

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

**C. A. No. 472/97 (F)**

D. C. Gampaha, No. 33068/L

Mary Agnus Philomina  
Seneviratne  
No. 770 C, Araliya Gardens,  
Tewatta,  
Ragama.

**PLAINTIFF**

**VS**

1. W. Philips Zoysa  
(*Deceased*)
2. W. J. P. Shirantha de  
Zoysa of No. 35/06,  
Araliya Gardens, Tewatta,  
Ragama

**DEFENDANTS**

**AND NOW BETWEEN**

Mary Agnus Philomina  
Seneviratne  
No. 770 C, Araliya Gardens,  
Tewatta,  
Ragama.

**PLAINTIFF-APPELLANT**

**VS**

W. J. P. Shirantha de Zoysa  
No. 770 C, Araliya Gardens,  
Tewatta,  
Ragama.

**DEFENDANT-RESPONDENT**

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

**COUNSEL** : Dr. Sunil Cooray for the Plaintiff-Appellant

Defendant-Respondents are absent and unrepresented

**WRITTEN SUBMISSIONS**

**TENDERED ON** : 21.09.2018 – by the Plaintiff-Appellant

**DECIDED ON** : **16.01.2019**

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**M. M. A. GAFFOOR, J.**

This is an appeal from the judgment of the learned District Judge of Gampaha in respect of land action bearing Case No. 33068/L.

The Plaintiff-Appellant had instituted this action seeking a Declaration of title to the land described in Schedule 1 of the Plaint and to eject the Defendant-Respondents from the strip of the land encroached by them. Also, the Plaintiff-Appellant prays for a declaration that she is entitled to the servitude of having light and into her house and also entitled to use the road to the North of her land.

The 2<sup>nd</sup> Defendant along with his deceased father who was the 1<sup>st</sup> Defendant prays that due to the issuance of the enjoining order prayed by the Plaintiff-Appellant, they had been suffered damages and added in their Plaint claiming in reconvention damages.

The learned District Judge of Gampaha pronounced his judgment on 08<sup>th</sup> May 1997 dismissing the Plaintiff-Appellant's action.

The Plaintiff-Appellant (hereinafter referred to as the Appellant) being dissatisfied with the judgment of the learned District Judge preferred this appeal and prayed to set aside the judgment of the learned District Judge on the grounds that the learned District Judge of Gampaha had misdirected himself on the burden of proof in the said case, the judgment delivered by the learned District Judge of Gampaha is contrary to the law and against the weight of the evidence adduced in the case.

The learned District Judge of Gampaha had rejected the Plan prepared by the Surveyor on a commission taken out by the Appellant on the ground that the original of the Plan superimposed have not been produced by the Appellant when the evidence given by the said commissioner, But the said Plan was filed of record in the case at the time he obtained a tracing from the same and the learned Judge had failed to give due consideration to the documents produced by the Appellant.

Further the Appellant stated that the learned District Judge of Gampaha had held that the Appellant is entitled to the land described in the schedule to the Plaint which is in extent of 30.5 Perches but had held that the Appellant failed to prove her title to the strip of land disputed by the Defendant-Respondents (hereinafter referred to as the "Respondents") which is clearly a portion of the land in the said schedule.

It is to be noted that the learned District Judge of Gampaha in his judgment held that the Respondents cannot claim the encroached land by prescription but he had failed to give judgment in favour of the Appellant.

The Respondents had submitted that they are entitled to claim the encroached strip of land under prescription the facts that germane to the issue are whether the Respondents had prescribed the land in terms of Section 3 of Prescription Ordinance.

According to the provisions of Section 3 of the Prescription Ordinance, No. 02 of 1889, the claimant must prove:

1. *Undisturbed and uninterrupted possession*
2. *Such possession to be independent or adverse to the claimant plaintiff and*
3. *Ten years previous to the bringing of a such action*

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 **D.R KIRIAMMA VS. J.A. PODIBANDA AND 8 OTHERS** [2005 B.L.J. 09] in order to claim prescriptive title Udalagama J. emphasized that,

*“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”.*

But the evidence led before the learned District Judge of Gampaha had clearly proved that the encroachment made by the Respondents was for the period of 1989-1990 but this action filed against the Respondents by the Appellant in the year of 1990.

This is very clear that the Respondents did not prove any requirement and cannot claim upon the prescription of the encroached land according to Section 3 of the Prescription Ordinance, also the view of the learned District Judge of Gampaha that the Respondents claim by prescription cannot be ascertained was within the law.

It is observed that the land described in the 1<sup>st</sup> schedule to the Plaint and the Plan which had been made by the A. C. S. Gunaratne, Licensed Surveyor numbered as 3325 dated 14.05.1954 and the lot marked as 09 allotted to the Appellant which is in extent 30.5 perches and lot marked 08 was allotted to the Respondents. It is important to note that both parties admitted before the learned District Judge of Gampaha in regard to the correctness of the Plan No. 3325 but the photocopy of the Plan had been submitted to the trial court not the original.

It is also to be noted that no party had objected it and relied on the identical document although the court had not objected the document even before its judgment on the basis that it was a photocopy and not the original. But the learned District Judge of Gampaha in his judgment had misdirected himself and refused to accept the document as evidence. Secondary evidences such as photocopies of the originals are admissible under Section 65, 66 of the Evidence Ordinance. In my view, the photocopy of the Plan No 3325 is admissible and it is a primary identical document to this issue.

The Court Commissioner's Plan No. 4733/L dated 18.04.1991 which is the superimposition of Plan No 3325 dated 14.05.1945 clearly shows that lot 9 of the Appellant was divided into two parts 9A and 9B. 9A is an extent of 29.5 Perches and 9B is an extent of 1.25 Perches. The above-mentioned 9B in extent of 1.25 perches and it is the encroached land by the Respondents.

The building Plan to build the Appellant's house in the Lot 09 area, had submitted by her and authorized by the Chairman of Urban Council of Ragama dated 05.08.1972 and the extension to the same house approved by the Urban Council on 09.02.1984 exhibits that a distance of 10 feet has left by the Appellant's house to the Western boundary of her land. In accordance with the above-mentioned building Plans, there was a fence on her Western boundary ten feet away from her house.

It is observed that the fence on her Western boundary ten feet away from the Appellant's house, the land has encroached and the fence was partially destroyed by the Respondents.

The documents submitted by the Respondents is the Plan No 667 dated 28.10.1992 made by the Surveyor H. L. M. Sheriff in 1972 which was not the original but only a photocopy of the original and later the photocopy was certified by the same Surveyor H. L. M. Sheriff and marked as D 14.

Unlike Plan No. 3325 the authenticity of the Plan No. 667 was doubtful and several objections made in the trial before the learned District Judge of Gampaha to prove its accuracy.

The Surveyor H. L. M. Sheriff who has made the Plan No. 667 was from Badulla District and the evidence given by another Surveyor R. M. J. Ranasinghe stated that the Surveyor H. L. M. Sheriff had not worked in the Western province.

Considering the evidence of the son of the Surveyor H. L. M. Sheriff that the field notes of his father which relates to the Plan No. 667 were not available to prove the accuracy of the above said Plan.

I am of the view that according to the Survey Plan No. 3325 dated 14.05.1954, the Court Commissioner's Plan No. 4733/L dated 18.04.1991 and the building Plans of the Appellant authorized by the Chairman of Urban Council of Ragama shows that the encroached strip of the land disputed belongs to the Appellant.

Therefore, I am of the firm view that the Respondents failed to prove any of the requirements under Section 3 of the Prescription Ordinance in order to claim prescription to the above-mentioned strip of the land disputed.

For the foregoing reasons, I allow the appeal with costs and set aside the judgment of the learned District Judge of Gampaha pronounced on 08<sup>th</sup> May 1997 and I further hold that the Appellant is entitled to the strip of land encroached by the Respondents and the Respondents to vacate the above mentioned encroached strip of the land.

***Appeal allowed.***

**JUDGE OF THE COURT OF APPEAL**