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

Court of Appeal Case No.:
804/2000 (F)

District Court of Panadura:
DC Case No: 421/P

Kottaralage Seulet Eanet Peiris (nee Caldera)
No 15, Bishop Terrace, Laksapathiya, Moratuwa.

PLAINTIFF

Vs.

1. Halpewattage Sri Ranjani Mallika Peiris,
   No. 15, Bishop Terrace,
   Laksapathiya, Moratuwa,

2. Halperattage Sri Kanthi Sudarma Srimathi Peiris,
   No. 125, Kawdana Road,
   Dehiwala.

3. Hettige Millee Magret,

   No. 46, now No.52, Kithalanduwa,
   Willorawatta, Moratuwa

4. Lindamulage Erin Malkanthi De Silva

5. Lindamulage Renuka de Silva

6. Lindamulage Mallika de Silva

7. Lekamge Eveline Perera

8. Lindamulage Sepala de Silva

9. Lindamulage Suranjith de Silva

10. Lindamulage Rathnasiri de Silva

11. Balapuduwage Eveline Magret Mendis

    All of No. 120, Willorawatta
    Moratuwa.

DEFENDANTS

AND BETWEEN

1. Lindamulage Erin Malkanthi De Silva

2. Lindamulage Renuka de Silva

3. Lindamulage Mallika de Silva

4. Lekamge Eveline Perera

5. Lindamulage Sepala de Silva

6. Lindamulage Suranjith de Silva

7. Lindamulage Rathnasiri de Silva

8. Balapuduwage Eveline Magret Mendis

All of No. 120, Willorawatta
Moratuwa.

DEFENDANT-APPELLANTS

Vs.

Kottaralage Seulet Eanet Peiris (nee Caldera)
No. 15, Bishop Terrace,
Laksapathiya,
Moratuwa.
[Deceased]

1A. Halpewattege Krishanthas Lakmal Peris,
No. 17/2, Bishop Terrace,
Laksapathiya,
Moratuwa.
[Substituted Party]

PLAINTIFF-RESPONDENT

1. Halperattage Sri Ranjani Mallika Peiris
No. 15, Bishop Terrace
Laksapathiya, Moratuwa.
[Deceased]

1A. Ranbaranage Ranjith Silva,
No. 15, 1st Lane, Bishop Terrace,
Lakshapatiya, Moratuwa.
[Substituted Party]

2. Halpewattage Sri Kanthi Sudharma
Srimathi Peiris
No. 125, Kawdana Road,
Dehiwala.

3. Hettige Millee Magret,
No. 46, now No. 52, Kithalanduwa
Road, Willorawatta Moratuwa.

DEFENDANT-RESPONDENTS

Before:	**Prasantha De Silva, J.**
	K.K.A.V. Swarnadhipathi, J.
Counsel:	Chathura Amaratunge AAL for the Defendant-Respondents
	A.K. Chandrakantha AAL on the instructions of the Legal Aid Commission for Defendant-Appellants
Written Submissions: filed on	Written submissions were not filed by both parties.
Delivered on:	14.07.2023

Prasantha De Silva J.

Judgment

It appears that the Plaintiff instituted action bearing no 421/P in the District Court of Panadura to Partition an allotment of land called Lot 'D' of Willorawatte described in the schedule to the Plaint and also depicted as Lot 'D' in plan bearing no 5402 dated 30.03.1940. 1st to 8th Defendants filed their statements of claim and thereafter, the trial commenced on nine points of contest of which 1st to 4th points of contest were proposed by the Plaintiff and points of contest no 5th - 9th were proposed by the Defendants.

Apparently, Plaintiff had adduced evidence on behalf of the Plaintiff and 4th Defendant had given evidence on behalf of the Defendants.

However, at the end of the trial the Learned District Judge answered the said points of contest no 1,2,3 in the affirmative and 4,5,7 points of contest were answered as not proven and 6th and 9th points of contest were answered in the negative. It is interesting to note that 8th point of contest was decided in the affirmative. However, the learned District judge held in favour of the Plaintiff by judgement dated 17.08.2000 and ordered to enter the interlocutory decree accordingly.

Being aggrieved by the said judgment 4th to 11th Defendant-Appellants have preferred this Appeal seeking to set aside the judgment dated 17.08.2000 and sought relief prayed in prayer to the statements of claim of the Defendant-Appellants.

According to the evidence of the Plaintiff the corpus sought to be partitioned is 'Lot D' a portion of land allotted in the final partition decree in the District Court of Colombo case bearing no 617 Partition and the said Lot 'D' is depicted in the final partition plan bearing no 5402 dated 03.03.1940 marked as P2.

When this matter was taken up for trial on 24.01.1996, it was recorded as an admission that the corpus sought to be partitioned in the instant action is depicted as Lot 'D' in final partition plan bearing no. 5402 dated 30.03.1940 prepared by M. L. De Silva Licensed Surveyor.

The said final partition decree was marked and produced in evidence as 'P1'. The said Lot 'D' was allocated to 4th Defendant in the said partition action bearing no 617/P in the District Court of Colombo, namely Richard Vincent Mendis of Laxapathiya-Moratuwa.

The said lot 'D' was described in the final Partition decree as follows, Lot D is bounded on the,

North: by Lot E

East: by 'Panadura River'

South: by 'Kahatagahawatte' formerly of B.D. Mendis

West: by Lot 'C'

in the extent of Acres - 0, Roods - 0 and Perches - 29.85

It is to be noted that the schedule of the Plaint described the same land Lot 'D' which was sought to be partitioned.

'බස්නාහිර පළාතේ කොළඹ දිස්ත්‍රික්කයේ සල්පිටි කෝරලේ පල්ලේ පත්තුවේ මොරටුවේ විලිලෝරාවත්තේ පිහිටි විල්ලෝරා වත්ත කියන ඉඩම සඳහා වර්ෂා 1940.03.30 දින ඇම්.ඩී. ඩි සිල්වා මාවත තැනගේ අංක 5402 බෙදුම් පිඹුරේ අංක 'ඩී' දරණ කැබෙල්ලට මායිම්:-

උතුරට: එම පිඹුරේ ප්‍රකාර ඊ දරණ කැබෙල්ලද,

නැගෙනහිරට: පානදුර ගඟද

දකුණට: බී.ඩී. මැන්ඩිස්ට අයිතිව තිබූ කහටගහවත්තද, (දැනට ජෝන් බාස් හිමිකම් කියන ඉඩම)

බස්නාහිරට: අංක 'සී' දරණ කැබල්ලද මායිම් වන්නාවූ

අක්; 0 රූ0 ප29.85ක් විශාල ඉඩම වේ.

එම ඉඩම කොළඹහ ඉඩම ලියාපදිංචි කිරීමේ කයීාලයේ ඇම්. 1788/157 හි ලියාපදිංචිවි ඇත.'

The said Richard Vincent Mendis became entitled to Lot 'D' in plan bearing no 5402 marked as 'P2' and produced in evidence by virtue of final partition decree 'P1' in case bearing 617/P.

The Plaintiff adduced evidence that the said Richard Vincent Mendis has transferred his rights to Martheles Caldera father of the Plaintiff by deed bearing no. 2272 dated 01.06.1945 marked as 'P3' and produced in evidence.

Subsequently, Martheles Caldera died leaving his four children namely Yasmin Hendry, Mulin Ignal, Rekey Margaret and Seulet Eanet (the Plaintiff).

The said Yasmin Hendry, Mulin Ignal and Henley Margaret transferred their rights to their sister Seulet Earnet, the Plaintiff by deed bearing no 3330 dated 02.07.1991 marked as [P4], whereupon the Plaintiff became entitled to the entirety of Lot 'D' depicted in plan bearing no 5402 [P2].

The Plaintiff after retaining undivided 1/3rd of said Lot 'D' for herself, had transferred the balance undivided 2/3rd to her two children Ranjani Mallika, the 1st Defendant and Sudharma Srimathi, the 2nd Defendant, by virtue of deed bearing no 1671 dated 21.02.1992 '1වි1'.

Therefore, the Plaintiff, 1st Defendant and 2nd Defendant became entitled for 1/3rd each of the corpus.

However, it was brought to the notice on behalf of the 4th to 11th Defendant-Appellants that the said deeds marked as P3, P4 and 1වි1 are not contained in the appeal brief.

As such, counsel for the 1st -8th Defendant-Appellants urged Court that the said deeds marked as P3, P4 and 1වි1 pertain to the title of the Plaintiff have failed to reach the record of the case warrants a dismissal of the Plaintiff's case on this ground alone.

Court observes that these three deeds P3, P4, and 1වි1 marked in evidence are not in the appeal brief.

However, it is pertinent to note, according to proceedings dated 24.03.1998 the said deeds P3, P4 and 1වි1 had been marked by the Plaintiff in evidence without any objection by the Defendants.

Since the Defendant-Appellants had not challenged those deeds and as the said deeds were not marked 'subject to proof', the deeds P3, P4 and 1වි1 are deemed to be admitted by the contesting Defendants.

It is to be noted that the plaintiff has listed these three deeds bearing no's 2272 dated 01.06.1945 [P3], 3330 dated 02.07.1991 [P4] and 1671 dated 21.02.1992 21.02.1992 [1වි1] in the list of witnesses and documents dated 29.12.1995.

The Plaintiff's evidence was concluded, and the Plaintiff case was closed on 19.05.1999 and at the closure of the Plaintiff's case, it was informed that the Plaintiff's case is being closed by marking documents පැ1, පැ2, පැ3, and පැ4.

On perusing the judgment of the learned District Judge, it is seen that the learned District Judge had considered the final partition plan [P2] and the final partition decree [P1] in case bearing no D.C Colombo 617/Partition and also deeds marked as P3 and P4.

Court observed that deed bearing no 1671 dated 01.02.1992 marked as 1වි1, which is the deed that plaintiff gifted 1/3rd each to her children the 1st and the 2nd Defendants, had not been mentioned as 1වි1 at the closure of the Plaintiff's case. Nevertheless, it is in evidence that,

> *'පැමිණිලිකාරිය පැ4 වශයෙන් ලකුණු කර ඉදිරිපත් කරන ලද අංක 3330 දරන ඔප්පුව මගින් පැමිණිලිකාරයින්ගේ සහෝදරයින් විසින් එම ඉඩම පැමිණිලිකාරියට පවරා ඇත. පැමිණිලිකාරිය එම දේපොලෙන් 1/3න් තමා වෙත රඳවා ගෙන ඉඩම 2/3, 1 හ 2 විත්තිකරුවන්ට පවරා ඇත.'*

It is worthy to note that on the proceedings dated 24.03.1998 following was recorded,

> *ප්‍ර: තමා මෙම අයිති දේපල දැනට 'ඩී' අක්ෂරයෙන් තිබෙන ඉඩම තමා විසින් තමාගේ ළමයාට 1/3 තමා ලබගෙන ඉතිරි හරිය පවරා තිබෙනවා.*

උ: 1,2 විත්තිකරුවන් දෙදෙනාටය.

ප්‍ර: මෙම පැවරීම කර තිබෙන්නෙ 1992.02.01 දින ලලිතා චන්ද්‍රරත්න ප්‍රසිද්ධ නොතාරිස් තැන සහතික කරන ලද අංක 1671 දරන ඔප්පුවෙන්ය.

උ: ඔව්, එම ඔප්පුව 1වි1 වශයෙන් ලකුණු කරනවා.

It seems that the contesting Defendants had not challenged the said deed 1වි1 as well and it was also marked without any objection. Thus, it can be considered that 1වි1 is admissible in evidence for the purpose of proving the pedigree of the Plaintiff.

Therefore, it clearly shows that although the learned District Judge had not referred to deed 1වි1 in his judgment, it seems to be an omission. However, the learned District Judge had come to the correct findings of fact and had come to the correct conclusion that the Plaintiff has proved her pedigree and therefore the Plaintiff, 1st and 2nd Defendants are entitled to equal shares of the corpus.

However, it was the contention of the Defendant-Appellants that,

- the learned District Judge had not properly evaluated the evidence adduced on behalf of the Defendant-Appellants and thereby misdirected himself in relation to the requirements to establish proof of prescriptive title;
- the learned District Judge has not properly investigated the title of the Plaintiff with regard to the corpus of the instant action.

According to the evidence adduced by the 4th Defendant on behalf of the Defendants, the original owner of the corpus was one Lindamulage John Richard De Silva. Therefore, it was the position of the contesting Defendants that since the said Lindamulage John Richard De Silva had been in possession of the corpus for a long period of time, he became entitled to a prescriptive title over the land,

As such, it is clear that the contesting Defendants solely relied on the prescriptive title of the said Lindamulage John Richard De Silva.

In a situation where the Plaintiff proved his pedigree, and the Defendants are claiming the property rights and solely depending on a prescriptive claim, it is the burden of the Defendants to prove their claim to the land by way of prescription.

In this regard, attention is drawn to Section 03 of the Prescription Ordinance No 22 of 1871;

"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:

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 only evidence adduced by the 4th Defendant with regard to the possession of their original predecessor Lindamulage John Richard De Silva was that he had paid assessment tax to the subject matter in dispute from the year 1942. According to the Assessment Register [6වි1] assessment tax had been paid by the said Lindamulage John Richard De Silva during the period from 1942 to 1985 for the premises bearing no 52/3, Kithulandaluwa Road, Willorawatte.

In the case of ***Kirihamy Muhandirama Vs Dingiri Appu 6.N.L.R 197*** an action brought by the plaintiff to vindicate certain lands from the Defendants, *Moncriff J.* held that

"in order that a person may avail [in order for a person to avail] himself of section 3 of the Prescription Ordinance No. 22 of 1871,*

(1) Possession must be shown from which a right in another person cannot be fairly or naturally inferred.

(2) Possession required by the section must be shown on the part of the party litigating or by "those under whom he claims.

(3) The possession of those under whom the party claims mean possession by his predecessors in title.

(4) Judgement must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action."

Since the Defendant-Appellants solely relied on prescriptive title of their predecessor the said Lindamulage John Richard De Silva, it is the burden of the Defendant-Appellants to prove prescriptive possession of their predecessor.

Thus, the Defendant-Appellants are obliged to prove that they had exclusive possession of the defined block of land claimed by the Defendant-Appellant without any interruptions or disturbances for well over a period of ten years.

In this regard, a mere general statement of witnesses that the possessor had possessed the land in dispute is not sufficient evidence to prove prescriptive possession.

In ***Juliana Hamine Vs. Don Thomas (59 N. L. R. 546)*** *L. W. De Silva J.* observed that when a witness gives evidence of prescriptive possession and states "I possessed" or "we possessed" the Court should insist on those words being explained and exemplified. The Court relied upon the observation made by *Bertram C.J.* in the case of ***Alwis Vs. Perera (21 N.L.R. 321)*** (full bench) in which it states that;

> "I wish very much that the District Judges - I speak not particularly, but generally- when a witness says, "I possess" or "we possess", or "we took the produce" would not confine themselves merely to recording the words but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."

On behalf of the Defendant-Appellant the 4th Defendant Lindamulage Erin Malkanthi De Silva adduced evidence to establish their prescriptive claims.

The 4th Defendant has stated in evidence that the impugned subject matter of the instant action had been possessed for a long period of time by Lindamulage John Richard Silva and as such became entitled to a prescriptive right. Nevertheless, no evidence was adduced to prove how Lindamulage John Richard De Silva came into possession of the impugned land and whether he

developed the land. Thereby the Defendant-Appellants had failed to prove the date or period from which the adverse possession commenced to claim a prescriptive right.

It is to be noted that the 4th Defendant had said in evidence that her father is more competent than her to adduce evidence in this regard, but the father was not called as a witness to give evidence.

The only evidence submitted by the Defendant-Appellant to prove a period of possession by the said Lindamulage John Richard De Silva was by producing an assessment register 6වි1 to show that assessment tax had been paid during the period from 1942 to 1985. However, it was not revealed in evidence that the said Lindamulage John Richard De Silva was in exclusive possession of the subject land during the said period 1942-1985, which is the requirement for a prescriptive title under our law as elucidated in section 3 of the Prescription Ordinance.

In the case of ***Sirajudeen Vs Abbas [1994(2) S.L.R 365]***, *G. P. S. De Silva C. J.* elucidated the legal requirements and proof necessary to establish prescriptive title in the following manner,

> *"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 find a claim based on prescriptive title.*
>
> *As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiffs 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 witness should speak to specific facts and the question of possession has to be decided thereupon by Courts.*
>
> 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 to 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."

It is worthy to note that according to the assessment register 6වි1 from 1986 onwards, owners name has been changed and it indicates for the year 1986 successors of L.J.R De Silva and for the period of 1987-1990 Erin Malkanthi De Silva's name appears on the register.

The said Malkanthi De Silva is the 4th Defendant-Appellant who gave evidence before the learned District Judge. It is observable that in cross-examination the said witness the 4th Defendant could not describe the boundaries of the subject land.

Court draws the attention to the plan submitted by the contesting Defendants, bearing no 397 dated 04.09.1985 marked as 4වි1 and produced in evidence. The said plan depicts lot 'D' in plan bearing no 5402 dated 30.03.1940 [P2] made by M.S De Silva licensed surveyor and filed of record in District Court of Colombo Case no 617/P which is in the lot allocated to Richard Vincent Mendis in the said final partition decree of the District Court of Colombo case bearing no 617/Partition.

The said lot 'D' was subdivided into lots 1,2,3,4 and 5 by plan bearing no 397 dated 04.09.1985 [4වි1]. Therefore, it is apparent that the Defendant-Appellants had admitted that the impugned corpus is lot 'D' depicted in the final partition plan bearing no 5402 dated 30.03.1940 [P2]. This is tantamount to an admission that the original owner of lot 'D' is Richard Vincent Mendis.

Since the Plaintiff has proved her title, it is the burden of the Defendant-Appellants to prove their prescriptive right to the subject matter.

According to Section 03 of the Prescriptive Ordinance, proof of exclusive possession by a title adverse to or independent of that of the plaintiff is an essential element to prove prescriptive title.

Hence, it is relevant to note that the Defendant-Appellants had not proved the necessary ingredients to claim a Prescriptive title to the subject matter of the instant action. Apparently, the Defendant had failed to establish that said Lindamulage John Richard De Silva had acquired a Prescriptive title to the subject land.

It is noteworthy that the preliminary plan bearing no 6305 dated 20.03.1993 and report were marked as 'X' and 'Y' respectively, by the contesting Defendants in cross-examination of the Plaintiff.

It is seen that the boundaries of Plan 'X' tallies with the corpus described in the schedule to the Plaint. Nevertheless, the extent surveyed in Plan X is 38.9 Perches and the extent of Lot 'D' in Plan marked as [P2] described in the schedule to the Plaint is 29.85 perches.

The report [X1] states that the boundaries are shown by 3,4,5,6,7 Defendants. Since the extent surveyed is more than 9.05 perches had been surveyed extra and included to the corpus. However, the surveyor had superimposed Lot 'D' in Plan 'P2' on Plan 'X'. Therefore, it is clear that the 4th to 11th Defendants are in possession of the adjacent land to Lot 'D'.

It is to be observed that the title deeds marked as 4වි2, 4වි4, 4වි5 and, 4 වි6 relied upon by contesting Defendants, referred to a Plan bearing no 397 dated as 02.09.1985 [4වි1]. However, court observes that the report pertaining to the said Plan [4වි1] was not produced in evidence nor filed of record.

It is worthy to note that since those title deeds were executed in the year 1985 and assuming that the contesting Defendants encroached upon to lot 'D' and commenced adverse possession in 1985, and since the Plaintiff instituted the instant partition action on 30.03.1992, the contesting Defendants have not proved that they have exclusively possessed the corpus with defined boundaries for a period of 10 years to establish prescriptive possession to acquire prescriptive right.

Therefore, Court is of the view that the contesting Defendants had not proved the necessary ingredients to establish their prescriptive possession to claim a prescriptive right to the corpus in dispute.

Hence, it clearly manifest that the learned District Judge had come to the correct findings of fact and law and held against 4th to 11th Defendant-Appellants. As such, we see no reason to interfere with the judgment of the learned District Judge of Panadura dated 17.08.2000. Therefore, the appeal is dismissed with costs.

Appeal dismissed with costs.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL