

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

In the matter of an appeal from the  
final judgment in the District Court of  
Kalmunai in Case No. 1641/L.

**CASE NO: CA/DCF/1395/00**

D.C. Kalmunai No. 1641/L

Athamkandu Seenathumma,  
Tamil Division,  
Sammanthurai.

**Plaintiff**

**Vs.**

1. S. L. Abdul Rahman
2. S. L. Adam Lebbe *alias*  
Bawa
3. A. B. Sulaima Lebbe

All of  
Division No. 1,  
Sammanthurai.

**Defendants**

**AND BETWEEN**

Athamkandu Seenathumma  
(Decesased)  
Tamil Division,  
Sammanthurai.

**Plaintiff-Appellant**

Abdul Majeed Ashraf Ali,  
Tamil Division,  
Sammanthurai.

**Substituted Plaintiff  
Appellant**

**Vs.**

1. S. L. Abdul Rahman,  
No. 251, Ampara Road,  
Sammanthurai.
2. S. L. Adam Lebbe Alias Bawa,  
No. 256, Hospital Road,  
Sammanthurai 01.
3. A. B. Sulaima Lebbe (Now  
Deceased)
- 3a.S.L. Abdul Rahman,  
No. 251, Ampara Road,  
Sammanthurai
- 3b.S.L. Adam Bawa  
No. 256, Hospital Road,  
Sammanthurai 01.
- 3c.S.L. Akber,  
No. 256, Hospital Road,  
Sammanthurai 01.

**Substituted 3a, 3b and 3c  
Defendant-Respondents.**

Before: **M. T. MOHAMMED LAFFAR, J. and  
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: N. M. Shaheed with Husni M. Rizni for the Substituted  
Plaintiff-Appellant.

M. Nizam Kariapper with M.I.M. Iynullah for the Substituted  
Defendant-Respondents.

Written Submissions on: 22.07.2020 (by the Substituted Plaintiff-  
Appellant).

21.07.2020 (by the Substituted Defendant-  
Respondents).

Decided on: 14.07.2021.

**MOHAMMED LAFFAR, J.**

This is an appeal from the judgment of the learned District Judge of Kalmunai dated 12-01-2000.

The facts, briefly in this case are as follows:

The plaintiff-appellant (hereinafter referred to as the “appellant”) instituted action in the District Court of Kalmunai on 18-04-1983, against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant-respondents (hereinafter referred to as the respective “respondents”) seeking *inter-alia*, for a declaration of title to the premises morefully described in schedule B of the plaint and the ejectment of the respondents therefrom.

The respondents moved for a dismissal of the appellant’s action on the footing that they have acquired prescriptive title to the subject matter.

After trial, the learned District Judge, having accepted the paper title of the appellant to the land in suit, dismissed the action on the basis that the respondents have obtained prescriptive title to the same. Being aggrieved by the judgment, the appellant has preferred the instant appeal.

**Identification of the subject matter:**

In a *re-vindicatio* action, it is a burden cast upon the plaintiff to identify the corpus, to which the judgment was prayed for. If the subject matter is not properly identified, the action will fail.

In this regard, I refer to the case of ***Saravanamuthu vs. Packiyam and Another***<sup>1</sup>. This is a case where the District Judge entered judgment in favour of the plaintiff, for a declaration of title to the corpus. In appeal, the provincial High Court set aside the said judgment and sent the case back to the District Court for a trial *de-novo*, on the basis that the corpus was not identified. The Supreme Court set aside the order of the Provincial High Court and affirmed the judgment of the District Judge, on the footing that

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<sup>1</sup> [2012] 1 Sri LR 298.

*the Defendant is not in a position to raise an issue before the appellate Court, pertaining to the identification of the corpus, where the corpus was admitted by him before the trial judge, and when there was no issue before the trial judge, in respect of the identification of the corpus, it cannot be taken up in appeal as an issue.*

The corpus in this case is morefully described in schedule B of the plaint which is in extent of Five acres (5A-0R-0P). For the purpose of this action, Mr. K. Retnarajah, Licensed Surveyor has made a plan marked P1 and the report of the Commissioner is produced as P1a. Having superimposed the title plans, the Commissioner has properly identified the subject matter as lots 2, 3, 4 and 5 in plan P1 which is the land described in schedule B.

It is pertinent to note that, although the respondents had taken up the position in their answer that the subject matter was not properly identified, they failed to frame an issue in this regard. In the case of **Hanafi vs. Nallamma**<sup>2</sup> the Supreme Court held that “.....Once issues are framed the case which the court has to hear and determine becomes crystallised in the issues and the pleadings recede to the background.....”

In the circumstances, it is clear that the question of the identification of the subject matter in this case was not put in issue before the trial Judge. Hence, the respondents are precluded from taking up such an issue in appeal.

**Title of the plaintiff to the subject matter:**

It is settled law that, *in revindicatio* actions the onus of proof of title to the subject matter is always with the plaintiff. In the event of failure on the part of the plaintiff to establish his title, his action is liable to be dismissed.

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<sup>2</sup> [1998] 1 Sri LR 73.

In the case of ***Dharmadasa vs. Jayasena***<sup>3</sup> it was observed that “*in a rei vindicatio action the burden is on the plaintiff to establish the title pleaded and relied on by him. The defendant need not prove anything.*”

In the instant case, one Velupillai Kathirama Thamby by virtue of the Crown Grant bearing No.14977 dated 31-05-1907 marked P2, became the owner of the paddy land called “Malukkampuddi” in extent of Twenty acres and Twenty Two perches (20A-0R-22P) which is morefully described in schedule A of the plaint. Thereupon, the said Velupillai Kathirama Thamby, by Deed No. 6410 dated 21-03-1932 attested by P.K. Velupillai, Notary Public marked P3, had gifted an undivided Five acres to his son, Kathirama Thamby Sithamparapillai who later became Swamy and was known as Swamy Nadarajananthar. The said Swamy Nadarajananthar by Deed bearing No. 12082 dated 09-11-1943 attested by P.K. Velupillai, Notary Public marked P4, gifted his rights to Kathirama Thamby Theivanapillai. Thereafter, the said Kathirama Thamby Theivanapillai and other co-owners of the larger land, (land in schedule A) namely Kathirama Thamby Alagaratnam, Kathirama Thamby Sivasidamparam and Kathirama Thamby Chellamma, having executed a Deed of Partition bearing No. 1581 dated 22-05-1951 attested by Santhiresegari, Notary Public marked P5, got their undivided rights devided. Accordingly, the said Kathirama Thamby Theivanapillai became the owner of the land in suit which is described in schedule B, who had conveyed the same to the plaintiff (A. Zeenathumma) by Deed No. 3694 dated 09-04-1982 attested by N. Rasiah, Notary Public marked P6. Accordingly, the appellatant became the owner of the land in suit.

It is to be noted that the learned trial Judge has accepted the paper title of the appellatant, and thereafter, dismissed the appellatant’s action on the basis that the respondents have acquired prescriptive title to the subject matter.

Hence, the only question to be determined in this appeal is as follows:

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<sup>3</sup> [1997] 3 Sri LR 327.

*“Whether the respondents, in terms of section 3 of the Prescription Ordinance, have acquired prescriptive title to the subject matter?”*

**Prescriptive title of the respondents to the land in dispute:**

In *re vindicatio* actions, once the paper title of the plaintiff is established, the onus of proof shifts to the defendant to establish his legal entitlement to be in possession of the subject matter. In the event of failure on the part of the defendant to prove his legal entitlement, there is no option for the trial judge, but to enter a judgment in favour of the plaintiff as prayed for in the prayers to the plaint.

In ***Don Namaratne vs. Don David***<sup>4</sup>, S. N. Silva, CJ, (agreeing with Bandaranayake, J. and Yapa, J.) held that,

*“The learned President’s counsel for the Defendant submits that the plaint is defective since the date on which wrongful possession on the part of the Defendant commenced is not set out. We cannot agree with this submission. The owner is entitled to possession of his property at all times. The rights of others are subject to the right of ownership. Once the title of the Plaintiff is admitted or proved, the burden shifts to the Defendant to prove his right to possess the property. If the Defendant fails to prove the right [Tenancy, licensee superior title] judgment to be entered in favour of the Plaintiff. In the re-vindicatio action, if the title of the Plaintiff is admitted by the Defendant, the Defendant should begin the case.”*

In ***Sirinivasam Prasanth vs. Nadaraja Devaraja***<sup>5</sup>, recently the Supreme Court reiterated the above position as follows:

*per* Mahinda Samayawardena, J.

*“In a vindicatory action, the initial burden is on the Plaintiff to prove title to the property. If he fails to prove title, the Plaintiff’s action shall*

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<sup>4</sup> SC Appeal No. 54/2002, SC Minutes of 17.02.2003.

<sup>5</sup> SC Appeal No. 163/2019, SC Minutes of 22.03.2021.

*fail, no matter how weak the case of the Defendant is. However, once the paper title to the property is accepted by the Defendant or proved by the Plaintiff, the burden shifts to the Defendant to prove on what right he is in possession of the property.*

In the instant case, the respondents are claiming a prescriptive right to the land in dispute. Thus, the burden is on the respondents to prove the purported claim of prescriptive title with strong and cogent evidence in terms of section 3 of the Prescription Ordinance which reads thus:

*“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 favour with costs.”*

It is trite law that any person who claims prescriptive title to a land, must prove the fact that he was in possession of such land at least for a period of 10 years. It is pertinent to note that, having raised the issues No. 07 and 08, the respondents are claiming the land in dispute on prescription on the basis that they have been in possession of the same for more than 05 years.

The issues No. 07 and 08 framed by the respondents are reproduced as follows:

7. *Are the defendants possessing the land which is morefully described in the schedule B of the plaint and lot No.3 in the plan for more than 05 years considering as their own land?*
8. *If answered to the above issue in the affirmative, is the defendants are prescribed for this land?*

Since, there is no issue framed by the respondents stating that they are in possession of the corpus for a period of 10 years, the respondents are not entitled to claim the prescriptive title to the same. Besides, it is manifestly clear from the issues No. 07 and 08 that *the respondents have admitted the fact that they are in possession of the land in suit less than 10 years*. In the circumstances, this Court is of the view that the respondents have not acquired prescriptive title to the land in dispute.

Furthermore, the attention of this Court is drawn to the fact that though the respondents in their answer claimed title to the subject matter upon a Deed bearing No. 11861 dated 23-10-1956 attested by C. Gnanamuttu, Notary Public, at the trial, they have opted not to claim rights upon the said deed.

Besides, the 1<sup>st</sup> respondent in his evidence categorically asserted that his father's name (3<sup>rd</sup> respondent) has been entered in the paddy land registry marked D1 in 1980<sup>6</sup>. This case was instituted in the District Court of Kalmunai in 1983. As such, the only document, D1 produced by the respondents does not substantiate the possession of the respondents for a period of 10 years.

The witnesses who gave evidence on behalf of the respondents, namely Vattavithanai Ismalebbe, Mohamed Haneefa Thajeem (Grama Niladari), Udumalebbe Abdul Careem (owner of the adjoining land) and the

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<sup>6</sup> *Vide* page 127 of the Appeal brief.



respondents merely asserted that the respondents were in possession by cultivating the land in suit. The attention of this Court is drawn to the fact that there is no iota of evidence adduced to prove the fact that the respondents' possession was adverse against the true owner, i.e. the appellant. Mere statements of the witnesses stating that the respondents possessed the land in dispute can not establish the significant requirement of adverse possession against the true owner in order to claim prescriptive title.

In the case of **De Silva vs. Commissioner General of Inland Revenue**<sup>7</sup>, it was held that *“a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.”*

In the case of **Sirajudeen vs. Abbas**<sup>8</sup> the Supreme Court held that;

*“Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.*

*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.*

*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.*

*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*

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<sup>7</sup> 80 NLR 292, (Samarakoon CJ, Wijeratne J and Sharwananda J).

<sup>8</sup> [1994] 2 Sri LR 365.

*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.”*

In the circumstances, this Court is of the considered view that the respondents totally failed to adduce adequate evidence to establish their purported claim of prescriptive title to the subject matter, and therefore, the impugned judgment of the learned District Judge of Kalminai holding that the respondents have acquired prescriptive title is palpably erroneous and misconceived in law.

For the foregoing reasons, the appeal is allowed and the judgment of the learned District Judge of Kalmunai dated 12-01-2000 is set-aside. A judgment in favoure of the plaintiff as prayed for in the prayers to the plaint is entered.

Since the appelliant could not cultivate the subject matter from May 1982 due to the unlawful occupation of the respondents, the appelliant is entitled to the damages as prayed for in the plaint.

The issues have been answered as follows:

1. Yes.
2. Yes.
3. Yes.
4. Yes, as prayed for.
5. (a) Yes.  
(b) Yes.  
(c) Yes.

6. Does not arise.

7. No.

8. No.

The learned District Judge of Kalmunai is directed to enter a decree accordingly.

The Registrar of this Court is directed to dispatch a copy of this Judgment along with the original case record to the District Court of Kalmunai.

*Appeal allowed.*

Judge of the Court of Appeal

**K. K. A. V. SWARNADHIPATHI, J.**

I agree.

Judge of the Court of Appeal