appeal Brief.

instituted this action within one year. The plaintiff has instituted this action on 03.03.1993.

Hence, the plaintiff cannot succeed in this action.

Accordingly, the plaintiff's action shall stand dismissed.

The Judgment of the District Court is set aside and the appeal is allowed but without costs.

Judge of the Court of Appeal