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

In the matter of an Appeal under Section 755 of the Civil Procedure Code.

CA Appeal: 915/2000(F) DC
Hambantota Case No. 253/P

1. Gamhewage Service, (Deceased)
   Thawaluwila,
   Ambalantota.

1A. Bandulasena Gamhewa,
   Thawaluwila,
   Ambalantota.

2. S.E. Sujatha,
   C/O.K.T. De Silva,
   Ambalangoda.

PLAINTIFFS

- VS –

1. Donald Warnakulasooriya Gunasekara,
   (Deceased)
   Divulapitiya,
   Boralesgamuwa.

1a. E. Seeman Gunasekera,
   Divulapitiya,
   Boralesgamuwa.

1b. Sunil Warnakulasooriya Gunasekera,
   Divulapitiya,
   Boralesgamuwa.

1c. Jayantha Warnakulasooriya Gunasekera,
   Divulapitiya, Boralesgamuwa.

1d Eric Warnakulasooriya Gunasekera,
   Nawa Thotupala Road,
   Ratmalana.

2. J.H. Julienona, Thawaluwila,
   Ambalantota.

3. Malani Jayasinghe,
   C/O Sectas Wickramasinghe,
   Gurukanda, Kathaluwa,
   Ahangama.

4. Punchinona Jayasinghe (Deceased)
   Old Market,
   Tangalle.

4a Leelawathie Jayasinghe,
   162, Muhudu Mawatha,
   Tangalle.

5. Jussienona Abeysooriya,
   Vijitha Road, Dodampahala,
   Dickwella.

6. Silee Mathangaweera,
   Vijitha Road, Dodampahala,
   Dickwella.

7. Daisy Mathangaweera,
   Vijitha Road, Dodampahala,
   Dickwella.

8. Paranamanage John Silva, (Deceased) Thawaluwila,
   Ambalantota.

8a & 9 Thilakaratne Paranamana, Thawaluwila,
   Ambalantota.

8b & 10 A.J.S.P. Jossienona,
   Thawaluwila,
   Ambalantota.

DEFENDANTS

AND

Thilakaratne Paranamana,
Thawaluwila,
Ambalantota.

A.J.S.P. Jossienona,
Thawaluwila,
Ambalantota.

8a, 9 AND 8b, 10 DEFENDANT/ APPELLANTS

- VS –

1a. Bandulasena Gamhewa,
Thawaluwila, Ambalantota.

2. S.E. Sujatha, C/O.K.T. De Silva,
Ambalangoda.

PLAINTIFF/RESPONDENTS

1a E. Seeman Gunasekera,
Divulapitiya,
Boralesgamuwa.

1b. Sunil Warnakulasooriya Gunasekera,
Divulapitiya,
Boralesgamuwa.

1c Jayantha Warnakulasooriya Gunasekera,
Divulapitiya,
Boralesgamuwa.

1d Eric Warnakulasooriya Gunasekera,
Nawa Thotupala Road,
Ratmalana.

2 J.H. Julienona, Thawaluwila,
Ambalantota.

3 Malani Jayasinghe,
C/O Sectas Wickramasinghe,
Gurukanda, Kathaluwa,
Ahangama.

4a Leelawathie Jayasinghe,
162, Muhudu Mawatha,
Tangalle.

5. Jussienona Abeysooriya,
Vijitha Road, Dodampahala,
Dickwella.

6. Silee Mathangaweera,
Vijitha Road, Dodampahala,
Dickwella.

7. Daisy Mathangaweera, Vijitha Road,
Dodampahala, Dickwella.

Before:	**N. Bandula Karunarathna J.**
	&
	R. Gurusinghe J.
Counsel:	A.S.M. Perera PC with Prabodhini Kumarawadu for the 8A, 8B, 9th & 10th Defendant-Appellant
	Bhagya Herath with Piyumi Senevirathne for the 1A Plaintiff-Respondents.
Written Submissions:	By Substituted 8A, 8B, 9th & 10th Defendant-Appellants on 22.02.2021
	By 1A Plaintiff-Respondents on 09.03.2012 & 08.03.2018
	Substituted 4A Defendant Appellant on 20.12.2019
Argued on:	**14.07.2020** and **22.02.2021**
Judgment on:	**30.03.2021.**

N. Bandula Karunarathna J.

The 8A, 8B, 9th & 10th Defendant-Appellants (hereinafter called and referred to as the "Defendants") preferred this appeal against the Judgment dated 25.04.2000 of the learned District Judge of Hambantota in case No. 253/P.

On or about 31st July 1980, the Plaintiff-Respondents (hereinafter referred to as "Plaintiff"), filed the above styled action in the District Court of Hambanthota against the 1st to 7th Defendant-Respondents (hereinafter referred to as the Defendants) seeking a Judgment to Partition the land more fully described in the schedule to the plaint.

They claimed that the land to be partitioned is called Thanalanda bounded on the North by Lot 22 of P.P. Nos. 466 on the East by Lot 24 of P.P. Nos. 466 and on the South by Lot 34 of P.P. Nos. 466 and on the West by Lot 12 of P.P. Nos. 466 depicted in T.P. 275465 and containing in extent of Three Acres Two Roods and Thirty Perches (3A. 2R.30P) together with everything thereon (hereinafter referred to as the "Subject Land").

The 8th Defendant and 8a & 9th Defendant Appellants (hereinafter referred to as the 9th Defendant) and the 8b & 10th Defendant-Appellants (hereinafter referred to as the 10th

Defendant), who were the father, son and the mother of the same family filed papers for intervention on the purported basis that;

(i.) The 8th Defendant has enjoyed lot 1 and 2 as amalgamated land since 1925 and has gained prescriptive title thereto;

(ii.) whilst the 10th Defendant (his wife) has acquired prescriptive rights for lot 2 only on the basis of her exclusive possession of lot 2 for a period of 35 years.

(iii.) To top it all, the 9th Defendant (their son) claimed rights as the Cultivator for Lot 2 under The 10th Defendant and as owner for both Lot 1 and 2 under his father the 8th Defendant.

Their application for intervention was allowed.

No admissions were recorded and the matter proceeded to trial wherein the Plaintiffs raised 2 points of contest, 2nd Defendant-Respondent recorded 2 points of contest and 8th Defendant raised 3 points of contest.

The 1st Plaintiff himself gave evidence but was deceased before his cross examination on behalf of the 8th, 9th and 10th Defendants were concluded.

Madakalapuwage Appu Singho, the previous owner of Lot 1 gave evidence and closed the Plaintiffs case marking in evidence the documents P1 to P15 and X and X1. The 9th Defendant and, an officer from the Ambalanthota Pradeshiya Sabha gave evidence on behalf of the 8th, 9th and 10th Defendants and marked in evidence 8වි1 to 8වි10. The 2nd Defendant also gave evidence and the matter was fixed for Judgment.

On or about 25th April 2000, the Judgment was pronounced wherein the claim of the Plaintiffs were upheld.

It is the position of the Appellants that the Learned Trial Judge has seriously misdirected himself when he relied upon the 2 complaints said to have been made to the police by the 1st Plaintiff (P14 & P15) against the 8th Defendant to arrive at an inference that the 8th Defendant Appellant had forcibly entered into possession of lots 1 & 2. The said 2 complaints have been made to the police after the institution of the instant case. According to the survey report marked Xl, the surveyor who carried out the preliminary survey has mentioned in his report that the 8th Defendant Appellant was in possession of lots 1 & 2 of the corpus when the preliminary survey was carried out by him.

The Appellants submit that the Learned Trial Judge has erroneously come to an inference that the 8th Defendant Appellant has forcibly entered in to possession of the said land, by accepting the contents of the documents marked P14 & P15, which were the two complaints made only after the institution of this action. The Appellants further state that the Learned Trial Judge also has erred when he accepted the extract of the Agricultural Land Register for the year 1975-1976 where the 1st Plaintiff's name is included. It is an extract from a cancelled register.

The Appellants state that the finding of the Learned Trial Judge that the prescription claimed by the 8th Defendant Appellant in his statement of claim to the lot 1 and 2 and the claim of lot 2 by the 10th Defendant in her statement of claim are inconsistent and therefore, due to such inconsistency the prescriptive rights claimed by the 8th Defendant to the said two lots have failed as against the recognized principle of law that the 8th and 10th Defendants are husband and wife and they are entitled to claim prescription in view of their long, undisturbed and uninterrupted possession of the said lots. The Appellants further state that the Learned Trial Judge in arriving at his finding has stated that the 8th, 9th & 10th Defendant Appellants have not challenged the documents submitted by the plaintiff amounts to an admission is against the principle of prescription as the only issue in this case is whether the 8th Defendant had an undisturbed and uninterrupted possession of lot 1 and 2 over 10 years prior to the institution of this action.

It is also the Position of the Appellants that The Learned Trial Judge has acted in contravention of the relevant provisions of the Partition Act when he held that the 8th 9th & 10th Defendant Appellants are not entitled to improvements in lot 1 when there was no claim made by any of the other parties.

The Appellants state that the plaintiff commenced his evidence on 4-12-1990. The examination in chief and cross examination of the Plaintiff by the 2nd Defendant was concluded on that day. In addition cross examination on behalf of the Defendant-Appellants commenced but it was not concluded and further trial was fixed for another day. However, on the next date it was reported that the plaintiff had died.

The Appellants further state that the proceedings dated 2-9-1991 where this fact has been recorded and further, Court has made a determination that the plaintiff's evidence will be considered only against the 2nd Defendant since he has been cross examined only by the said 2nd Defendant Respondent and that the said evidence will not be considered against the Defendant Appellants.

Thus the Appellants are of the view that Court has relied upon the evidence given by the Plaintiff which has directly or indirectly caused prejudice to the interest of the Defendant-Appellant. It was argued on behalf of the defendant-appellants that the evidence given by the plaintiff should not have been taken into account by Court in arriving at the final determination. This is a violation of the very basic principles relating to natural justice and it was stated that for this reason alone this Judgement cannot stand.

The Appellants state that in the course of the evidence given by Appu Singho who was called on behalf of the plaintiff, he has stated that he purchased this land in 1960 and that he sold it to the plaintiff in the year 1974. It is his position that he possessed the said land and cultivated it till 1974 and thereafter it was possessed by the plaintiff. As against this, the Defendant-Appellants have taken up the position that they have acquired prescriptive title to the relevant portions of land claimed by them. In fact, Appu Singho in his evidence has stated

that the 9th Defendant Appellant forcibly constructed a building in the year 1980. This admission is possibly made by this witness in view of the fact that a survey was done in relation to this land in the year 1981 and neither the plaintiff nor his representatives had made any claim to the land claimed by the Defendant Appellants. In addition the Defendant-Appellants had marked in evidence and proved several documents such as voters registers, receipts relating to payment of rates, to establish the fact that they were in occupation of the said land for a long period of time. On the other hand, this documentary evidence contradicts the position taken up on behalf of the plaintiff and supports the claim made by the Defendant-Appellants that they have acquired prescriptive title to the said land.

The Appellants stated that the Learned Trial Judge has not properly evaluated and considered these items of evidence when arriving at his findings. In the above circumstances, it was argued that the Judgement of the learned trial Judge is erroneous.

The Plaintiff Respondent, in response to the aforesaid states that the annexed Pedigree chart marked 'A' shows the devolution of title of the Plaintiff. Thus, as far as his pedigree and the recitals in the deeds, the Plaintiff has discharged his evidentiary burden.

Further, the Plaintiff has led the evidence of the previous owner of the land who in no uncertain terms testified that;

> "මම කුඹුර වගා කළා 74 වෙනකම් වගා කළා. අවුරුදු 14ක් මම මේ කුඹුරු වගා කළා මම මේ ඉඩමෙන් පංගුවක් ගත්තා. මගේ කොටස මම වික්කා. මේ නඩුවේ පැමිණිලිකරුට"
> [Vide page 147 of the main brief]

Wherein the continuous use and enjoyment of the Subject Land by the Plaintiffs and his predecessors are established and substantiated.

The Plaintiff Respondent states that as for the rights of the 8th Defendant, 9th and 10th Defendants, the position of the Plaintiffs are that the 8th Defendant forcibly entered the subject premises, and built a house there at which point the Plaintiffs complained of the same to Police. The said Police Complaint has been marked in evidence as P14 and P15. The evidence of the Plaintiff on the same is categorically substantiated by the said Madakalapuwage Appu Singho who testifies as follows;

ප්‍ර :- තමා සුවිස්ට විකුණපු කෑල්ල සුවිස්ට විකුනල අවුරුදු 7ක් 8ක් ගියාම ජෝන් සිල්වා බලෙන් පදිංචි උනාද

උ :- ඔව්. ඊට ඉස්සෙල්ලා ජෝන් සිල්වා හිටියේ මගේ ඒකට අල්ලපු කෑල්ලේ මම විකුණලා අවුරුදු ගණනක් ගියාට පස්සේ තමයි සිල්වා බලහත්කාරයෙන් පදිංචියට ගියේ. බලහත්කාරයෙන් ගෙයක් හැදුවා. පොලීසියට පැමිණිලි කලේ සුවිස්. මමත් ගියා.

Thus, the Plaintiff Respondent stated that the Plaintiffs have proved beyond reasonable doubt their entitlement as prayed for in the pedigree. The claim of the 8th Defendant had been that

since 1925 both lot No. 1 and 2 had been amalgamated and the 8th Defendant had been enjoying the same as his own and thereby acquired prescriptive title to the said lot no 1 and lot 2 both.
(Vide page 104 of the Appeal Brief)

The relevant portion reads;

> "1925 පමණ සිට මෙම විත්තිකරු ඉහත කී අංක 1 සහ 2 දරන කැබලි අංක එකම ඉඩමක් ලෙස අඛණ්ඩව නිරවුල්ව කිසිවෙකුගේ මැදිහත්වීමකින් තොරව බුක්ති විඳීම හේතුවෙන් හා අවුරුදු 10කට වැඩි බුක්ති විඳීම හේතුවෙන් බුක්තියට සවි වී ඇත."

The Plaintiff Respondent states that as per the 9th Defendant has claimed in his statement of claim dated 9th January 1990 that he is the Cultivator of the lot No. 2 of the Subject Land in an extent of 1 Acre and 2 Roods and thereby entitled to protect his "anda rights.''

The Plaintiff Respondent further says that even the 10th Defendant has in her statement of claim dated 9th January 1990, has claimed that, the 10th Defendant has enjoyed the Lot No. 2 in an extent of 1 A: 2R: and 0 P uninterrupted and undisturbed for a period well over 35 years and has acquired prescriptive title to the said plot whilst the 9th Defendant is a Cultivator of the said lot No. 02.

> ''මෙකී මැදිහත් වන්නිය වන 10 වන විත්තිකාරිය මෙකී නඩුවට ගොණුකර දැක්වෙන් පිඹුරේ කැබලි අංක 2 ඉඩම් හිමියා වශයෙන් වසර 35කට වැඩි කාලයක් අඛණ්ඩව ස්වාධීනව මෙකී විත්තිකාරිය භුක්ති විඳ ඇති අතර ඒකී කොටසේ අද ගොවියා වන්නේ තිලකරත්න පරණමානය.''

The Plaintiff Respondent states however that the 9th Defendant is the son of the 8th Defendant John Silva and the 10th Defendant Josie Nona.

> ''මගේ පියා මෙම නඩුවේ 08 වන විත්තිකරු. මගේ මව මෙම නඩුවේ 10වන විත්ති කාරිය''

And the 9th Defendant, who has been substituted on behalf of the 8th Defendant has testified to the effect that,

> ''සුවිස් සිල්වා අයිතිවාසිකම් කියන අංක 1 කොටස 1980න් අවුරුද්දට පෙර සිට අවුරුදු 40ක් පමණ ජෝන් සිල්වා භුක්ති වින්දා. ඒ කොටස වෙනම කොටසක් ලෙස භුක්ති වින්දේ.''

Therefore, it is apparent that the very claim of the 8th, 9th and 10th Defendants embody an intrinsic incongruity that cannot be maintained at the same time nor reconciled. The 8th Defendant cannot claim his rights for the entire property on prescription and his heir to strenuously claim exclusive possession of a part of it at the same time. It's equally unmaintainable as to how their son be the owner of the entire land under the paternal rights of the 8th Defendant is a Cultivator of under the rights of the mother for only lot 2. In other words, the claim of the 9th Defendant is that he is the owner as well as the Cultivator of Lot 2 at the same time.

On the pleading of the 8th 9th and 10th Defendants themselves, the aforesaid claim cannot be maintained, nor any relief be obtained on the said purported grounds.

Subsequent to a thorough analysis of the facts of the case, it is my position that as held in the case of Don Siyadoris Vs Nandoris Appu (1900) 1 Matara Cases 25,

> "A party who brings a partition action has to prove that he is entitled to share of the whole extent claimed by him

Sinnathamby J in Cooray Vs Wijesuriya 62 NLR 158, held that,

> "Before a Court can accept as correct a share which is stated in a deed to, belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in section 32 (5), 32 (6) and 50 (2)"

The question is whether the Plaintiff has discharged his burden in presenting all material facts, as opposed to the 8th, 9th and 10th Defendants and as to whether the Learned District Judge has evaluated the evidence elicited, properly investigated the title and has drawn accurate conclusions.

The claim of the Appellants are that they have been in uninterrupted and undisturbed possession of the Subject Property for 10 years and she is reliant upon Section 3 of the prescription Ordinance No. 22 of 1871, which reads as follows.

> "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 favor 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".

The claim of the Appellants are that they had amongst other requisites of S.3 of the Prescription Ordinance had possessed the Subject Property adverse to the rights of the Plaintiffs.

Explaining the said principle of adverse possession, it was held by Bertram CJ in Tilekeratne Vs Bastian 21 N.L.R 12 that,

> "A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity"
>
> "The effect of the principal is that, where any person's possession was not originally not adverse, and he claims that it has become adverse, the onus is on him to prove it, and what must he prove? He must prove not only an intention to possess adversely, but a manifestation of the intention to the true owner against whom he sets up his possession ... Thus it is sometimes said that he must prove an "overt unequivocal act."

Therefore, it is my view that in order to acquire prescriptive title, the 8th, 9th and 10th Defendants should perform an "Over Act" which displays that they are in fact in occupation as the owner against the rights of the Plaintiffs. However, there is a total lack of evidence of whatsoever nature that establishes any such act on the part of the 8th, 9th and 10th Defendants.

It is pertinent to note that the only attempt made by the 8th, 9th and 10th Defendants in that regard is a claim that they have entered their names at the Electoral register. On that, mere entering of the name in the Electoral register does not establish the prescriptive title.

In the case of Maria Fernando vs. Anthony Fernando 1997 (2) SLR 356, where it was held that,

> "Long possession, payment of rates and taxes, enjoyment of produce, filing suit without making the adverse party, a party preparing plan and building house on land and renting it are not enough to establish prescription among co-owners in the absence of an overt act of ouster. A secret intention to prescribe may not amount to ouster".

On the other hand, the proof which has been presented to Court as extracts from the Electoral register has contradictory reference numbers. Thus, the documents marked 8V2 for the year 1961 (vide 8V3), 1962 (vide 8V4) and 1965 (vide 8V5) identifies the house as bearing number 98G. However the document marked 8V1 identifies the number of the House for the year 1977, 1978, 1979, 1980 and 1981 as Bearing Number 207/5 and not as 98C. However, for

some mysterious reason, the house acquires the same number again in 1984 (vide 8V10) and 1985 (Vide 8V6) to be 98C. Thus, correctly perusing the relevant documentation, the Learned District Judge correctly concludes that,

> ‘‘ඒ අනුව මෙම නිවස් දෙකම එකම නිවස විය නොහැක. 1961 සිට 1984 අංක 98සී ලෙස තිබියදී එයට අතරමැද කාලයකදී 77 සිට 81 දක්වා 207/5 විය නොහැක. මුලදී එක් අයෙකුත් අතරමැදදි තවත් අයෙකුත් පසුව එම අංකයමත් ලැබීමට හේතුවක් නොමැත. එබැවින් 9 වන විත්තිකරු 8වන විත්තිකරු වෙනුවෙන් මෙම ඉඩමේ ලොට් අංක 1 හි පිහිටි නිවසෙහි දීර්ඝ කාලයක් භුක්ති විඳින බව කිව්වත් ඔවුන් බුක්ති විඳි නිවස යාබද ඉඩම් අංකය බවට තීරණය කරමි ’’

Moreover, in the case of Sirajudeen and Two Others Vs. Abbas 1994(2) S.L.R 365 it was held

> "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”.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.

However, there is not an iota of evidence to prove such a claim and the claim of the 8th, 9th and 10th Defendants and their claim stands as a mere unsubstantiated statement. As demonstrated above, it is seen that the purported arguments made on behalf of the 8th, 9th and 10th Defendants are, ex-facie contradictory to the evidence placed before Court by them in the course of the trial. In other words, the submissions made on behalf of the 8th, 9th and 10th Defendants in support of the above styled appeal is ex facie contradictory to the contents of the appeal brief.

Further, the principle enunciated in the case of Sigera Vs Attorney General (2011) 1 SLR 201 Court held inter alia, that "Appellate Court will not lightly interfere with the findings of facts of a trial Judge as its the trial Judge who has the privileged and the advantage of hearing and observing the demeanor and deportment of the witnesses as and when they gave evidence in Court".

In all of the aforesaid circumstances it is seen that the Learned Trial Judge has properly evaluated both oral and documentary evidence placed before court by the respective parties

and quite correctly had rejected the purported defense raised by the 8th, 9th and 10th Defendants and entered Judgment in favor of the Plaintiffs.

Therefore, I believe that the findings of the Learned Trial judge contained in the said Judgment is sound in law and the learned Trial Judge has not erred in law and in fact in arriving at the conclusions contained in the said Judgment.

Thus, in the light of the above quoted arguments, the Appeal of the 8A, 8B, 9th & 10th Defendant-Appellants, is dismissed with cost.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal