

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

1. Mohamed Haniffa Mohamed Anwar
2. Mohamed Haniffa Mohamed Iqbal
3. Abdul Lathif Ziard

All of Main Street, Periya Kinniya, Kinniya.

PLAINTIFFS

C.A. Case No. 987/1998

D.C. Trincomalee Case No.  
519/1995

-Vs-

1. Abdul Samathu
2. Hathijambu

Both of Periya Kinniya, Kinniya.

DEFENDANTS

AND NOW

1. Abdul Samathu
2. Hathijambu

Both of Periya Kinniya, Kinniya.

DEFENDANT-APPELLANTS

-Vs-

1. Mohamed Haniffa Mohamed Anwar
2. Mohamed Haniffa Mohamed Iqbal
3. Abdul Lathif Ziard

All of Main Street, Periya Kinniya, Kinniya

PLAINTIFF-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : V. Puvitharan for the Defendant-Appellants  
Jegasothy with R. Ranatunga and P. Krishanthan  
for the Plaintiff-Respondents

Decided on : 01.11.2016

A.H.M.D. Nawaz, J.

The Plaintiffs-Respondents (hereinafter sometimes referred to as “the Plaintiffs”) instituted this action, praying among other things for a declaration of title to the premises morefully described in the schedule to the plaint, declaration of unlawful possession of the said premises on the part of the Defendant-Appellants (hereinafter sometimes referred to as “the Defendants”) and ejectment of the Defendants therefrom. In fact the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are brothers of the 2<sup>nd</sup> Defendant, while the 1<sup>st</sup> Defendant is the husband of the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Plaintiff happens to be the nephew of the Plaintiffs and 2<sup>nd</sup> Defendant. It was the claim of the Plaintiffs that it was with the leave and licence of their mother-Meera Ummah that the Defendants-their brother in law and sister had entered the premises.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who are husband and wife respectively, filed answer averring that the land in question had been given to them as a nuptial dower on the occasion of their marriage and they had been living on the land for more than twenty three years.

They further pleaded prescription which is referable to Section 3 of the Prescription Ordinance. The Defendants, in the circumstances, prayed for a dismissal of the plaint and declaration of title on the strength of their alleged prescriptive title.

The respective cases of the parties went to trial on 15 issues with Issues No. 1 to 6 and 11 to 14 by the Plaintiffs and Issues No. 7 to 10 and 15 by the Defendants.

The person whom the Plaintiffs claimed to be the licensor of the premises -the mother of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the 2<sup>nd</sup> Defendant, was summoned to testify and her evidence was that she permitted her eldest daughter-the 2<sup>nd</sup> Defendant to live in her house in 'Vedankarai' when one fine day the 2<sup>nd</sup> Defendant-daughter had turned up at her house where the witness was living with her husband, the Plaintiffs, and a daughter. The matriarch of the family was emphatic that the residence of the 2<sup>nd</sup> Defendant commenced in the house in Vedankarai with her leave and licence. She further testified that by the time the permissive possession of the 2<sup>nd</sup> Defendant began, she had already settled the 2<sup>nd</sup> Defendant in a dowered property in a place called 'Kuttikarachchi'-which was away from Vedankarai. This evidence makes it clear that the house where the 2<sup>nd</sup> Defendant was permitted to live in Vedankarai with the leave and licence was not a dowered property but premises where the witness had been living with her sons. Though the 2<sup>nd</sup> Defendant was given a dowry in Kuttikarachchi, after a lapse of 2-3 years, the 2<sup>nd</sup> Defendant came to Vedankarai and began to live in the house where the witness had been living with her unmarried children.

However, it would appear that troubles began to develop between the siblings in that the daughter (2<sup>nd</sup> Defendant) and the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs (brothers) were soon embroiled in altercations that led to the police instituting action making them parties. This has possibly led to the witness - transferring the house and the land to her sons-the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and a grandson (3<sup>rd</sup> Plaintiff). The Deed of Gift bearing No. 4570 in favor of all three Plaintiffs, which was executed on 05.08.1990, attested by Notary Public S.A. Hameed, was produced at the trial marked as "P1". The witness testified that this property had devolved on her by way of a gift from her own maternal grandmother-P2. Her husband had built a house thereon and paid land tax-P4.

In cross-examination, the witness was affirmative that the subject-matter of the action was never given as a nuptial settlement on the 2<sup>nd</sup> Defendant-daughter. Another suggestion that the Defendants were possessing the subject-matter of the dispute, *possessio civilis*, was also repudiated by the witness.

Whilst the mother was thus emphatic that the 2<sup>nd</sup> Defendant lived on the subject-matter with her leave and licence and she parted with the title of this land to the Plaintiffs by way of a deed of gift on 05.08.1990, the 1<sup>st</sup> Plaintiff who was summoned to give evidence testified on the same tenor as his mother.

### 1<sup>st</sup> Plaintiff's Testimony

The pith and substance of his testimony was that he along with the 2<sup>nd</sup> Plaintiff (a brother) and 3<sup>rd</sup> Plaintiff (his nephew) became the owners of the disputed land by way of the deed of gift executed by her mother on 05.08.1990. The Defendants-his sister and brother in law came to reside on the subject-matter of the land at the beginning of 1990, when his parents and he had been living on the land. She was permitted to live on the house, as she was their sister. The questioning by Court of the 1<sup>st</sup> Plaintiff also elicited the following items of evidence.

1. By the time the 2<sup>nd</sup> Defendant-sister came to live with them in 1990, the deed of gift had already been executed in favour of the Plaintiffs.
2. The 2<sup>nd</sup> Defendant was permitted to live as she had settled all her properties on her own children and she had nowhere else to go.

The 1<sup>st</sup> Plaintiff also referred to Section 66 proceedings in the Magistrate's Court, Trincomalee which had been instituted on a complaint made against the Defendants consequent to a fracas that had arisen between the parties. The Court had by its order dated 22.11.1994 restored possession of the Defendants until title was adjudicated in a civil court. The witness had left the premises consequent to the 66 application but he asserted that he sent a letter, through his Attorney-at-Law dated 09.03.1995, to the Defendants. Though this document had been marked as P6, it appears that this document does not seem to be part of the record but the reply sent to P6 by the Defendants through their Attorney-at-Law marked "P7" clarifies that P6 was a letter which had been received by them.

In fact the learned District Judge states that P6 also contained a notice terminating the leave and licence, but the Defendants had denied leave and licence in P7 with the

assertion that they had been living on the land in their own right. The 2<sup>nd</sup> witness for the Plaintiffs namely 1<sup>st</sup> Plaintiff further testified that since the Defendants did not leave the premises in response to P6, the civil action was instituted. The witness under cross-examination stated that it was with the leave and licence of his mother that Defendants came to live on the land in question. At the conclusion of the Plaintiff's case, the 2<sup>nd</sup> Defendant testified on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. She asserted that the subject-matter of the action was dowered to her on her marriage though it was not in writing.

The thrust of her brief examination in chief was to the effect that she had paid taxes for the land and she possessed it on her own. In cross-examination she admitted that she had a house elsewhere in a place called "Kuttikarachchi". She did live in Kuttikarachchi but only for a month. In fact, it should be recalled that the testimony of the 2<sup>nd</sup> Defendant's mother was that it was in Kuttikarachchi that the 2<sup>nd</sup> Defendant was given dowry and the 2<sup>nd</sup> Defendant admits to living in Kuttikarachchi, rendering the testimony of the mother more probable.

The possession of the land by the Plaintiffs in 1994, when the Section 66 inquiry terminated, was also corroborated by the 2<sup>nd</sup> Defendant, when she said that the police subsequent to the termination of the 66 application took goods and effects belonging to the Plaintiffs from the disputed house and handed them over to the Plaintiffs. This was after the Court had decreed that parties must keep the peace till the determination of title took place in a Court of competent jurisdiction.

The evidence that has transpired in the case could be summarized.

1. The subject-matter of the dispute - the land and house standing thereon had belonged to the mother of the Plaintiffs and 2<sup>nd</sup> Defendant-namely Meera Ummah.
2. In 1990, the mother gifted the subject-matter to the Plaintiffs by a deed of gift.
3. The 1<sup>st</sup> Defendant had been dowered with a land in Kuttikarachchi but she left Kuttikarachchi and came to reside on the subject-matter of the dispute in

Vedankarai with the leave and licence of her mother. The house standing on the dispute was built by the father.

4. The leave and licence were not contradicted by the Defendants when the mother quote categorically asserted it in her evidence.

The donees of this land on the deed of gift namely the Plaintiffs had also been living on this land, when the 2<sup>nd</sup> Defendant was given leave and license.

5. As rumpus broke out, a 66 application was filed in 1993 and it terminated in 1994.
6. The Plaintiffs left the premises immediately thereafter for the purpose of keeping the peace.
7. There is evidence of leave and licence that had been obtained by the Defendants in 1990.

-See page 43 of the appeal brief.

It is quite evident that the 2<sup>nd</sup> Defendant and her husband commenced their possession of the land with the permission obtained from the owner of the premises-Meera Ummah, the mother of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the 2<sup>nd</sup> Defendant. The ruckus between the parties occurred in 1993 when all had been living together in the same house. No suggestion was ever put to the mother nor was it elicited from her that at some point prior to 14.06.1995-the date of institution of action by the Plaintiffs, the permissive possession of the land by the Defendants had turned adverse.

It is trite law 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-see *Sirajudeen and two others v. Abbas* (1994) 2 Sri.L.R 365 -(SC) per G.P.S. de Silva, CJ.

Even in the context of co-ownership, the celebrated case of *Tillekaratne v. Bastian* 21 N.L.R. 12 comprising the full bench of the Supreme Court (Bertram C.J, Shaw and

Sampayo JJ) formulated three propositions of law applicable to what is meant by the word "adverse" - in Section 3 of the Prevention of the Prescription Ordinance-see page 18 of the judgment.

For example proposition 3 went as follows:-

*"A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity"*

The Supreme Court observed: *"the effect of this principle is that where any person's possession was originally not adverse and he claims that it has become adverse, the onus is on him to prove it. And what must be proved? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession..."* at page 19

Upon a careful perusal of all evidence led, I do not find any scintilla of evidence that goes to establish the prescriptive possession of the Defendants. On the contrary it was the permissive possession of the Defendants that was established and in the circumstances I affirm the judgment of the learned District Judge of Trincomalee dated 12.06.1998 and dismiss the appeal of the Defendant-Appellants with costs.

JUDGE OF THE COURT OF APPEAL