SIRAJUDEEN AND TWO OTHERS
v.
ABBAS

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 45/93.
C.A. NO. 282/86 (F).
D.C. KANDY NO. L10357.
MARCH 01, 02 , APRIL 29, 30 & 31.
MAY 30, 31 AND SEPTEMBER 13, 14 AND 30, 1994.

Vindicatory suit – Prescriptive title – Prescription Ordinance, section 3 – Burden of proof – Mode of proof.

Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.

Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.

A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.

Cases referred to:

1. *Ahamed Thajudeen v. M. N. M. Pathumuttu Natchiya and Others* 57 CLW 57, 59.
2. *Hassan v. Romanishamy* 66 CLW 112.
3. *Chelliah v. Wijenathan* 54 NLR 337, 342.
4. *Peynis v. Pedro* 3 SCC 125.

APPEAL from judgment of the Court of Appeal.

N. R. M. Daluwatte P.C. with *A. R. M. Kaleel* for defendant-appellants.
K. Kanag-Isvaran P.C. with *Harsha Cabraal, Chandaka Jayasundera, M. A. Sumanthiran* and *S. Mahenthiran* for plaintiff-respondent.

Cur. adv. vult.

October 10, 1994.
G. P. S. DE SILVA, C.J.

The plaintiff instituted these proceedings seeking a declaration of title to the premises in suit, namely No. 10, Yatinuwara Patu Mawatha, Kandy, and for the ejectment of the defendants. The date of action was 15.5.73. After trial, the District Judge dismissed the plaintiff's action. The plaintiff appealed to the Court of Appeal which set aside the judgment of the District Court and entered judgment for the plaintiff. The defendants have now preferred an appeal to this court.

The plaintiff's case was that he purchased this property along with premises No. 8 of Yatinuwara Patu Mawatha, Kandy on the deed P1 dated 30.11.71 from Saharuban Bee Bi (hereinafter called Bee Bi). In P1 there is the recital of the vendor's title namely, (i) that it was jointly owned and possessed by her father and his brothers; (ii) that at a division of the houses and premises jointly owned by her father and her brothers, premises No. 10, and No. 8 (as well as some other premises) were allotted to Bee Bi and her sister Salha Natchiya as their father's share; (iv) that Bee Bi entered into exclusive possession of premises Nos. 8 and 10; (v) that in consideration of a sum of Rs. 3000/- she was transferring to the plaintiff premises Nos. 10 and 8. Apart from the oral evidence of the plaintiff, cogent documentary

evidence of sound probative value was placed before the District Court in support of the title asserted by Bee Bi in the recitals in P1. The relevant issues were issues (1) and (2) which read as follows:

> (1) Did the person called Bee Bi have title to the land and premises described in the schedule to the plaint?
>
> (2) Did the abovenamed Bee Bi by Deed No. 4363 dated 30.11.71 (i.e. P1) sell and transfer the aforesaid land and premises to the plaintiff?

Both issues were answered in the affirmative by the District Judge who went on to hold that the title conveyed on P1 was "amply proved" and was in fact not challenged.

The Court of Appeal affirmed the finding of the trial Judge on issues (1) and (2). Thus the concurrent findings on the issue of title are clearly in favour of the plaintiff. This court in granting the defendants special leave to appeal specifically stated, "special leave to appeal is granted **only** on the question whether the Court of Appeal was justified in reversing the finding of the District Court on the question of prescription in favour of the 1st defendant."

The defendants filed a joint answer on 6.9.74. The 1st defendant pleaded that he has been in possession of the said premises No. 10 for a period of over 15 years and acquired a prescriptive title thereto; he further averred that he was the owner of the adjoining premises Nos. 8, 12 and 14 as well. The 2nd defendant took up the position that he was a tenant under the 1st defendant. Since the legal title to the premises in suit (No. 10) was in the plaintiff (a matter which could not have been challenged and was not challenged at the hearing before us) the burden of establishing the plea of prescriptive title was clearly on the 1st defendant.

As observed by K. D. de Silva, J., in *Ahamed Thajudeen v. M. N. M. Pathumuttu Natchiya and Others* [1]. "The burden of proof of prescription depends on the question of legal ownership." The Court of Appeal held that the 1st defendant had failed to discharge the burden, and reversed the finding of the District Judge in his (1st defendant's) favour. The question for consideration on this appeal is

whether the Court of Appeal was correct in holding against the 1st defendant on his plea of prescriptive title.

What then is the evidence led on behalf of the 1st defendant to establish his claim of prescriptive title to the premises in suit? According to the 1st defendant, he came into occupation of premises No. 10 in June 1947. He found these premises (and the adjoining premises Nos. 8, 12 and 14) abandoned after the Japanese air raid. On the advice of his elder brother, he effected repairs and went into occupation of premises No. 10. He then commenced to run a business on these premises. In proof of occupation of premises No. 10, he relied strongly on 1D1, 1D3 and 1D11. However, a scrutiny of these documents do not support the 1st defendant's evidence of occupation from 1947, as submitted by Mr. Kanag-Isvaran, counsel for the plaintiff respondent. 1D1 relates to a notification dated 1.9.69 under section 7 of the Business Names Ordinance in respect of cages 6 and 8. The changes notified relate to the name of the individual and the nationality of the individual. 1D3 is a similar document dated 4.5.56. It indicates changes in cages 3 and 8, that is, the place of business and the nationality of the individual. 1D3 is clear proof of the fact that the 1st defendant's business (Laila Industrial Works) shifted to the premises in suit in **February 1956** and not in 1947 as claimed by the 1st defendant in his evidence. 1D11 is the Certificate of Registration under the Trade Marks Ordinance and it shows that as on 28.12.54 the 1st defendant was carrying on his business at 29, Brownrigg Street, Kandy, and not at the premises in suit. It is significant that the 1st defendant failed to produce the certificate relating to the **original registration of his business.** This was the vital document which could have supported his oral evidence, if in truth he was in occupation of the premises from 1947. The documents he has marked in evidence (1D1, 1D3 and 1D11) are contradictory of his oral evidence of possession from 1947. It is to be noted that his oral evidence is that his residence and his place of business were the same at all times.

Besides, there is no consistency in his claim in regard to the period of his occupation of the premises in suit. In his original answer dated 6.9.74 he pleaded prescriptive possession for a period of over 15 years. In his amended answer of 13.10.80 he averred that he was

in possession as owner for 33 years. In his further amended answer of 10.11.81, he claimed that he possessed the premises as owner for over 36 years. Thus it would appear that his case in respect of the period of possession varied from answer to answer. This naturally affects the credibility of his story of occupation from 1947.

Furthermore, the issues raised on behalf of the 1st defendant in the course of trial show a disturbing lack of consistency in the case as presented before the court. These issues read as follows:

(1) Are the premises in suit subject to the provisions of the Rent Act?

(13) If so, can the plaintiff maintain this action as constituted presently?

(4) Has the plaintiff considered the 1st defendant as his tenant?

(15) If so, can the plaintiff maintain this action?

If the 1st defendant's case is that by virtue of prescriptive possession he is the owner of the premises (as specifically pleaded in the answer, the amended answer and the further amended answer) what is the need to invite the court to hold that he was "protected" tenant under the plaintiff, and thus secure "the dismissal of the plaintiff's action for ejectment." The irreconcilable position made manifest by these issues casts grave doubt on the 1st defendant's story of occupation of the premises in his own right as owner from 1947. In my view, the effect of these issues tells heavily on his case as presented at the trial.

The one item of evidence on which the 1st defendant relied to sustain his plea of prescriptive possession was the payment of rates to the Municipal Council. The witness Yapa, attached to the Municipal Council, Kandy, was called to identify the receipts for the payment of rates marked 1D5 to 1D10 and 1D18 to 1D30. The earliest receipt 1D18 was dated 31.1.62. It is to be noted that Yapa in cross examination admitted that "rates can be paid by the tenant or the

owner of the house or by any other person." On this point the observations of Basnayake, C.J. in *Hassan v. Romanishamy,* [2] are intensely relevant; "The payment of rates is by itself not proof of possession for the purpose of section 3, for rates can be tendered by a tenant or one occupying any premises with leave and licence of the owner or by any other person." The payment of rates therefore does not advance the case of the 1st defendant any further.

Mr. Daluwatta for the defendants appellants strongly urged that apart from the oral evidence of the 1st defendant and the document 1D11, the plaintiff himself admitted that the defendant was in occupation of the premises from at least 1953. But what needs to be stressed is that the fact of occupation alone would not suffice to satisfy the provisions of section 3 of the Prescription Ordinance. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession "by a title adverse to or independent of that of the claimant or plaintiff." In other words, there must be proof that the 1st defendant's occupation of the premises was of such character as is incompatible with the title of Bee Bi and her predecessors in title. In the present case, there is a conspicuous absence of evidence of "adverse" possession. The trial Judge has altogether failed to appreciate this significant weakness in the 1st defendant's case. It seems to me that he has not properly addressed his mind to the important fact that the burden is definitely on the 1st defendant to establish his plea of prescriptive title.

There is another relevant aspect of the plea of prescriptive title which was overlooked by the trial Judge. That principle is best stated in the words of Gratiaen, J. in *Chelliah v. Wijenathan* [3], "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." Mr. Daluwatta relied on 1D1 as the starting point of prescription. As already stated, 1D1 is of little or no avail to the 1st defendant's case. In my view, the 1st defendant has failed to establish a starting point for his acquisition of prescriptive title. This too is another important lacuna in the 1st defendant's case.

On a consideration of the totality of the evidence led in support of the 1st defendant's case, all that we are left with is the facile story of walking into abandoned premises after the Japanese air raid. The material is far too slender to found a claim based on prescriptive title. Mr. Kanag-Isvaran for the plaintiff respondent relevantly cited the following passage from Walter Pereira's Laws of Ceylon, 2nd Edition, page 396. "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by court. *Peynis v. Pedro* [3]. In the present case there is a significant absence of clear and specific evidence on such acts of possession as would entitle the 1st defendant to a decree in his favour in terms of section 3 of the Prescription Ordinance.

In this view of the matter, it is unnecessary for me to consider the several other submissions made by Mr. Kanag-Isvaran, as affecting the credibility of the testimony of the 1st defendant; nor is it necessary to consider the conduct of the 1st defendant in relation to his claim of ownership to premises Nos. 8, 12 and 14 which are in close proximity to the premises in suit.

In the result, the judgment of the Court of Appeal is affirmed, and the appeal is dismissed with costs.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.