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

C.A. Case No. 1045/ 99 (F)

D.C. Matale Case No.

4778/L

Mohamadu Haniffa Siththy Sirin,
No. 328/D, Elkaduwa Road,
Ukuwela.
PLAINTIFF

-Vs-

1. Noordeen Alisa Umma,
   No. 7, Nagahathanna Road,
   Warakamura, Ukuwela.

2. Noordeen Buhary,
   No.8B, Nagahathanna Road,
   Warakamura, Ukuwela.
   DEFENDANTS

AND BETWEEN

1. Noordeen Alisa Umma,
   No. 7, Nagahathanna Road,
   Warakamura, Ukuwela.

2. Noordeen Buhary,
   No.8B, Nagahathanna Road,
   Warakamura, Ukuwela.

DEFENDANT-APPELLANTS

-Vs-

Mohommed Haniffa Siththy Sirin,
No. 328/D, Elkaduwa Road,
Ukuwela.
PLAINTIFF-RESPONDENT

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

COUNSEL : K.V.S. Ganesharajah with M.Pushparajah for the Defendant- Appellants
N.M.Shaheid with Nusky Lathiff for the Plaintiff Respondent

Decided on : 17.01.2017

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

This case raises the usual contest between the paper title pleaded by a Plaintiff and prescription that is put forward by two defendants to defeat the paper title. Whilst the plaintiff is the daughter of one M.M. Haniffa, the two defendants claim to be the children of one M.M. Noordeen who was the brother of the said Haniffa. In other words, the two defendants are the children of the Plaintiff's paternal uncle. By a plaint dated 5th April 1994, the Plaintiff Respondent (hereinafter sometimes referred to as the 'Plaintiff') instituted this action pleading her title to the land in contest which had devolved on her by a deed of gift bearing No. 39143 of 28th September 1972. She prayed for a declaration of title and ejectment of the Defendants in the main. The donor- Mohamadu Haniffa of Warakamura, Ukuwela, Matale- the father of the Plaintiff made this settlement on his daughter- the Plaintiff as an irrevocable gift on her marriage. Admittedly, long before the donor-father parted with this property in favor of his daughter, he had permitted his

brother- the father of the defendants- Noordeen to occupy the land. The land in contest is more fully described in schedule 'B' to the plaint. The narrative of the Plaintiff as to her ownership of the land goes further in that in paragraph 7 of the plaint she asserts that what is depicted in the schedule 'B' to the plaint is the balance portion of the land that remains with her after an extent of 15 acres was sold by her to a 3rd party. It is worth recording at the outset that at the trial the Defendants admitted the title of the Plaintiff to the land which had devolved on her by the aforesaid deed of gift bearing No. 39143 dated 28th September 1972. It was also admitted that the said Noordeen- the paternal uncle of the Plaintiff and father of the Defendants passed away in 1987. The said Noordeen had also been a witness to the deed of gift bearing No. 39143 dated 28th September 1972 wherein his brother Mohamadu Haniffa had donated this property to the Plaintiff.

Thus, apart from the admissions the defendants made as to the ownership of the Plaintiff to this property, the predecessor of the Defendants namely Noordeen had been fully aware of the transfer of title to the Plaintiff by her father as he had subscribed to the deed of gift as a witness. It was the contention of the Plaintiff that after the demise of her paternal uncle Mohamadu Noordeen who had been let on the premises to look after the property, the 1st and 2nd Defendants who claimed to be the children of the deceased Noordeen entered the land and began to dispute the ownership of the plaintiff.

As opposed to this version of the Plaintiff Respondent the Defendant-Appellants (hereinafter sometimes referred to as the "Defendants") filed answer putting forward a deferent version of events, namely they had been living with their father Noordeen on these premises for a long time and even after the death of their father in 1987 their possession had continued giving rise to a possession of more than 10 years which would entitle them to a prescriptive title. In the circumstances the Defendants prayed for a dismissal of the Plaint and a declaration that they were the sole legal owners of the land described in the schedule to the answer.

Thus, there were two rival claims before the learned District Judge of Matale namely a declaration of title prayed for by the Plaintiff and ejectment of the Defendant on the one hand and a claim for declaration of title based on prescription on the part of the Defendants. When the trial was taken up, several admissions were recorded among which one finds an unambiguous admission as to title of the plaintiff to the property.

It is trite law that once the title of the plaintiff is admitted in a *re vindicatio* action, the burden shifts to the defendant to show that his possession is lawful-see ***Wanigaratne vs. Juwanis Appuhamy*** (65 N.L.R.167) where Herat J., (with Abeyesundere J. agreeing) held:

> *"It has been laid down by this Court that in an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title".*

Following the above decision, it was held in the case of ***Sumanawathie vs. Jayakaduwa*** (2012) B.L.R. Vol. XIX Part II, p. 308 that in an action '*rei vindicatio*' the Plaintiff must prove and establish title. Only when the legal title to the premises is admitted the burden of proof is shifted to the Defendant to show that his occupation is lawful. A similar view was taken in the case of ***Wadduwage Dharmadasa vs. Manthree Vithanage Jinasena*** (2012) B.L.R. Vol. XIX, Part II, p. 336, where Anil Gooneratne J. held that, "in a *rei vindicatio* action the Plaintiff must prove and establish his title. If the Plaintiff has so established his title, the burden of proof is shifted to the defendant to establish his lawful occupation if any."

The allegation of the Plaintiff in this case was that the possession of the Defendants had been unauthorized.

Before I look at this question and dispose of it, the learned counsel for the Defendant Appellants attempted to impugn the judgment of the learned District Judge of Matale dated 10th September 2010 by reference to a document marked P8 dated 28th May 1974. This was an affidavit that the uncle of the plaintiff and father of the two defendants Noordeen had executed 13 years prior to his death in 1987 deposing to the fact that he had come on the land in contest with the leave and license of the plaintiff and her father Haniffa. As this affidavit, which admitted the leave and license given to Noordeen, would cut across the case of prescription put forward by the defendants, the learned Counsel for the defendants Mr Ganesharajah strenuously contended that this affidavit could not have been used by the Learned District Judge of Matale to conclude on permissive possession.

As this contention turns on the admissibility of an affidavit given by a deceased person, I would focus on this argument presently after having dealt with some other items of evidence, which Mr Ganesharajah urged, advanced the case of prescription.

Other Items of Evidence to establish prescription.

The question arises whether the Defendants have established in this case that their possession was lawful. Has their claim of prescription trumped the paper title of the plaintiff? It has to be borne in mind that the case of the plaintiff is that the leave and licence terminated with the demise of Noordeen in 1987 and therefore the possession of this land by his adopted children-the Defendants could not be lawful. The allegation was that the defendants entered the premises in 1987 following the death of their father -the licensee. But the defendants have traversed this plea and taken the stance at the trial that their predecessor and they had been on the land for more than 10 years. What are the items of evidence that the Defendants led to establish this position? The learned Counsel for the Defendants relied on electoral registers marked as 2V2 to 2V4 where the names of

the Defendants are reflected under Mohamed Noordeen - a fact which only supports the position of the Defendants that they had been living on the land with the said Noordeen, after having been adopted by him. Yet, one has to remember the evidence led on behalf of the Plaintiff that the possession of Noordeen was permissive. Noordeen had been left on the premises with the leave and licence of the predecessor in title of the Plaintiff and this title passed to the Plaintiff in 1972 by way of a deed of gift. Thus there was no adverse possession on the part of Noordeen to tack on. This was the argument of Mr N.M.Shaheid who appeared for the Plaintiff. This is where the affidavit given by the deceased Noordeen becomes vital. The fact that the adversity which is required for prescription never began is manifested by the affidavit of Noordeen dated 28th May 1974. Noordeen passed away on 29.08.1987-see his death certificate marked as P17 at page 176 of the appeal brief and in this affidavit Noordeen quite clearly declared that his possession of the land was with the leave and licence of his brother Haniffa and thereafter the plaintiff-the one who holds the paper title to the land. I have to consider the effect of the affidavit at this stage because the electoral registers I have spoken to above have been put forward as indicative of independent possession by Noordeen and the defendants. The Defendants argue that these electoral registers begin from as far back as 1965. As opposed to the electoral registers there is the affidavit of Noordeen in 1974 admitting a possession which depends on the title of the plaintiff. Taken on its face value the admission by Noordeen that he was a licensee of the plaintiff and her father cuts across the case of the Defendants that Noordeen's possession was adverse and they have prescribed to the land. That is why the contents of the affidavit given by Noordeen becomes dispositive of the issue in the case-whose title is superior? Is it the title of the plaintiff which has been admitted by the Defendants or the prescriptive title claimed by the Defendants, which if established would defeat the paper title.

Contents of the affidavit dated 28th May 1974

It was only in 1972 that the plaintiff became the owner of the land and in 1974 the occupier of the land Noordeen gave an affidavit. In this affidavit Noordeen an ex-village headman

affirmed that his brother Mohamadu Hanifa's daughter Siththy Sirin the Plaintiff in the case was the owner or/and proprietor of all that land called "*Polgahamula Watta*" situated at Warakamura as depicted in Plan No.2056. He further stated in that affidavit that he had obtained permission to occupy the said land called '*Polgahamula Watta*" and the house standing thereon, with the leave and license granted to him by the Plaintiff and her predecessor in title who was her father and his brother.

Giving the solemn undertaking to look after the said land and house and maintain them in good condition and repair, the said Noordeen deposed in that affidavit that he would vacate and deliver vacant possession of the said land and house to the said Plaintiff, her heirs, executors, administrators and assigns as soon as a demand was made. This affidavit of Mohamadu Noordeen confirmed that he had been there on the land with the leave and license of the Plaintiff and her predecessor in title M.M. Haniffa. This shows that the character of possession of Mohamadu Noordeen the predecessor in title of the Defendants had been *qua* a licensee. It is admitted by the predecessor of the Defendants that he was allowed to occupy the land in dispute as a licensee by both the Plaintiff and her father. In other words, the said Noordeen has accepted the ownership of his brother and his privy and he cannot therefore deny during the continuance of such license the title of the other person- see Section 116 of the Evidence Ordinance which codifies the common law principle of estoppel. Noordeen who entered with the leave and licence of the owner of the land could not claim adverse possession or ownership to the owner unless there was an identifiable event which signified an ouster.

In the case of ***Chelliah vs. Wijenathan*** 54 N.L.R. 337 at 342 Gratiaen J. (with Alan Rose C.J concurring) 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".*

The Defendants who claims prescriptive title to the land in dispute by adverse possession must establish a starting point when their adverse possession commenced and they became entitled to the land. In ***Tillekaratne vs. Bastian*** 21 N.L.R 12-the full bench of the Supreme Court (Bertram CJ, Shaw and De Sampayo JJ) formulated three propositions of law applicable to what is meant by the word "adverse" in terms of Section 3 of the Prescription Ordinance (especially at page 18).

The proposition that is apposite to the instant case is 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 in the case that; *"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 he prove? 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)

But here the predecessor in title to the Defendants claimed permissive possession rather than adverse possession. If entry into possession is on a dependent title, the acknowledged principle in our law is that possession is presumed to continue in that capacity. In other words, prescriptive possession will not commence to run in this situation until and unless the possessor clearly manifests a change in *causa* to possess on an independent and adverse title. In this connection the courts have postulated the principle that the mere *animus* to possess *ut dominus* is insufficient and there must be a verifiable manifestation of that intention as a precondition to the acquisition of a prescriptive title. A corollary to this principle is that the change of character must be shown to have begun at a particular point of time and continued undisturbed and uninterrupted for ten years prior to the institution of the action. The permissive possession as is found in this case must have turned adverse at one point. This is what Gratiaen J. pointed out as the starting point of prescription in ***Chelliah vs. Wijenathan*** 54 N.L.R. 337 (*supra*)-see also the dicta of G.P.S. De Silva C.J (with Kulatunga J. and

Ramanathan J. concurring) in ***Sirajudeen and two others vs. Abbas*** (1994) 2 Sri.LR 365 at p 370 (SC) alluding to the words of Gratiaen J. in ***Chelliah vs. Wijenathan***. G.P.S. De Silva C.J pointed out in ***Sirajudeen*** that the necessity to look for a starting point is a relevant aspect of the plea of prescription which must be borne in mind by trial judges.

But has this starting poin : been established? The affidavit would negative any possibility of a starting point being established in light of the fact that Noordeen deposed to a permissive possession.

Purpose of Giving the Affidavit

Noordeen had passed away on 29.08.1987 and the affidavit was produced and marked at the trial through a Grama Sevaka-one Haniffa Mohamed Haseem who was married to the daughter of a brother of Noordeen. The Grama Sevaka testified that he was a witness to the affidavit given by Noordeen. He saw Noordeen signing the affidavit. Here was the evidence of a witness who saw the deponent of the affidavit subscribe to the affidavit. The witness further stated that the purpose of giving the affidavit was to enable the disbursement of a bank loan to the plaintiff, by way of a mortgage secured over this land. By 1974 , the owner of the land was the plaintiff who wanted a loan and it is consistent with reason and logic that the lender bank possibly wanted a security free from encumbrances and this seems to have been the objective behind giving the affidavit on the part of Noordeen. The occupier Noordeen affirmed to the bank that he was a licensee with the sufferance of his brother and later his niece. After this affidavit was given, there is testimony on record that the plaintiff proceeded to execute a mortgage on the same day as the affidavit namely 28.05.1974 in favour of the Rural Bank, Ukuwela and obtained a loan of a sum of Rs 5,000.

It is this affidavit given by Noordeen which has impelled the learned District Judge of Matale to hold that the permissive possession of Noordeen never turned adverse.

The learned Counsel for the Defendants Mr Ganesharajah strenuously argued that the affidavit was taken only for the purpose of obtaining a loan and it is conclusive only on that fact. It is not proof enough of leave and licence. In other words, this contention was

an invitation to reject the declaration of Noordeen in the affidavit that he was a licensee. It is worthwhile to recall that Noordeen crossed the great divide in 1987 and his affidavit was produced by a witness to the affidavit in 1999 during the course of the trial.

Mr Ganesharajah argued that the contents of the affidavit cannot be used to establish the fact that Noordeen was a licensee. It could only be used to attest to the fact that Noordeen the uncle of the plaintiff gave the affidavit for the purpose of enabling his niece to secure the loan.

I am afraid I would disagree with this argument. The contents of the affidavit of Noordeen were those of an absent witness when the trial came around. But his affidavit spoke volumes of the leave and license and his intention to give up possession on demand. The import of Mr Ganesharajah's argument was that other than for establishing the purpose of the affidavit, the contents of the affidavit could not be used to establish leave and licence. I must observe that when the affidavit was tendered in evidence, it became part of the record without any objections on the part of the Defendants. But it has to be noted that the learned District Judge of Matale relied on the contents of the affidavit to conclude that there was *in esse* leave and licence and this character did not change at any stage prior to the institution of the action in 1994. I must observe that no legal principle was advanced before me to preclude Court from relying on the contents of the affidavit.

Admissibility of an Affidavit of a Deceased Person

The only objection that could be possibly taken to the adduction of the affidavit evidence is that the maker of the document was not before Court and therefore it would be hearsay to lead the evidence of an absent witness like Noordeen.

But our Evidence Ordinance contains within it exceptions to hearsay from Sections 17 . It is the general rule of law that hearsay is no evidence, that is, a witness who has received from someone a narrative whether oral or written, describing some fact in issue or relevant fact is not allowed to give that narrative in evidence to prove the truth of the contents thereof-see the Privy Council decision from Malaya ***Subramanium v Public***

Prosecutor (1956) 1 W.L.R 965. The general rule is that the informant must be called as a witness- ***The King v Karthigesu*** (1946) 47 N.L.R 234.

But our Evidence Ordinance has enacted exceptions to hearsay in Sections 17 to 39. It is the general rule of law that hearsay is no evidence, that is, a witness who has received from someone a narrative, whether oral or written, describing some fact in issue or relevant fact is not allowed to give that narrative in evidence to prove the truth of the contents thereof -see ***Subramaniam v. Public Prosecution*** (1956) 1 W.L.R. 965. The general rule is that the informant must be called as a witness- ***The King v. Kathigasu*** (1946) 47 N.L.R, 234 at 235. But there are exceptions to this exclusionary rule of evidence that enable the adduction of contents of a document such as an affidavit of a deceased person. The classic definition of hearsay was given by Rt. Honorable L.M.De Silva in the Privy Council decision of ***Subramaniam v. Public Prosecution*** (1956) 1 W.L.R. 965:

> Evidence of a statement made to a witness by a person who is nor himself called as a witness may or may not be hearsay. *It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement.* It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

If the object of the affidavit evidence is to prove the truth of what it states to wit the deponent Noordeen entered the land as a licensee then it is shut out as hearsay and the affidavit cannot be led unless the maker of the affidavit is called. In this instance the maker of the affidavit cannot be called but it is axiomatic that any item of hearsay evidence can be led provided there is an exception to the rule against hearsay in the Evidence Ordinance. So one has to find one provision between Section 17 to 39 (exceptions to hearsay) to justify the reception of this hearsay evidence. In my view it is section 32 falling under the rubric "Statement by Persons who cannot be called as witnesses" under which the affidavit evidence of deceased Noordeen could be led.

Section 32 of the Evidence Ordinance admits statements, written or verbal, of relevant facts, and made by persons who are dead. Section 32(3) makes statements of a deceased person relevant in a trial if,

1. it is a statement against *the pecuniary or proprietary interest of the person* making it; or
2. it is a statement which, if true, would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

The section gives two illustrations to this subsection, to wit, illustrations (e) and (f) which show as to how statements of deceased would be used in a trial for their truth. In the same way when Noordeen made a statement in the affidavit that he was a licensee or a tenant, it was definitely a statement against his proprietary interest. This admission implies that his possession of the land was in a dependent capacity and it goes against any claim of prescription. To that extent of excluding an assertion of prescription, the statement in the affidavit is against the proprietary interest of Noordeen and it can be used in the trial for its truth under Section 32 (3) of the Evidence Ordinance.

The affidavit can be adduced under Section 32 (3) of the Evidence, as an exception to the rule against hearsay. The Court can act upon it as substantive evidence. The rationale for reception of such statements is the presumption that what a man states against his interest is generally true. Experience tells us that self-interest induces men to be cautious in saying anything against themselves and when one makes a declaration in disparagement of his own rights or interest, it is generally true and because it is so, the law has deemed it safe to admit evidence of such declarations. So the argument that the affidavit cannot be relied upon for the truth of what it states is patently wrong and has to be rejected.

In the end this statement in the affidavit is relevant and admissible to prove that Noordeen's possession was permissive and the leave and licence terminated when he passed away in 1987. In 1993 the plaintiff complained against the Defendants to police- see the document **2VI**.

This case was instituted in 1994 and if one takes the view that adverse possession was manifested in 1987 by the entry of the defendants into the land after their father had passed away, there is no continuous manifestation of adversity between 1987 and 1994, which is only a period of 7 years.

Therefore the claim of the Defendants that they had prescribed to the land cannot be supported having regard to the evidence. I must advert to another point Mr Ganesharajah raised namely Noordeen had effected a partition by a deed bearing no 454. On a perusal of this partition deed it only becomes apparent that the defendants had been living on a different land. There is no misdirection whatsoever as regards this deed of partition by the learned District Judge.

In the end the prescriptive plea raised by the defendants fails and accordingly I affirm the judgment of learned District Judge of Matale dated 10.9.1999 and I proceed to dismiss the appeal of the Defendant-Appellants.

JUDGE OF THE COURT OF APPEAL