

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

C. A. 1282/99 (F)

D. C., Kandy No. 16861/L

1. MOHAMMED IBRAHIM
NAZAAR GHOUSE (*Deceased*)
 - 1a. G. Siththi Hajifa Ghouse
 - 1b. Ahamed Mohideen
Mohamed Asheem Ghouse
 - 1c. Fathima Shameema
Mohamed Ghouse
 - 1d. Nurul Susaan Mohid Ghouse
 - 1e. Ilfan Jerifia Farid Ghouse

2. AHAMED CASSIM GHOUSE
(*Deceased*)
 - 2a. Enaya Ghouse
 - 2b. Ansal Ghouse
 - 2c. Amjad Ghouse
 - 2d. Mohamed Ghouse
 - 2e. Gassali Ghouse
 - 2f. Nurul Kanisa Ghouse

3. NURUL HIDANA GHOUSE

All of No. 379, Galle Road,
Colombo 03

PLAINTIFFS

VS

1. WILLAIM BROTHERS LTD.,
No. 250, Watharanthenna
Road, Kandy
2. SRI LANKA CENTRAL
TRANSPORT BOARD,
No. 22, Kirula Road, Colombo
05

DEFENDANTS

AND NOW BETWEEN

1. WILLAIM BROTHERS LTD.,
No. 250, Watharanthenna
Road, Kandy

1ST DEFENDANT-APPELLANT**VS**

1. MOHAMMED IBRAHIM
NAZAAR GHOUSE (*Deceased*)
 - 1a. G. Siththi Hjifa Ghouse
 - 1b. Ahamed Mohideen Mohamed
Asheem Ghouse
 - 1c. Fathima Shameema Mohamed
Ghouse
 - 1d. Nurul Susaan Mohid Ghouse
 - 1e. Ilfan Jerifia Farid Ghouse

2. AHAMED CASSIM GHOUSE
(*Deceased*)
 - 2a. Enaya Ghouse
 - 2b. Ansal Ghouse
 - 2c. Amjad Ghouse
 - 2d. Mohamed Ghouse
 - 2e. Gassali Ghouse
 - 2f. Nurul Kanisa Ghouse

3. NURUL HIDANA GHOUSE

All of No. 379, Galle Road,
Colombo 03

PLAINTIFF-RESPONDENTS

SRI LANKA CENTRAL TRANSPORT
BOARD,
No. 22, Kirula Road, Colombo 05

2ND DEFENDANT-RESPONDENT

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

COUNSEL : Lakshman Perera P.C. for the 1st Defendant-Appellant

: Faiz Musthapha P.C. with Athula Perera and Vindya Divulwewa for the Substituted Plaintiff-Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 06.12.2018 – by the 1st Defendant-Appellant

DECIDED ON : **12.02.2019**

M. M. A. Gaffoor, J.

The Plaintiff-Respondents (hereinafter referred to as the ‘Plaintiffs’) filed the above styled action in the District Court of Kandy seeking a declaration of title to the land and building described in the Schedule to the plaint, to have the Defendants ejected therefrom and to obtain an order preventing the 2nd Defendant from handing over the said building to the 1st Defendant and for costs.

The Plaintiffs in their joint plaint averred that,

- a. The Plaintiffs were the owners of the land in suit;
- b. The Plaintiffs and their predecessors in title had rented the premises in suit to the 1st Defendant-Appellant company;
- c. With the establishment of the Ceylon Transport Board (hereinafter referred to as ‘CTB’) (the 2nd Defendant-Respondent) in or around

1957-1958, premises No. 76, Trincomalee Street, Kandy was requisitioned by the CTB; and

- d. The Appellant is now challenging the ownership of the Plaintiffs and claiming rights to the premises in suit.

Whereas, the 1st Defendant-Appellant Company filing amended answer dated 25th September 1992 claimed prescriptive title to the premises in suit and pleading *inter alia* that,

- a. William Brothers Ltd., the 1st Defendant-Appellant Company which was originally a partnership comprising of members of the Jayawikrama family which had been in possession of these premises for well over 50 years;
- b. The said Partnership possessed up to 1947, and thereafter, the Company was in possession until the premises were requisitioned as aforesaid.

After the conclusion of the trial, the learned District Judge of Kandy delivered judgment on 18th June 1999, in favour of the Plaintiffs in terms of the plaint.

Being aggrieved by the said judgment, the 1st Defendant-Appellant (hereinafter referred to as the 'Appellant') has preferred this appeal to set aside the judgment dated 18th June 1999.

At the District Court trial, the Plaintiffs had set out their title fully in the plaint and stated that the 1st Plaintiff's father had given the said building bearing No. 76, Trincomalee Street, Kandy on rent to William Brothers Company which was ran a bus and a collecting services. Thereafter, the said building was taken over by the CTB and it was in the exclusive possession of the CTB. They further

stated that the said father of the 1st Plaintiff had been waiting for the CTB to call for his title but the CTB did not do so. When he came to know that the CTB was giving back the building he wrote to the relevant Minister by a letter which has been marked as **P7**.

Although, the Appellant was submitted that no tenancy agreement, whether a formal agreement of any other document as to the existences of tenancy had been produced by the Plaintiffs, and the Appellant Company further stated that the Plaintiffs have failed and or were unable to state even what the rent that was allegedly charged by them, and they Plaintiffs failed to establish any instances of payment of rent by or on behalf of William Brothers the Appellant. To answer this argument, the Plaintiffs stated in the District Court that the documentary proof on payment of rent was destroyed by fire due to civil commotion. And they further state that at the time when the 1st Plaintiff's evidence was recorded these issues had not been raised.

After careful perusal of the statement of claims and the answer of the Appellant, it is clear that they had not pleaded any title; they only pointed out few enigmas on the Plaintiff side and directly claimed for prescriptive title. In paragraph 5, the Appellant had stated that the Appellant had given the said building on rent for a period of 30 years and had recovered rent. However, the Respondents' position is that statement on the rent that recovered by the Appellant is incorrect. They further stated that no payment of rent was made by the CTB from the year 1958. It was in the year 1991 on the orders of the CTB that the rent from the year 1958 was calculated and paid to the Appellant after deducting the amount paid as rates and expenditure incurred in the repairs. They also stated that this had taken place without informing the Plaintiffs who had requested the release of the buildings.

It is important to note that a perusal of the Deeds marked by the Plaintiffs show an unavoidable fact that the land and premises described in the schedule (No. 76, earlier No. 43 & 43) possessed by them in different period of times. Therefore, this fact suggested that they have a clear paper title.

However, the only position taken up by the Appellant is that they have prescribed to the premises claimed by the Plaintiffs.

A person who claims prescriptive title against the rightful owner who has the paper title has a very heavy burden to prove all the requirements prescribed in section 3 of the Prescription Ordinance. Mere possession over ten years is not prescriptive possession. The possession shall be by title adverse to or independent of that of the rightful owner. *"A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title."* (*Sirajudeen vs. Abbas* [(1994) 2 SLR 365] per G.P.S. de Silva C. J.)

There is another important point to be noted 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 squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights." (*Sirajudeen vs. Abbas* [1994] 2 SLR 365 at 370. See also *Chelliah vs. Wijenathan* (1951) 54 NLR 337 at 342, *Reginald Fernando vs. Pabilinahamy* [2005] 1 SLR 31 at 37, *Mitrapala vs. Tikonis Singho* [2005] 1 SLR 206 at 211-212).

In all the circumstances, I am in a firm view that the Prescriptive claim of the Appellant cannot stand. The District Judge has analyzed the documentary evidence as per the standard of balance of probabilities and correctly held with Plaintiffs.

Therefore, I do not wish to interfere with the judgment dated 18th June 1999.

Judgment of the District Court is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL