

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

Mohamed Shariff Mohamed
Sanoon

Deceased Plaintiff-Appellant

1. Mohamed Sanoon Fouzul Rezvi
2. Jainul Shariffa Sanoon
3. Pathimathul Naziliya Sanoon
4. Mohamed Sanoon Fouzul Luthifi
5. Mohamed Sanoon Fouzul Rajubi
6. Mohamed Sanoon Fouzul Shibly
7. Mohamed Sanoon Fouzul Mazeez

Substituted Plaintiff Appellants

CASE NO: CA/417/1998/F

DC COLOMBO CASE NO: 16968/L

Vs.

1. Mohamed Yoosuf Junaid
Deceased 1st Defendant-
Respondent
- 1A. Mohamed Salih Saffiya Umma
- 1B. Mohamed Nihaz
Minor
Appearing by his *Guardian ad
litem*
- 1C. Mohamed Sali Fawzana

Guardian ad litem

Substituted 1st Defendant

Respondents

2. Mohamed Salih Saffiya Umma

2nd Defendant-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: H. Withanachchi for the Plaintiff-Appellant.

C.V. Vivekananthan for the Defendant-
Respondents.

Decided on: 18.01.2019

Samayawardhena, J.

The plaintiff filed this action against the two defendants seeking declaration of title to the land described in the 2nd schedule to the plaint, ejectment of the defendants therefrom and damages. The defendants sought dismissal of the plaintiff's action and also made several contradictory claims in reconvention including (a) a declaration that the plaintiff is holding the property in trust for the defendants and (b) the defendants have acquired prescriptive title to the land. After trial the learned District Judge dismissed the plaintiff's action and entered Judgment for the defendants on the basis that the defendants have prescribed to the land. Hence this appeal by the plaintiff.

It shall be emphasized that the defendants did not file a cross appeal against the Judgment. Nor did they file objections in terms of section 772 of the Civil Procedure Code before the hearing. They have filed purported objections after argument was concluded,¹ which is clearly an afterthought.

By way of a formal admission, the defendants have admitted that the plaintiff became the absolute owner of the land by Deed marked P1.²

It is the position of the defendants that they paid the full purchase price in a sum of Rs.47,000/= to buy the land from the plaintiff, but the plaintiff did not transfer the land in their name. It is on that basis they state that the plaintiff is holding the land in trust for them. The learned District Judge has rejected this claim.

The 1st defendant is the brother in law of the plaintiff³, and the 2nd defendant is the wife of the former. The learned Judge has come to the finding that the defendants came into the land with the leave and licence of the plaintiff. Having come to that conclusion, quite surprisingly, the learned Judge states that from the date on which they came into possession of the land, they have started prescriptive possession against the plaintiff.⁴ The latter conclusion is plainly untenable in law. If they have

¹ According to JE dated 13.03.2014, the Argument has been concluded on that day and the purported objections under section 772 have been filed on 18.09.2014.

² Vide page 52 of the Brief.

³ Younger brother of the plaintiff's wife.

⁴ Vide the 2nd paragraph of page 4 of the impugned Judgment at page 98 of the Brief.

come as licensees, how can they maintain adverse possession from day one?

Permissive possession, however long it may be, is not prescriptive possession. Permissive possession to become adverse possession to claim prescriptive possession, there shall be compelling cogent evidence. In that setting, firstly, the defendants must establish a starting point for their acquisition of prescriptive rights. The defendants are not entitled to do so by forming a secret intention unaccompanied by an act of ouster.⁵

When the relationship between the two parties is so close such as in the instant action, the overt act manifesting the commencement of adverse possession and strong affirmative evidence to establish continuance of adverse possession are all the more important.⁶

The defendants have not proved when they started adverse possession against the plaintiff, which is a *sine qua non* for a successful claim of prescription.

When one looks at the answer it is clear that the defendants have not put forward the prescriptive claim with seriousness. What they seek is a declaration that “*the 1st defendant and or the*

⁵ Sirajudeen v. Abbas [1994] 2 Sri LR 365, Reginald Fernando v. Pabilinahamy [2005] 1 Sri LR 31 at 37, Chelliah Vs. Wijenathan (1951) 54 NLR 337 at 342, Mitrapala v. Tikonis Singho [2005] 1 Sri LR 206 at 211-212, Seeman v. David [2000] 3 Sri LR 23 at 26.

⁶ De Silva v. Commissioner of Inland Revenue (1978) 80 NLR 292, Podihamy v. Elaris [1988] 2 Sri LR 129.

2nd defendant has or have acquired prescriptive title” to the land.⁷ They are not certain in favour of whom the prescriptive title shall be claimed. Further, they claim prescription “*by a title adverse to or independent of that of the plaintiff for a period of more than ten years previous to the date of action*”.⁸ Be it noted that the defendants claim to have maintained adverse possession *only* against the plaintiff (and not against the plaintiff and his predecessors in title). Admittedly, the plaintiff became the owner by Deed P1 dated 21.03.1985, and the action has been filed on 22.02.1995. That means, even if the defendants have maintained adverse possession against the plaintiff from 21.03.1985, the defendants have not had adverse possession for ten years prior to the institution of the action.

The defendants both before the District Court and before this Court deny that they were licensees of the plaintiff. If that is so, the defendants should not have been allowed to raise an issue, be it noted, after the conclusion of the trial⁹ that the plaintiff’s action is not maintainable as the licence given to the defendants has not been terminated.

It is settled law that a party cannot be inconsistent in his approach in legal proceedings. He cannot blow hot and cold, affirm and disaffirm the same transaction simultaneously to suit the occasion. The doctrine of approbate and reprobate forbids him from doing so.¹⁰ Whilst holding that the defendants have

⁷ Vide paragraph 11 of the plaint and paragraph (c) of the prayer to the answer.

⁸ Vide paragraph 10 of the answer.

⁹ Vide page 94 of the Brief.

¹⁰ *Ranasinghe v. Premadharm* [1985] 1 Sri LR 63, *Bandula v. Karthelis Appuhamy* [1988] 2 Sri LR 114

prescribed to the land, I fail to understand how the learned District Judge has also held that the plaintiff cannot maintain this action as the licence given to the defendants have not been terminated.¹¹

The positions taken up not only by the defendants but also by the learned District Judge are contradictory.

As I stated earlier, the paper title of the plaintiff has been admitted by the defendants by way of a formal admission.

It was held by Sharvananda C.J. in *Theivandran v. Ramanathan Chettiar*¹² that:

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 lawful possession.

The same position was reiterated in a long line of decisions including *Beebi Johara v. Warusavitharana*¹³, *Candappa nee Bastian v. Ponnambalam Pillai*¹⁴, *Wijetunge v. Thangarajah*¹⁵.

¹¹ Vide issue Nos.10 and 11 and the answers thereto.

¹² [1986] 2 Sri LR 219 at 222

¹³ [1998] 3 Sri LR 9

¹⁴ [1993] 1 Sri LR 184 at 187

It is my considered view that the defendants have not discharged that burden.

I unhesitatingly set aside the Judgment of the learned District Judge and allow the appeal with costs both here and the Court below.

Let the present District Judge enter Judgment as prayed for in the prayer to the plaint.

Judge of the Court of Appeal