

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

Appeal No.C.A.1110/96 (F)
D.C. KEGALLE Case No.3911/L

Hewa Pedige Chandrasena of Pahala Atugoda
Galigamuwa.

Plaintiff (now Deceased)

1. Hewa Pedige Seditis
of Pahala Atugoda
Galigamuwa.

Substituted Plaintiff

- VS.-

Arachchilage Podinilame alias Punchiappuhamy
alias P.A. Renapana of Renapana, Galigamuwa.

Defendant

- AND now BETWEEN-

Arachchilage Podinilame alias Punchiappuhamy
alias P.A. Renapana of Renapana, Galigamuwa.

Defendant – Appellant (Now Deceased)

Renapana Arachchilage Champa Janaki Kumari
Renapana of Renapana
Galigamuwa Town.

Substituted – Defendant – Appellant

- Vs –

Hewa Pedige Chandrasena of Pahala Atugoda
Galigamuwa.

Plaintiff (now Deceased)

1a. Hewa Pedige Seditis of Pahala Atugoda
Galigamuwa.

Substituted – Plaintiff - Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: S.A.D.S. Suraweera for the Substituted – Defendant- Appellant.

Rohan Sahabandu, PC with Sachini Senanayake for the Substituted – Plaintiff – Respondent.

Written Submissions: Filed on 9th January 2015, by the Substituted – Plaintiff – Respondent.

Filed on 29th January 2015, by the Substituted – Defendant – Appellant.

Argued on: 20/05/2019 and 22/02/2021

Judgment on: **18/03/2021**

N. Bandula Karunarathna J.

The Plaintiff- Respondent (herein after referred to as the Plaintiff) instituted action against the Defendant- Appellant (herein after referred to as the Defendant) seeking a declaration of title to the land more fully described in the schedule to the Plaint, for the ejectment of the Defendant there from, for damaged of Rs. 2,000/- up to the date of institution of the action, for continuing damages at the rate of Rs. 1,000/- per annum and for costs.

The present action had been instituted on 19.08.1987 although the Plaint is dated 30.7.1987.

The Plaintiff in his Plaint averred that the said land was transferred to him on a conditional transfer by the Defendant on 07.05.1973 with the condition to redeem the said land within a period of 3 years from the said date. The Defendant is in unlawful and illegal possession of the said land even after the expiration of the said period of 3 years in 1976 and thus claimed the relief prayed for in the prayer to the Plaint. Further he averred that he had requested the Defendant to redeem the property even after the expiration of the said period and despite the said requests, the Defendant had failed to do so.

The Defendant filed answer denying all and singular the several averments contained in the Plaint and pleaded inter alia that he had paid a sum of Rs.1,600/- to the Plaintiff during and within the prescribed period of time and the Plaintiff had failed to re-transfer the land in his name despite repeated requests made by him to the said effect. The Defendant also averred that the action of the Plaintiff is prescribed in law and the Plaintiff could not have had and maintained the instant action and thus had prayed for a dismissal of the Plaintiff's action with costs.

Thereafter, the case was fixed for trial by the Learned Trial Judge and the case proceeded to trial on the many issues raised on behalf of the contesting parties. At the trial, the Plaintiff as well as the Defendant gave evidence adducing oral as well as documentary evidence in support of their respective claims and after the conclusion of the evidence, the Learned Trial Judge fixed the case for judgment. The said judgment was delivered by the Learned Trial Judge on 16.10.1996 whereby answering the issues in favor of the Plaintiff and granting the relief as prayed for by the Plaintiff for the reasons stated therein in the said Judgment.

Thus, being aggrieved by the said judgment of the Learned Trial Judge, the Defendant had lodged the present appeal to this Court. During the pendency of the instant action, the original Defendant passed away and his daughter was substituted in the room of the said Deceased Defendant -Appellant.

It is important to note that the conditional transfer was admitted by the parties. The Defendant sought to rely on a document marked D1 which was examined by the Learned District Judge. D1 is dated 07.05.1976. This appears to be an acknowledgement of Rs. 1,650/- by the Notary Public, who attested the deed 22723. This is the document relied upon by the defendant to show that, he had paid the sum involved. The Learned District Judge observed that, if that is true, the Notary Public ought to have cancelled the deed of conditional transfer and written a deed of transfer. In my view it is not so as the cancellation of a disputed deed wholly depend on the two parties who were involved in the transaction. There was no evidence to say that the Plaintiff has requested from the Notary, to cancel the deed upon accepting the payment.

The Defendant argued that the aspect of prescription be considered primarily and to deal with the other merits of the case thereafter as there is a serious question as to the maintainability of the Plaintiff's action in the first instance. The Defendant in filing his answer had taken up the defense that the action of the Plaintiff is prescribed in law. On perusal of the pleadings contained in the Plaintiff, it is very clear that the conditional transfer had been executed on 07.05.1973 with the condition that the land should be redeemed within a 3-year period commencing from the said date. Hence the 3-year period lapsed on 06.05.1976 and according to the Plaintiff's own pleadings, the Defendant had failed to fulfil his obligation by the said date.

The present action had been instituted by the Plaintiff on 19.08.1987 after 14 years from the execution of the conditional transfer. It is after the expiration of 11 years when the agreed time period lapsed. The evidence of the Plaintiff has to be carefully considered in the said light in order to arrive at a decision as to whether the Plaintiff's action is prescribed in the law.

Section 3 of the Prescription Ordinance is as follows;

3. Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or Plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right

existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with

costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favor with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

It is evident that the Defendant had prescribed to the land, despite the existence of the conditional transfer. The evidence of the Plaintiff himself at page 47 of the brief wherein the Plaintiff had adverted to the fact that the Defendant is in forcible possession of the land from the date of execution of the Deed and no income had been given to the Plaintiff at any time. This evidence alone demonstrates the fact that the Plaintiff had not been recognized by the Defendant to be the owner of the land and the Defendant had held the land adverse to any right of the Plaintiff for a period well over 10 years as required by the law.

The said fact will also establish that the Defendant had changed the nature and character of his possession from the year 1976, after the expiration of the 3-year period and had not recognized the Plaintiff to be the owner of the land in suit. The evidence of the Plaintiff will establish the fact that the character of possession of the Defendant after the said date in 1976 had been adverse to the Plaintiff. The Defendant had continued to occupy the land in the same character for a period well over ten years by the time the action was instituted after 11 years without recognizing any right of the Plaintiff. Hence this is a very clear instance where the Defendant had acquired a prescriptive title to the land in suit as against the Plaintiff and this fact alone was sufficient for the Learned Trial Judge to answer issue 10 in favor of the Defendant.

The Defendant marked and produced document "V1" a receipt issued by the Notary Public acknowledging the receipt of Rs. 1,650/- from the Defendant and the date of the said document also is very significant to the case. The said document bears the date as 07.05.1976, the last date to redeem the deed, and the evidence of the Defendant to explain as to why the said monies were paid to the Notary should have been considered by the Learned Trial Judge with the other attendant circumstances of the case. The said document had not been marked subject to proof and the Notary Ariyaratne had passed away by the time the case was taken up for trial. Since there was no objection to the said letter, it is my view that the Learned Trial Judge was in error in rejecting the same without any good, valid or legitimate reason being adduced. However, on perusal of the said document, it is very clearly evident that the said Notary had very specifically stated the purposes of receiving the said amount of money and the number of the deed is also given. These facts have not been challenged by the Plaintiff. The Plaintiff had admitted the fact that the signature of the said document resembles the signature of Mr. Ariyaratne, N.P.

The Defendant had adduced the reason that the original of the deed was not available at the time of executing the second deed and the Plaintiff's father who was present and who had

subscribed to the said second deed had been advised by the Notary to come with the original of the deed to cancel the same and to handover the money had to be considered in the said context as it is a very probable and a plausible explanation.

Therefore, by the time the Plaintiff had instituted action, the Defendant had acquired a prescriptive title to the land in suit and the Plaintiff's right to sue also had been prescribed and the Plaintiff could not have had and maintained his action. The said aspect had totally evaded the consideration of the Learned Trial Judge as the issues raised with the said regard had been answered in the negative by the Learned Trial Judge without a proper assessment and appraisal of the facts and circumstances as well as the law in the proper perspective. Hence the judgment of the Learned Trial Judge is erroneous and bad in law and has no force of avail in law. It is very clear that the Learned Trial Judge had also erred both in law as well as in fact in answering the issues in favor of the Plaintiff and granting relief to the Plaintiff.

The Defendant in giving evidence had very clearly stated that he had gone to the Notary to redeem the property and executed another deed in respect of the same shares of the same lands in the year 1976 before the expiration of the 3-year period. The reason for executing the next deed was that he did not have the money required at that time and he was compelled to give the land to one Soma Alahakoon and realize the money. It is very important to note that at the time when the said deed was executed, the Plaintiff's father who is the Substituted Plaintiff in this appeal had been present and he had been a subscribing witness to the said deed. It was also the uncontroverted evidence of the Defendant that he did not have any other rights in the lands apart from the rights transferred to the Plaintiff in 1973 and although the land was transferred in the name of the Plaintiff in 1973, the father was the person who advanced the money to the said transaction.

The Learned Trial Judge had also placed a heavy reliance upon the fact that the defendant had stated that he had paid only a sum of Rs. 1,400/- to the Plaintiff's father. This is also a clear misdirection as it will be observed that the Defendant had been very constant in his evidence as to the amount tendered to be Rs. 1,650/- right throughout his evidence and the only instance where the said sum is mentioned is under re-examination where the said sum is mentioned. That is also with regard to the capital due on the deed and the Learned Trial Judge had failed to appreciate the fact that the extra Rs.250/- was only the interests due on the capital.

The Plaintiff argued that the Learned District Judge observed that D1 is a photocopy and it was not even certified. Most importantly to prove this vital fact that Notary was not called but keeping an open mind, states that, the Notary according to the Evidence was dead at the time of the trial, but holds on the matter as adverted to earlier, that he cannot accept D1.

The father of the Plaintiff has given Evidence, and he specially states that, on 07.05.1976 no money was given to him. One of the issues of the Defendant was that, the transaction was with the Plaintiff's father. The Plaintiff argued that the Learned District Judge had the advantage of listening, seeking the parties when they gave Evidence and he believed when he stated that no money was given to him. Further it was stated that because of the inconsistent position taken up by the Defendant, the trial Judge does not believe him or rely on his Evidence. Looking at the totality of the Evidence the Court states, that Court cannot accept the Defendants position.

Considering all the evidence, it is my view that the learned trial Judge is not correct. The Learned Trial Judge had failed to assess and consider the said evidence in the case in the proper perspective in arriving at her judgment and hence the said judgment is bad in law.

it is very clearly evident that the Learned Trial Judge had misdirected herself on the law as well as on the facts of the case which are of paramount importance and hence the judgment of the Learned Trial Judge is bad in law and is liable to be set aside by this Court. I set aside the Judgment of the Learned District Judge of Kegalle dated 16/10/1996. In the aforesaid circumstances I hold that the Plaint of the Plaintiff be dismissed. Appeal allowed. No order for cost.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal