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

In the matter of an appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No: 78/2018
SC/HCCA/LA No. 336/2017
WP/HCCA/AV 1675/2017 (F)
DC Pugoda Case No: 669/P

Vithana Pathirennehelage Premaratne,
No: 180, Giridara, Kapugoda.

PLAINTIFF

Vs.

1. V.P. Jayaratne,
   No. 11/138, Swarna Kanda Nivasa,
   Thalahena, Malabe.

2. Vithana Pathirennehelage Chalo Singho
   No. 179, Giridara, Kapugoda.

2A. Vithana Pathirennehelage Lankmal
   Husain Sisirakumara,
   No. 148,C, Jayanthi Road,
   Meegahawatta, Dompe.

3. Vithana Pathirennehelage Ariyasena,
   No. 179/2, Giridara, Kapugoda.

4. Vithana Pathirennehelage Chandra Pathirana,
   No. 179/1, Giridara, Kapugoda.

5. Vithana Pathirennehelage Wilson,
   No. 179/1, Giridara, Kapugoda.

DEFENDANTS

And between

Vithana Pathirennehelge Premaratne,
No. 180, Giridara, Kapugoda.

PLAINTIFF – APPELLANT

Vs.

1. V.P. Jayaratne,
   No. 11/138, Swarna Kanda Nivasa,
   Thalahena, Malabe.

2. Vithana Pathirennehelage Chalo Singho
   No. 179, Giridara, Kapugoda**.**

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   No. 179/1, Giridara, Kapugoda.

5. Vithana Pathirennehelage Wilson,
   No. 179/1, Giridara, Kapugoda.

DEFENDANTS – RESPONDENTS

And Now Between

2A. Vithana Pathirennehelage Lankmal
   Husain Sisirakumara,
   No. 148,C, Jayanthi Road,
   Meegahawatta, Dompe.

3. Vithana Pathirennehelage Ariyasena,
   No. 179/2, Giridara, Kapugoda.

4. Vithana Pathirennehelage Chandra Pathirana,
No. 179/1, Giridara, Kapugoda.

5. Vithana Pathirennehelage Wilson,
No. 179/1, Giridara, Kapugoda.

2A – 5TH DEFENDANTS – RESPONDENTS – APPELLANTS

Vs.

1. Vithana Pathirennehelage Premaratne,
No. 180, Giridara, Kapugoda.

PLAINTIFF – APPELLANT – RESPONDENT

V.P. Jayaratne,
No. 11/138, Swarna Kanda Nivasa,
Thalahena, Malabe.

1ST DEFENDANT – RESPONDENT – RESPONDENT

Before: **Murdu N. B. Fernando, PC, CJ**
Yasantha Kodagoda, PC, J
Arjuna Obeyesekere, J

Counsel: Romesh Samarakkody for the 2A, 3rd, 4th and 5th Defendants – Respondents – Appellants

Seevali Amithirigala, PC with Pathum Wijepala for the Plaintiff – Appellant – Respondent

Argued on: 4th November 2022

Written Submissions: Tendered on behalf of the 2A, 3rd, 4th and 5th Defendants – Respondents – Appellants on 11th December 2018 and 9th December 2022

Tendered on behalf of the Plaintiff – Appellant – Respondent on 13th November 2018 and 15th December 2022

Decided on: 24th July 2025

Obeyesekere, J

This is an appeal arising from the judgment delivered by the Civil Appellate High Court of the Western Province holden in Avissawella [the High Court] on 12th June 2017. Leave to appeal has been granted by this Court on four questions of law. While I shall refer to the said questions of law later in this judgment, it should perhaps suffice to state at this stage that the primary question that needs to be determined is whether the 2nd – 5th Defendants – Respondents – Appellants [collectively, the Defendants] have established prescriptive rights to the corpus that is the subject matter of this appeal.

Action in the District Court

The Plaintiff – Appellant – Respondent [the Plaintiff] filed action in the District Court of Pugoda on 30th May 2003 seeking to partition the land morefully referred to in the schedule to the plaint. The plaint had set out the manner in which title had devolved on (a) the Plaintiff for an undivided 513/640 share of the said land, and (b) the 1st Defendant – Respondent – Respondent [the 1st Defendant], who is a brother of the Plaintiff, for an undivided 9/640 share of the same land. The Plaintiff had stated that the balance undivided share of 118/640 should devolve on the heirs of Jamis Perera Wanigasuriya but that details of the heirs of Jamis Perera Wanigasuriya are unknown, and for that reason, the said share must remain unallotted. The Plaintiff had therefore sought to partition the said land among the Plaintiff, the 1st Defendant and the heirs of Jamis Perera Wanigasuriya according to the above share ratio, with the 1st Defendant admitting his entitlement as pleaded in the plaint.

The 2nd Defendant is a brother of the Plaintiff's father, Girigoris. The 3rd – 5th Defendants are the sons of the 2nd Defendant. The Plaintiff had stated that the 2nd – 5th Defendants are in illegal occupation of the corpus, and had sought to evict the Defendants from the corpus. While denying the pedigree pleaded by the Plaintiff, the Defendants took up the position that the land has not been properly identified, and that in any event, the 2nd Defendant has been in occupation of the said land since his birth, and the 3rd – 5th Defendants for a period of over 50 years, and that they have thus prescribed to the said land. The Defendants also pleaded that all structures on the said land have been erected by them at

a cost of Rs. 4 million. These structures, some of which are permanent, are depicted in the Preliminary Plan No. 3545.

Admissions and Issues were raised on 24th March 2009, with the Defendants raising Issue Nos. 6 and 7 on prescription. The case proceeded to trial thereafter. The 2nd Defendant passed away after giving evidence, and was substituted with the 2A Defendant. During the trial, it transpired that, (a) the said land belonged to the father of the 2nd Defendant [i.e. the grandfather of the Plaintiff] and that although deeds had been executed in favour of the father of the Plaintiff, the 2nd Defendant had continued to occupy part of the said land, (b) the Defendants did not have any title deeds to the said land, (c) over the years, the Defendants and the father of the Plaintiff had a dispute over the roadway leading to the land which resulted in an application being made under Section 66 of the Primary Courts Act, and (d) the 3rd Defendant had entered into a lease agreement in July 1997 with the father of the Plaintiff in respect of an undivided portion of one acre out of the said land that was the subject matter of the case for a period of five years that allowed the 3rd Defendant to cultivate pineapple and other minor crops on the land referred to therein.

Judgments of the District Court and the High Court

By its judgment delivered on 5th October 2016, the District Court held that the Plaintiff has not established the identity of the land and that in any event, the Plaintiff has failed to prove the pedigree. The claim of the Defendants that they have prescribed to the said land [Issue Nos. 6 and 7] was rejected on two grounds, to which I shall advert to later in this judgment.

Aggrieved, the Plaintiff lodged an appeal with the High Court. The High Court concluded that (a) the land that was sought to be partitioned has been duly identified, (b) the Plaintiff's pedigree has been established, and (c) the land must be partitioned among the Plaintiff, the 1st Defendant and the heirs of Jamis Perera Wanigasuriya according to the share ratio pleaded in the plaint.

The High Court proceeded to state as follows:

"*For the foregoing reasons, the appeal is allowed, the determination of the learned District Judge dismissing the plaint is set aside and* ***the finding that the contesting defendants failed to establish their claim of prescriptive rights to the subject matter is affirmed****.*

As per the report of the Commissioner marked X1, the parties are entitled to the improvements as follows:

*The 2nd Defendant is entitled to the building Nos. 1,2,3,4 and 7 [****no soil right****]*

*The 3rd Defendant is entitled to the building Nos. 5 and 6 [****no soil right****]*

*The 4th Defendant is entitled to the building Nos. 8,9 and 10 [****no soil right****]*

*The 5th Defendant is entitled to the building Nos. 11 and 12 [****no soil right****]*

The Plaintiff and the 1st Defendant are entitled to the plantation over 50 years of age and the ***2nd Defendant is entitled to the rest of the plantation****."* [emphasis added]

The High Court was thus emphatic in their conclusion that the Defendants are not entitled to any soil rights. This position is consistent with the view taken by Sharvananda, J [as he then was] in **Kanagasabai v Mylvaganam** [(1976) 78 NLR 280; at page 288] where he stated that:

"*Our law does not recognise ownership of a house or building apart from the land on which it stands. The building loses its independent existence and becomes part of the land on which it is constructed. The principle of accessio in the case of buildings is embodied in the maxims, 'Omne quod inaedifecatur solo solo cedet' (All that is built on the soil belongs thereto) and 'Superficies solo cedet' (Things attached to the earth go with the immovable property). Thus, land, in its signification, means not only the surface of the ground, but also everything built on it. Cujus est solum ejus est usque ad caelum (He who possesses land possesses also that which is above it). On a conveyance of land, all buildings erected thereon pass with the land, even though there is no specific mention of such buildings in the deed of transfer. Thus, 'land', in our law, includes houses and buildings, and when the legislature employs the term 'land' in any statute, the word is presumed to include 'houses and buildings', unless there are words to exclude 'houses and buildings'*."

The High Court however recognised the fact that each of the Defendants were entitled to be compensated for the improvements effected by them by way of construction of buildings and plantations.

Thus, the conclusion of the High Court was that even though the Defendants have failed to establish that they have prescribed to the land, the Defendants were entitled to compensation for the improvements and to the plantations that were below 50 years of age. Although the High Court has not adduced any specific reason for the latter conclusion with regard to plantations, it appears from a perusal of the evidence that the High Court was mindful that the 2nd Defendant was in occupation of part of the land since the time the said land belonged to his father, and that the Defendants had cultivated the said land or part thereof during that period, as well as during the validity period of the lease agreement.

Appeal to the Supreme Court and Questions of Law

This appeal arises from the said judgment of the High Court delivered on 12th June 2017.

This matter was supported for leave to appeal on 15th May 2018. Since the petition of appeal filed by the Defendants did not contain any questions of law, Court had raised the following question of law:

(1) Whether the 2nd – 5th Defendants are entitled to the buildings and **the appurtenant land** referred to in the judgment of the High Court?

I must state that the Defendants can only be entitled to the appurtenant land if they establish prescriptive rights to the land.

The following three questions of law were raised on behalf of the Plaintiff:

(2) Has Issue No. 6 relating to prescription been answered in the negative by the District Court?

(3) If the answer is in the negative, was there an appeal against the said finding to the High Court?

(4) If there was no appeal in respect of the aforementioned issue, whether the Defendants are estopped from raising Issue Nos. 6 and 7 in respect of prescription before the Supreme Court?

The plea of prescription raised by the Defendants

I shall at the outset address the three questions of law raised by the Plaintiff.

I have already stated that the District Court held against the Defendants on Issue Nos. 6 and 7 with regard to prescription. With the plaint having been dismissed, the necessity for the Defendants to file an appeal against the said finding of the District Court did not arise as the Defendants could have continued to possess the said land. However, with the Plaintiff having lodged an appeal, it was open for the Defendants to have acted in terms of Section 772 of the Civil Procedure Code or else, raised a question of law in that regard during the hearing of the appeal before the High Court. The Defendants did neither. That does not, in my view, prevent the Defendants from raising prescription before this Court, especially since the High Court ruled on the prescriptive rights of the Defendants. I would therefore answer the 2nd, 3rd and 4th questions of law as follows:

(2) Yes

(3) No. The necessity for the Defendant to file an appeal against the judgment of the District Court did not arise for reasons that I have already stated.

(4) No

With the primary question that needs to be determined being whether the Defendants have established prescriptive rights to the corpus, I shall now consider the two grounds on which the District Court rejected the plea of prescription raised by the Defendants.

The first was that in view of the conclusion that the Plaintiff has not identified the land to be partitioned, the question of the Defendants prescribing to the entirety of the said land did not arise and that in any event, the Defendants too have failed to identify the portion of the land that they claim to have prescribed to. I have examined the evidence and fully concur with the view of the District Court that even though the 2nd Defendant had been in occupation of part of the said land, the Defendants have failed to identify the land that they claim they have prescribed to.

Referring to the aforementioned lease agreement, the District Court held as follows:

> "මේ අනුව 1997 වර්ෂයේ දී 2,3,4,5 විත්තිකරුවන් විසින් පැමිණිලිකරුගේ පුර්ව ගාමියකුගේ අවසරයට යටත්ව බුළුගහවත්ත නැමැති පැමිණිල්ලේ උපලේඛනගත ඉඩමේ භුක්ති විඳිමක් සිදුකර ඇති බව බැලු බැල්මට තහවුරු වේ. එතැන් සිට සලකා බලන කල 2,3,4,5 විත්තිකරුවන් කාලාවරෝධී භුක්තියක් ඔප්පු කරන්නේ වී නම්, අවසර ලාභිත්වයට යටත්ව භුක්ති විඳිමේ ආකාරය අවසන් කර, කලාවරෝධී භුක්ති විඳිමක් ආරම්භ කිරීමේ අවස්ථාවක් ජනිත කරන භුක්ති විඳිමක් පටන් ගත් බව ප්‍රකටව පෙනෙන පහ කිරීමේ ක්‍රියාවක් මගින් ඔප්පු කර ඒ අනුව එතැන් සිට වසර දහයක කාලයක් පුරාවට අබාණ්ඩ ස්වාධීන ප්‍රතිවිරුද්ධ භුක්තියක් පවත්වාගෙන ගොස් ඇති බව නඩු පවරා ඇති දිනයට වසර දහයකට පුර්වයෙන් වූ කාලසීමාව තුළදි ඔප්පු කළ යුතුවේ.
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> අනෙක් අතට 2,3,4,5 විත්තියේ නඩුව (මෙහෙයවා ඇති සාක්ෂි) විශ්ලේෂණය කර බැලු කල ප්‍රකටව පෙනෙන පහකිරීමේ අවස්ථාවක් (ouster) ජනිත වන ආකාරයේ භුක්ති විඳිමක් 2,3,4,5 විත්තිකරුවන් විසින් ආරම්භ කර ඇති බවට කිසිදු පිළිගත හැකි සාක්ෂිමය තහවුරුවක්ද ඉදිරිපත් කර නැත.
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> නඩුව පවරා ඇත්තේ 2003 වර්ෂයේදි වන බැවින් P10 ඔප්පුව ලියා සහතික කර ඇති 1997 වර්ෂයේ සිට බලන කල 2003 වර්ෂය දක්වා අවුරුදු, දහයක කාලසීමාවක් නොමැති නිසා ප්‍රකටව පෙනෙන පහකිරීමේ ක්‍රියාවක් සිදුකර ඇති බව ඔප්පු කලත් නඩු පැවරීමේ දිනයට පුර්වයෙන් වූ වසර දහයක කාලයක් කාලාවිරෝධී භුක්තියක් තිබුණු බව ඔප්පු කිරීම කළ හැකි නොවේ"

Thus, the second ground on which the District Court rejected the plea of prescription was that the 3rd – 5th Defendants have come into occupation of the corpus only in 1997, and that in any event, the 3rd – 5th Defendants have failed to establish the manner in which the Plaintiff has been ousted. I must state that the lease agreement is between the 3rd Defendant and the father of the Plaintiff, and the 4th Defendant was only a signatory thereto. Thus, the existence of the lease agreement would only affect the prescriptive rights of the 3rd Defendant. I am therefore not entirely in agreement with the view that at least the 2nd Defendant was not in possession of the land prior to the execution of the lease agreement, but I agree with the District Court that the Defendants have failed to establish the manner in which the Plaintiff has been ousted from the corpus or the manner in which the Defendants entered into adverse possession.

In **The Law of Property in Sri Lanka** by G. L. Peiris [Volume 1], the author, while emphasizing that the possession relied upon in support of prescriptive title is required to be by a title adverse to, or independent of that of the claimant or plaintiff in the action, emphasised that:

> "*Where the possessor enters upon the premises in a capacity inconsistent with recognition on his part of the owner's title, no problem arises, since the possession of*

the party prescribing is, in such a case, demonstrably referable to an adverse title. However, if the occupier, at the commencement of his occupation, acknowledges the owner's title, he is presumed to continue occupation in the identical capacity. In such a situation of this kind, possession adverse to the owner begins only when the basis of occupation has been changed by an "overt unequivocal act". A mere intention of the occupier's part to transform the character of his occupation is ineffective [at page 110].

The pith and substance of "adverse possession" is that its basis is incompatible with the owner's title. If this element is capable of being proved at the commencement of possession "adverse possession" is established from the outset. On the other hand, if this quality attached to the possession of the party prescribing at a time subsequent to the origin of physical occupation, the beginning of "adverse possession" is signified by the change brought about in the nature and foundation of possession [at pages 110, 111]."

With regard to the *onus probandi* in the context of actions involving prescriptive title, the party who claims the benefit of prescriptive possession must undertake the burden of proof in a contest with the party who is able to point to a paper title, and must adduce evidence that points to a reasonable inference that he possessed the corpus in a character incompatible with, and adverse to the Plaintiff's title.

It is clear from the evidence that the Defendants failed to place before the District Court on a balance of probability clear and cogent evidence to establish that they possessed the corpus or a part thereof uninterrupted and adverse to that of the Plaintiff for a period of ten years, either by proving that they entered upon the premises in a capacity inconsistent with the owner's title or by proving a change in the character of possession from a dependent or subordinate capacity to that of an adverse capacity.

The issue of prescription is primarily a question of fact which has to be determined in accordance with the circumstances peculiar to each case. It need not be demonstrated by a single identifiable act. Instead, such inference can be obtained from a state of things existing over a sustained period. With the issues involved in the proof of prescriptive title being primarily a question of fact, it was held in **Robosingho Mudalali v Jayawardena** [(1965) 72 NLR 193] that an appellate court is naturally reluctant, in the absence of

compelling considerations such as any errors in law, to disturb the findings arrived at by the trial Court.

In these circumstances, I am in agreement with the conclusion reached by the District Court, affirmed by the High Court, that the Defendants have failed to establish on a balance of probability that they have prescribed to any part of the corpus.

The 1st question of law, i.e., "Whether the 2nd – 5th Defendants are entitled to the buildings and the appurtenant land referred to in the judgment of the High Court?" is therefore answered as follows – The 2nd – 5th Defendants are only entitled to be compensated for the buildings and the plantations referred to in the judgment of the High Court, and not to the soil rights nor to the appurtenant land.

Conclusion

The judgment of the High Court is accordingly affirmed, and this appeal is dismissed, without costs. The District Court is directed to enter the interlocutory decree and thereafter proceed in terms of the provisions of the Partition Act.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, PC, CJ

I agree

CHIEF JUSTICE

Yasantha Kodagoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT