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

Ihala Gedera Pethandiyalage **Premawathie,**
Malwala, Egodamalwala.
PLAINTIFF

C.A. Case No.938/1999 (F)

D.C. Ratnapura Case No.8855/L

-Vs-

1. L.S. Perera,
1a. Sembakutti Arachchige **Ingrid Irangani Perera,**
1b. Priyanka Perera,
1c. Dilani Perera,
1d. Krishani Perara
all of Dorekkanda Estate, Malwala,
Ratnapura.
DEFENDANTS

AND BETWEEN

Ihala Gedara Pethandilage **Premawathie,**
Malwala, Egodamalwala.
PLAINTIFF-APPELLANT

-Vs-

1. L.S. Perera
1a. Sembakutti Arachchige **Ingrid Irangani Perera,**

1b. Priyanka Perera,

1c. Dilani Perera,

1d. Krishani Perara

all of Dorekkanda Estate, Malwala,

Ratnapura.

SUBSTITUTED DEFENDANT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	B.O.P. Jayawardhana for the Plaintiff-Appellant. Athula Perera with Chathurani De Silva for the substituted Defendant-Respondents.
Decided on	:	07.08.2018

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

In this matter the Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action with an original plaint dated 29th July 1988 setting out her pedigree and she prayed for *inter alia*;

1. a declaration of title,
2. ejectment of the Defendant, his agents, tenants, servants and all those claiming under him, and
3. damages in a sum of Rs.10,000/- and additionally compensation in a sum of Rs.500/- per month from 29th July 1988 up to the date of being placed in possession.

In para 6 of this plaint the Plaintiff alleged that the Defendant who had no title to this land disturbed her possession in March 1988 by forcibly entering the land and by chopping 6 trees caused loss in a sum of Rs.10,000/. This was the cause of action that the Plaintiff alleged in her original plaint dated 29th July 1988.

Just after the original answer was filed, the Plaintiff took out a commission through Court and M. Samarasekara, a licensed surveyor and a court commissioner, after his survey reported back to Court with a plan bearing No.2781 along with his report which are at pages 146, 147 and 148 of the brief. The surveyor reported that the land depicted as lot A in his plan formed a portion of lot 89 in F.V.P 344/Sab and this lot A was claimed by both the Plaintiff and the Defendant. In the said plan bearing No.2781 which was marked as 'X' at the trial, lot A has been clearly reflected as being a portion of lot 89-*see* page 146 of the appeal brief.

In order to reflect the dispute as to lot A and further describe the disputed lots in the corpus, the Plaintiff filed an amended plaint dated 12th May 1994 whose schedule had been prepared specially based on the commissioned survey plan (X).

The amended plaint is substantially the same as the original plaint except the schedule to the plaint which describes for the 1st time the disputed lots between the Plaintiff and the Defendant. In terms of this schedule to the amended plaint it is lot A, lot 91A4 and lot No.97 depicted in the Plan No.2781 that form the bone of contention between the Plaintiff and the Defendant. As the amended plaint recites in its pedigree, the original owners of these lots had been Ihalagedara Kaluwalage Hathankira whose rights devolved on his son Ihalagedara Hathankiralage Pethanchiya. After the death of Pethanchiya, the corpus of devolved on Ihalagedara Pethanchiyalage Podisingho (the grandfather of the Plaintiff) whose interest passed on to his son Ihalagedara Pethanchiyalage Jamis Singho (the father of the Plaintiff). The pedigree filed along with the amended plaint dated 12th May 1994 recites that Ihalagedara Pethanchiyalage Jamis Singho (the father of the Plaintiff), by a deed bearing No.13086 and executed on 7th December 1987, transferred his rights to the Plaintiff. It was averred in the amended plaint that both the Plaintiff and her predecessors had been in uninterrupted and undisturbed possession of the land described in the schedule to the amended plaint for more than 10 years. It has to be noted that Jamis Singho (the father) had sold the lots the Plaintiff claimed in his original plaint on 7th December 1987 and the Plaintiff filed this action 7 months later on 29th July 1988.

According to the amended plaint dated 12th May 1994, the Plaintiff averred that the disturbance to the possession of the Plaintiff by the original Defendant took place in March 1989 and it is this disturbance and chopping of 6 trees that had given rise to the cause of action. Certainly the discrepant date, March 1989, appears to be a cardinal bloomer in the amended plaint. Whilst the original plaint alleged that the original Defendant forcibly entered the subject-matter in March 1988, the amended plaint locates the forcible entry to March 1989 as far as the temporal point is concerned and even issue No.3 of the Plaintiff was on the basis that there was a forcible entry in March 1989.

The Plaintiff gave evidence that the people who worked with the original Plaintiff wrongfully entered the land and chopped trees in March 1989-*see* page 59 of the appeal brief. The Plaintiff's Counsel cross-examined the substituted Defendant-Respondent on the basis that the disturbance took place in 1989. In other words the evidence placed against the original Defendant is that he forcibly entered or caused an entry on the land in March 1989 when the original plaint that had been filed in July 1988 stated that the forcible entry was in March 1988. Needless to say, the assertion in the amended plaint that the so called forcible entry of the original Defendant was in March 1989 might have been a typographical error having regard to the original plaint which had fixed the date of unlawful entry in March 1988. It would appear that the Counsel who appeared for the Plaintiff in the trial cross-examined the substituted Defendant-Respondent on the basis that the possession of the Plaintiff was disturbed in March 1989 having raised the point of contest to this effect.

It is pertinent to point out that Mr. Athula Perera for the Defendant-Respondent went to the extent of advancing an argument that the rights of parties have to be determined as at the time of the plaint and as the amended plaint, the issue and the evidence placed against the original Defendant showed, the cause of action possibly arose after the original plaint was filed. No attempt had been made by the Plaintiff to rectify these temporal discrepancies.

In the circumstances, I hasten to observe that trials in the original courts are oftentimes conducted with no amendment or corrections being made to pleadings or proceedings and these lapses result in untoward consequences to a party in the end.

As is axiomatic, a *rei vindicatio* action presupposes that at the time of filing action the Defendant is in unlawful possession and the Plaintiff seeks to vindicate its title and have him ejected from the subject-matter which is depicted in the schedule to the plaint. In ***Morais v. Victoria*** (1968) 73 N.L.R 409 de Kretser, J. said: "the right to possess" (which is one of the rights subsumed in the conception of ownership) "implies the right to vindicate-*i.e.*, to recover possession from a person who possesses without title to possess derived from the owner. It will thus be seen that the cause of action in a *rei vindicatio* action is the trespass which has resulted in the Plaintiff being kept out of property of which he is the owner, and which may have caused him consequential loss-*see* page 417 *(supra)*. The latter element, namely consequential loss, does not constitute an indispensable requisite of the *rei vindicatio*, but merely renders possible an additional claim for damages. The Plaintiff in this case has staked a claim for damages too on the basis of the trespass.

If evidence is led by the Plaintiff as in this case that the Defendant trespassed on the land after the original plaint was filed, the very foundation on which a *rei vindicatio* action rests no longer exists because an amended plaint relates back to the date of the original plaint-*see* ***Waduganathan Chettiar v. Sena Abdul Cassim*** 54 N.L.R 185.

One has to reject the evidence of trespass in March 1989 because it allegedly took place after the original plaint dated 29th July 1988 had been filed and the foundation of a *rei vindicatio* is that unlawful possession on the part of a defendant has already begun when a plaint is filed in a *rei vindicatio* action. The learned District Judge of *Ratnapura* found against the Plaintiff on her assertion of trespass and in other words even the trespass as alleged to have taken place according to the amended plaint, Issue No.3 and evidence, has been disbelieved by the learned District Judge.

This foundational lapse in the case is admittedly traceable to inadvertence in the conduct of the trial in the court *a quo* but Mr. Athula Perera contended that on the merits too the paper title and prescriptive title set up by the Plaintiff cannot hold water. In fact two very important points of contest raised by the Plaintiff were:

1) Is the Plaintiff the owner of the property depicted in the schedule to the plaint?

2) Has the Plaintiff acquired prescriptive title to the said property under the provisions of the Prescription Ordinance?

Let me observe that the learned District Judge of *Ratnapura* has answered these two issues in the negative against the Plaintiff. In the conspectus of the above two issues, it is apparent that the Plaintiff put in issue at the trial, her paper title and prescriptive possession to the property described in the schedule. What was this property depicted in the schedule to which the Plaintiff claimed both paper title and prescriptive title? The amended plaint came about in 1994 because of the commissioned survey conducted on 27th September 1993 by Licensed Surveyor Samarasekera who by his plan bearing No.2781 depicted a larger land and in the drawing of the plan he had superimposed Final Village Plan 344 and shown lot numbers assigned to distinct and separate allotments. According to the report marked as **X1**, both the Plaintiff and Defendant had been present at the survey and lot A which was part of lot 89 had been disputed both by the Plaintiff and the Defendant-*see* pages 146, 147, 148-151 of the appeal brief. The amended plaint dated 12th May 1994 sought to vindicate title to Lot Nos. A, 97 and 91A4 as depicted in the plan bearing No.2781 made by the licensed surveyor-*see* the schedule to the amended plaint at page 38 of the plaint.

Case advanced by the original Defendant

But the original Defendant had a different story to narrate as regards title to the lots claimed by the Plaintiff. The original Defendant counter claimed a declaration of title in his amended answer dated January 1995 and prayed for a dismissal of the Plaintiff's action. His version in the amended answer was that by a gazette notification No.231/8 dated 22nd

September 1976, the Land Reform Commission (LRC) established under the Land Reform Law, No.10 of 1972 made a statutory determination in his favour in respect of the disputed lots and by virtue of this statutory determination, as far back as 1976, he had already obtained an absolute title to these lands described in schedule to the plaint. The amended answer also rejected the prescriptive possession of the Plaintiff.

By para 7 of the amended answer, the original Defendant also averred that he too had possessed the land continually without any interruption from the Plaintiff. It was in those circumstances that the Defendant sought a dismissal of the plaint and a declaration of title in his favor. The issues were raised on 27th March 1996 and when the adduction of evidence got off the ground on 03rd April 1997, it was the Plaintiff who gave evidence to buttress her case based on paper title and prescription.

Since the original Defendant had passed away during the pendency of the trial, the wife of the original Defendant Irangani Perera was substituted and she testified to support the case of the original Defendant at the trial. In a judgment dated 16th August 1999, the learned District Judge of *Ratnapura* dismissed the plaint of the Plaintiff answering all the issues raised by the Plaintiff in the negative. It is against this judgment that the Plaintiff-Appellant has preferred this appeal.

When this matter came up before this Court for argument, Mr. B.O.P. Jayawardhana Counsel for the Plaintiff-Appellant submitted that the main thrust of his complaint against the finding of the learned District Judge is that the prescriptive possession of the Plaintiff has not been considered by the learned District Judge and in any event the Plaintiff also had paper title emanating from a deed of transfer bearing No.13086/C executed in her favour by her father on 11th December 1987. As opposed to this argument Mr. Athula Perera for the Defendant-Respondent submitted that the statutory determination made in favour of the Defendant-Respondent in 1976 has been taken into account by the learned District Judge and his possession on the land has been well taken cognizance of by the learned District Judge.

In order to assess the correctness of the rival arguments vis-à-vis the judgment in favour of the Defendant-Respondent, I would state that as does often happen in the majority of the cases, the resolution of this appeal turns on paper title and prescriptive possession alleged by the Plaintiff vis-à-vis possession referable to a lawful title secured from a statutory determination made by the LRC in 1976 in favour of the Defendant-Respondent.

This was indeed a *rei vindicatio* action filed by the Plaintiff who relied on a paper title and prescription.

Marsoof, J. had occasion to set out the basic ingredients of an action *rei vindicatio* in ***Jamaldeen Abdul Latheef and Another v. Abdul Majeed Mohamed Mansoor*** (2010) 2 Sri L.R 33.

> *"An important feature of the action Rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title. Wille's Principles of South African Laws (9th Edition-2007) at pages 539-540 succinctly set out the essentials of a Rei vindicatio action in the following manner:-*
>
> *"To succeed with the Rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the thing at the moment, the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration. (Emphasis added)"*

Thus the primary ingredients in an action for *rei vindicatio* go as follows:-

1. The ownership in the property.
2. Property must exist, be clearly identifiable and must not have been destroyed or consumed.
3. The Defendant must be in possession or detention of the thing at the moment, the action is instituted.

The Plaintiff in this case relies both on paper title and prescription for her vindication of title. If one focuses on ingredient (1), as is known, ownership in property can be of two types, *i.e.*:-

a. Ownership based on paper title.

b. Ownership based on possession (Adverse possession).

In the case before me, the Plaintiff's claim for ownership is based both on paper title and adverse possession and at one stage of the argument, Mr. B.O.P Jayawardhana submitted that he would rest his case on prescriptive possession alone as the adduction of paper title in the court *a quo* was likely to run into problems in this Court. Since it is the possessory element of ownership or prescriptive possession that formed the fulcrum of the Plaintiff's case, it would be unnecessary for me to dwell at length on the contentions made in respect of the deed bearing No.13086 **(P1)** produced to support the paper title. I would *though* deal with the arguments in respect of this deed which provoked some interesting questions.

Paper title alleged by the Plaintiff-Deed of Sale bearing No.13086/C in 1987

Let me first come to the paper title alleged by the Plaintiff. At first blush, this was a deed of sale effected by the father of the Plaintiff Pethanjiyalage Jamis Singho in favor of the Plaintiff on 11th December 1987. The Plaintiff filed this action barely 7 months later on 29.07.1988.

The father of the Plaintiff had executed this deed as a deed of sale in favour of the Plaintiff for an alleged consideration of Rs.4,000/-, which the Notary in his attestation declares never passed in his presence. Nor does the Notary attest that it was acknowledged to have been received prior to the execution. Before I make my conclusions on the deed, let me advert to an argument raised by Mr. Athula Perera, the learned Counsel for the Defendant-Respondent.

Mr. Athula Perera argued that this deed cannot be considered because this was not given a marking by the learned District Judge and when the Plaintiff closed his case, he had not read that document into evidence. But when I examine the original record, I find that the learned District Judge had given a marking **(P1)** and initialed it on 03rd April 1997. Identifying a document by a letter and initialing it are requirements imposed by Section 154 of the Civil Procedure Code and these are duties cast upon the District Judge and I

must say that the learned District Judge of *Ratnapura* had borne in mind these requirements but the fact remains that the Plaintiff's documents were not read into evidence at the end of her case. It must be remembered that only the Plaintiff gave evidence for herself, whilst the wife of the original Defendant alone gave evidence on behalf of the defence. It so happened on 03rd April 1997 that after the Plaintiff had been re-examined, the Court put off further trial for 16th October 1997. No formal closure of the Plaintiff's case took place on 03rd April 1997. Neither were the documents produced by the Plaintiff (X-the survey plan and P1-the deed bearing No.13086) read into evidence as does usually happen at the end of a party's case.

When the adjourned trial came up on 16th October 1997, the original Defendant's wife (the substituted Defendant) was summoned to give evidence. This only shows that the Plaintiff's case was closed on 03rd April 1997, though it had not been done expressly. If the Plaintiff's case had not come to a close on 03rd April 1997, the Defendant's wife could not have been summoned rd April 1997. But I do not consider it fatal to the Plaintiff's case. By the time the virtual end of the Plaintiff's case took place on 03rd April 1997, the documents produced by the Plaintiff namely X and P1 had already been led in evidence and their contents elicited. The Plaintiff was cross-examined on these documents. Therefore they constituted evidence in the case and it is odiously technical to contend that this Court cannot consider them because they were not read in evidence at the end of the Plaintiff's case. I hasten to observe that the fact that documents must be read in evidence at the end of a party's case is not a requirement imposed by the Civil Procedure Code. It has crystallized into a practice that must be followed for purposes of identification and proof but in the event the documents are not read in evidence at the closure of the case, the Court cannot shut its mind to them provided their contents are relevant and admissible. But as regards adduction of documentary evidence, the provisions of the Civil Procedure Code, Evidence Ordinance and other enactments relevant to documents have to be borne in mind.

For instance, Section 154 of the Civil Procedure Code states that: "Every document or writing which a party intends to use as evidence against his opponent must be formerly tendered by him in the course of proving his case at the time when it contents or purport are first immediately spoken to by a witness."

It is therefore abundantly clear that the correct time to raise objection to a witness being called or a document being tendered by a party is, when such witness was called to give evidence or the document is about to be tendered. There are no earlier opportunities. In this regard, it is pertinent to mention here the comments of Wijeyaratne, J. made in the case of ***Kandiah v. Wisvanathan*** (1991) 1 Sri L.R 269 at 277 that; "when an objection is taken to the admissibility of a document, it is desirable that such objection should be recorded immediately before any further evidence goes down". This view supports the proposition expressed above that the proper time to take objection is when the witness is called or the document is tendered.

F.N.D. Jayasuriya, J. echoed the same in ***Cinemas Ltd. v. Soundararajan*** (1998) 2 Sri L.R 16 at p 18-"In a civil case when a document is tendered, the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal." Justice F.N.D. Jayasuriya also cited the judgments of ***Adaicappa Chettiar v. Thomas Cook and Sons*** (1930) 31 N.L.R 385; ***Silva v. Kindersley*** 18 N.L.R 85; ***Perera v. Seyed Mohomed*** 58 N.L.R 246.

Even in the proceedings dated 03.04.1997 of this case, the deed bearing No 13086 and dated 11th December 1987 had been marked as **P1** (page 60 of the appeal brief) and inasmuch as no objection was taken to the document when it was indeed produced on 03rd April 1997, it became part of the record as admissible evidence-*see* ***Podiralahamy v. Ranbanda*** (1993) 2 Sri L.R 20 as well in addition to the cases cited above.

As regards the argument of Mr. Athula Perera that this deed was not read again at the closure of the case for the Plaintiff, I would say this. There was already on record **P1** standing there as admissible evidence. No objection was raised to the admissibility of the

document when it was produced. In such a situation it must be taken that evidence has been led and it has to be assessed subject to what would be led in the course of the defence case.

The cases beginning from ***Sri Lanka Ports Authority and another v. Jugolinija-Boal East*** (1981) 1 Sri L.R 18 deal with a situation where a document marked subject to proof is read again at the close of the case but is accepted without any objections. In such a situation too, the documents become part of the record. In fact what Samarakone C.J said in ***Sri Lanka Ports Authority*** case *(supra)* is worth recounting:-

> *"....When P1 was marked during the trial objection was taken "as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the cursus curiae of the original Civil Courts. The contents of P1 were therefore in evidence as to facts therein (vide section 457 Administration of Justice Law, No. 25 of 1975) and it is too late now in appeal to object to its contents being accepted as evidence of facts. Furthermore the trial Judge has, in the course of his order, accepted the document in evidence in terms of the provisions of section 32 (2) of the Evidence Ordinance. I cannot therefore agree with the contention that the order of the trial Judge on this point is wrong..."*

The learned Chief Justice was indeed referring to a document that had been marked subject to proof. There was no objection when it was read again at the closure of the Plaintiff's case. The contents of this document became evidence in the case. It also became admissible under another section of the Evidence Ordinance-Section 32 (2) which is one of the exceptions to the rule against hearsay in the Evidence Ordinance. Even though it was marked subject to proof, it became probative of what it stated because of Section 32 (2) and there was no necessity for the author of the document to have been called. It also

became admissible because it was not objected to when it was read a second time in evidence.

The above judgment was followed by G.P.S. De Silva C.J., in the case of ***Balapitiye Gunanandana Thero v. Talalle Mettananda Thero*** (1997) 2 Sri L.R 101 and the learned Judge put the ratio in a nutshell-"where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case"-*see* ***Wanigaratne v. Wanigaratne*** (1991) 2 Sri L.R 267 (CA).

None of these three cases becomes applicable when a document such as **P1** in this case has been admitted without any objections. The document constitutes admissible evidence subject to a caveat. Such admission will not give the document any greater force or validity than it has in law. Its probative value has to be assessed and evaluated.

Conclusions on the Deed of Sale

In terms of the deed marked as P1 the vendor was transferring a land in an extent of four and a half acres but the land that the Plaintiff claimed in the schedule to the amended plaint refers to Lots A, 97 and 91A4 out of which the extent of lot A is not specified. Only the extents of Lots 97 and 91A4 are given and in combination both these two lots constitute 2 acres, 3 roods and 56 perches. Even if these disputed lands are comprised in a larger land of 4 and a half acres, the identity of the land that was transferred to the Plaintiff in 1987 has not been clearly brought out at the trial. In fact the Schedule to the amended Plaint refers to a larger land in an extent of 4 and a half acres and if it was the larger land that the Plaintiff obtained by way of a purchase from her father in 1987, the boundaries of the larger land given in the schedule to the amended plaint do not correspond to some of the identified boundaries in the plans produced at the trial. Therefore I conclude that the deed of sale that the Plaintiff relies upon for vindication does not identify the land properly and an essential ingredient in a vindicatory action namely the identity of the corpus has not been established by the Plaintiff.

In any event by the time this deed of sale was executed by the father of the Plaintiff in favour of the daughter in 1987, a period of little over 11 years had elapsed since the

Defendant had obtained a statutory determination in his favour in 1976 and having regard to the fact that the Plaintiff instituted this *rei vindicatio* action in 1988, almost 7 months after the deed of sale, there are lingering questions that arise on the deed of sale from a father to the daughter. What was the necessity for a sale of a land from the father to the daughter?

Was the sale from the father to the daughter a simulated or a pretended transaction when the notary does not even mention the passage of consideration in his presence? Nor does he attest that it had been paid previously. That shows that except for the mere assertion in the deed that a sum of Rs.4,000/- was the consideration, there is no declaration to the Notary either by the vendor or the vendee about the passage of consideration so as to compel him to transcribe that declaration in the attestation clause.

The deed of sale recites that the father's title flows from a land settlement order of 1st November 1936. This order was not produced in Court and if this had been available, one could have ascertained the identity and the extent of the corpus that the father of the Plaintiff inherited. Thus the weight of this deed **P1** in order to prove Plaintiff's title suffers from its infirmities and in these circumstances there remain lurking doubts which do not satisfy the civil standard of preponderance of evidence or the balance of probabilities as regards proof of ownership through paper title.

As Ian Dennis quite pertinently observes in his *The Law of Evidence* (5th Edition 2013), "the relevance of evidence is its *potential* weight as tending to prove one or more facts in issue. When a factfinder decides on the weight of the evidence, the factfinder is estimating the degree to which the evidence *does* affect the probability of a fact in issue, on the assumption that the factfinder has found the evidence to have a degree of credibility and reliability. Evidence that the factfinder rejects as incredible or wholly unreliable has no weight. A risk of unreliability reduces the weight of the evidence."

So I conclude that the deed bearing No.13086 **(P1)** reeks of unreliability and though it was admitted, its weight is so negligible that it is not capable of proving the fact in issue namely the Plaintiff is the owner of Lots A, 97 and 91A4.

Possibly it is for this reason that Mr. B.O.P. Jayawardhana for the Plaintiff was heard to contend that he would rather drive home prescriptive title than paper title.

Let me now turn to prescriptive title that the Plaintiff had raised as the 2nd point of contest.

The Claim of Prescriptive Title

The principal complaint of Mr. B.O.P. Jayawardhana for the Plaintiff-Appellant was that that a consideration of prescription has eluded the learned District Judge of *Ratnapura*.

In order to establish prescriptive title, the relevant and governing criteria that must necessarily be fulfilled, are set out in Section 3 of the Prescription Ordinance No.22 of 1871. Section 3 provides 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, the 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 acknowledgement 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 hereinbefore 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"*

So Section 3 of the Prescription Ordinance equally applies to a Plaintiff who wishes to vindicate title through prescription and the salient features of Section 3 in relation to the Plaintiff in this case would be:

a. Proof of undisturbed and uninterrupted possession.

b. By a title adverse to or independent of that of the Defendant

c. For ten years previous to the bringing of the action.

No doubt, the statutory determination made by the Land Reform Commission in favour of the original Defendant in the year 1976 entailed the defeasance or elimination of all encumbrances that attached to the subject matter.

It is indisputable that the statutory determination in favour of the original Defendant gave him absolute title to lots 89, 91A4 and 97-*see* the statutory determination marked as **V6A** at p 201 of the appeal brief. What is the effect of this statutory determination made under Section 19 of the Land Reform Law No.1 of 1972?

In ***Jinawathie and others v. Emalin Perera*** (1986) 2 Sri L.R 121, Parinda Ranasinghe, J. (as His Lordship then was, with Sharvananda C.J, Wanasundera, J., Atukorale, J. and Tambiah, J. agreeing) declared:

> *"Once the statutory determination is made, the person in whose favour it was made becomes owner of the land specified in the determination with all the incidents of ownership. The land dos not then cease to be a distinct and separate entity and it does not become once again an undivided portion of the larger land from which such specified portion was carved out.*
>
> *By virtue of the Amending Act No. 39 of 1981 any encumbrance which subsisted over and in respect of the undivided shares the recipient of the statutory determination held in the larger land would however be revived. Subject to this such recipient is absolute owner of the portion of land specified in the statutory determination vested with the jus utendi, the jus fruendi and (so far as the law does not prohibit) the jus abutendi, the right of alienation and the right to vindicate his title in an action at law."*

So in 1976, the original Defendant (L.S. Perera) became the absolute owner of the lots 89, 91A4 and 97 as depicted in the main plan before this Court **X**. The Plaintiff claimed lot A which is part of lot 89, 91A4 and 97 by prescription. This title of the Defendant was in fact admitted by the Plaintiff when she gave evidence-*see* p 72 of the appeal brief. She *though*

added a rider that they *(sic)* rejected the Defendant's entitlement at the LRC. This clearly shows that she had participated at an inquiry conducted by the LRC and the fact remains that the statutory determination has not been called in question in any court thereafter. It does not lie in her mouth now to feign ignorance of the statutory determination.

If the statutory determination gave the Defendant absolute ownership and rights to lots 89, 91A4 and 97 in 1976, the next question to pose would then be-when was this absolute owner (original Defendant) ousted from his possession? It is in evidence that the Defendant had been possessing lots 89, 91A4 and 97 and once his title has been admitted, the burdens shifts to the Plaintiff to establish her prescriptive title from the year 1976 or afterwards. In fact since the publication of the statutory determination on 22nd September, 1976 there had been a lapse of a little over 11 years when the Plaintiff instituted this action on 29th July 1988.

There is no specificity in the way the Plaintiff answered questions as to possession. No doubt, she stated that she possessed the land but as to what specific portions she possessed is not on record. The disputed portions are lots A, 91A4 and 97. Nowhere does she make a reference that she possessed these lots to the exclusion of others. Her assertion of possession was in relation to "this land". One cannot infer adverse possession from the mere *ipse dixi*-"I possessed this land".

I would draw attention to the words of Bertam C.J in ***Alwis v. Perera*** (1919) 21 N.L.R 321 at 236 wherein the importance of requiring a witness to explain exactly what he meant by such expressions as "I possessed", "We possessed" is emphasized. This salient requirement was reiterated in ***Juliana Hamine v. Don Thomas*** (1957) 59 N.L.R 546, when the Court held that when a witness giving evidence of prescriptive possession states "I possessed" or "We possessed", the Court should insist on those words being explained and exemplified-see also Basnayake C.J in ***Rajapakse v. Henrick Singho*** 61 N.L.R 32 at p 36.

It has to be noted that the evidence of the Plaintiff has been vague and ambiguous as to which specific portions she had been in possession. There are three predecessors in title indicated in the plaint and pedigree and the Plaintiff's father Jamis Singho who had

effected the deed of sale on 17th December 1987 was the last of the predecessors. In fact the Plaintiff testified that he was still alive though old.

There being no presumption that all the predecessors in title of the Plaintiff who are alive are not able to give evidence owing to old age, it is for the Plaintiff to explain why they are not called to give evidence.

The Plaintiff has failed to do so and no supporting evidence of possession has been given. Even the complaint about the incident of the Defendant trespassing on to the land and cutting trees, if at all it was made to Police or Garama Sevaka has not been forthcoming. It is legitimate in these circumstances to presume that this evidence if produced would be unfavorable to the Plaintiff.

There is also an inconsistency per se in the case of the Plaintiff. Before the surveyor, she disputed only lot A which was part of lot 89. But in the amended plaint she brought in not only lot A but also lots 91A4 and 97. The omission to assert ownership to lots 91A4 and 97 at the earliest opportunity before the surveyor casts doubts on the prescriptive claim of the Plaintiff-Appellant in respect of these lots. In the circumstances, I hold that the learned District Judge of *Ratnapura* came to the correct finding that the Plaintiff has not prescribed to lots A, 91A4 and 97.

Accordingly I proceed to affirm the judgment of the learned District Judge of *Ratnapura* and dismiss the appeal of the Plaintiff-Appellant with costs.

JUDGE OF THE COURT OF APPEAL