

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

**In the matter of an Appeal against a  
Judgment of the Civil Appellate High  
Court of Avissawella.**

Don Peter Ranasinghe,  
No. 49, Athurugiriya Road,  
Kottawa, Pannipitiya.

Plaintiff

**SC APPEAL 33/2010**

SC/ HC CA / LA 273/09

HCCA / AV / 05 / 2008

DC Homagama 03 / 2498 / L

Vs

1. P.K. Nandasekera,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.
2. P. K. Sudath Premakumara,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.
3. P.K. Sunil Samarasekara,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.
4. Meshrek Bank PLC,  
Srimath Chittampalam  
A. Gardiner Mawatha,  
P.O.Box 302, Colombo 02.

Defendants

AND THEN BETWEEN

1. P.K.Sudath Premakumara,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.
2. P.K.Sunil Samarasekera,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.

2<sup>nd</sup> and 3<sup>rd</sup> Defendant  
Appellants

Vs

Don Peter Ranasinghe,  
No. 49, Athurugiriya Road,  
Kottawa, Pannipitiya.  
( Deceased )

Plaintiff Respondent

AND THEN AGAIN BETWEEN

1. P.K.Sudath Premakumara,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.
2. P.K.Sunil Samarasekera,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.

2<sup>nd</sup> and 3<sup>rd</sup> Defendant  
Appellant Petitioners

Vs

Jeewandarage Jayawathi  
Perera, No. 49, Athurugiriya  
Road, Kottwa, Pannipitiya.

Substituted Plaintiff  
Respondent Respondent

**AND NOW BETWEEN**

1. Ganemulla Gamage Suraji  
Ishara Therease Direkze of  
No. 56, Athurugiriya Road,  
Kottawa, Pannipitiya.
2. Pothuwila Kankanamalage  
Binara Harinedri Perera of  
No. 56, Athurugiriya Road,  
Kottawa, Pannipitiya.

**Substituted 2<sup>nd</sup> Defendant  
Appellant Appellants**

Vs

P.K.Sunil Samarasekera,  
No. 50, Athurugiriya Road,  
Kottawa, Pannipitiya.

**3<sup>rd</sup> Defendant Appellant  
Petitioner Respondent**

Jeewandarage Jayawathi  
Perera, No. 49, Athurugiriya  
Road, Kottawa, Pannipitiya.

**Substituted Plaintiff  
Respondent Respondent.**

**BEFORE**

**: S. EVA WANASUNDERA PCJ,  
PRASANNA JAYAWARDENA PCJ &  
L. T. B. DEHIDENIYA J.**

COUNSEL : Gamini Marapana PC with Navin Marapana for  
the Substituted 2<sup>nd</sup> Defendant Appellant  
Appellants.  
Rohan Sahabandu PC with Ms. D. Perera for  
the Substituted Plaintiff Respondent  
Respondent

ARGUED ON : 07.06.2018.

DECIDED ON : 05.07.2018.

**S. EVA WANASUNDERA PCJ.**

When the Petition of Appeal was supported for leave to appeal, the Court granted leave to appeal on the following questions of law, as prayed for in paragraph 39(1) and (2) of the Petition dated 20<sup>th</sup> October, 2009. The said **questions of law** are as follows:-

(1) Have their Lordships of the High Court erred in interpreting the provisions of Section 3 of the Prescription Ordinance together with the relevant case law in particular *Bandi Naidi Vs Appu Naide et al* ( 1923 5 C.L.Rec. 192) and *Cinnatambi Vs Chanmuga et al* ( 1909 Current Law Report 134 ) in the light of the facts of this case?

(2) Have their Lordships of the High Court erred in interpreting Section 21 of the Civil Procedure Code?

The Plaintiff in the District Court namely **Don Peter Ranasinghe** instituted action against **P.K. Nandasekera**, the Defendant seeking inter alia a **declaration of title** to the land described in the Schedule to the Plaint, which said land was of an extent of A0. R2. P7.5 depicted in Plan No. 112 dated 12.08.1925 made by Licensed Surveyor H.D.E.Gunatillake. The Defendant is alleged to have entered into the said land with a house thereon with the **leave and license of one Dona**

**Gnanawathie Ransinghe Wijesiriwardane** who was the predecessor in title to the said property.

The position taken up by the Defendant, Nandasekera however was that , the said Dona Gnanawathie Ransasinghe Wijesiriwardane gifted a portion of the land by a **non notarially executed document marked and produced as V4** and placed him in possession thereof on 02.07.1952. Therefore he took up the position that he had possessed the property with the house on it from 02.07.1952 without acknowledging title of anybody else and by having exclusively held possession adverse to the Plaintiff and his predecessor in title, he had acquired prescriptive title to the house and property which is the subject matter of this case. Nandasekera, the Defendant had notarially executed two deeds gifting half to each of his two sons keeping life interest to himself and his wife. His wife had passed away. Nandasekera divulged these facts when answer was filed and thereafter the Plaintiff added the Defendant's two sons as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. One of the sons had later mortgaged his half portion to the Mashreq Bank PLC and therefore the said Bank was also made a party as the 4<sup>th</sup> Defendant. When they filed answer, it was their position also that the prescriptive title of Nandasekera passed on to them. **So, the main question is whether Nandasekera acquired prescriptive title to the house and property which is the subject matter of this action.** The Defendants prayed that the Plaint be dismissed.

The **District Judge held with the Plaintiff** in his Judgment. The **Defendants** being aggrieved by the same **appealed** to the Civil Appellate High Court. The learned Judges of the High Court **dismissed the Appeal**. The learned District Judge and the learned Judges of the High Court founded their judgments on the fact that the Defendants had **failed to establish** that the 1<sup>st</sup> Defendant Nandasekera's **possession was adverse to or independent of that of the Plaintiff or his predecessor in title** as at the date of the Plaint filed **on 31.10.1985** as required by **Section 3 of the Prescription Ordinance**.

**Section 3 of the Prescription Ordinance** reads as follows:-

“ Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands of immovable property, by a title adverse to or independent of the claimant or Plaintiff in such action ( that is

to say a 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 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 Intervener or by those under whom he claims shall entitle such Plaintiff or Intervener to a decree in his favour with costs; saving in case of reversioners and remainder men:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when such parties so claiming acquire a right of possession to the property in dispute.”

**Section 21 of the Civil Procedure Code** reads as follows:-

“ Where a defendant is added, the plaint shall , unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants.”

This Court has to look into the matters before Court having in mind, **the questions of law on which leave to appeal has been granted.**

The Plaint was originally filed against Nandasekera on 31.10.1985 seeking a declaration of title to the land and premises described in the Schedule to the Plaint and ejectment of Nandasekera and those holding under him. The Plaintiff had bought the land and premises by Deed 361 dated 03.11.1975 attested by S.D.P.Wijesinghe Notary Public. The said Nandasekera filed answer stating that he came into the house (which is on the land of an extent of about half an Acre) with the leave and license of Gnanawathie Ransinghe Wijesiriwardena and occupied the house on or about 02.07.1952. When the Plaintiff bought the property he had sent a notice to Nandasekera through his lawyer on 31.05.1976 demanding that he leaves the premises and hands over the vacant possession to the Plaintiff.

The Plaintiff filed amended Plaintiff on 29.03.1988 . In paragraphs 13 and 14 of the amended Plaintiff, the Plaintiff states that he has become aware of the fact that the Defendant Nandasekera had complained to the Commissioner of National Housing that ' the Plaintiff had wrongfully bought the house over the head of the tenant, while the Defendant had continuously lived in the house belonging to Gnanawathie the predecessor in title, paying to the said owner a rental of Rs. 30/- per month as the tenant'. He had claimed that it should have been offered to him before the owner sold it to any other person as he was the tenant from the year 1952. The Defendant Nandasekera in his amended answer had placed a simple denial of all the paragraphs but had not placed any specific denial. In the amended answer, the defendant had stressed that he was in possession from 1952. He had written two deeds giving his two sons half share of the land to each of them taking for granted that he had acquired prescriptive title by having been on the land for a long time. His sons intervened into the case and were made the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The said two deeds had been written when they were minors and the gift was accepted by Nandasekera's wife as their mother and also subject to the life interest of Nandasekera and his wife.

Having gone through the evidence led in the case before the District Court , I find that the two documents marked at the trial as **P10 and P12** are very important. The Appellants submitted that these documents have not been proven by the Plaintiff at the trial. However I find that evidence has been led through official witnesses to prove the same with permission of court to prove the said documents.

Section 80 of the Evidence Ordinance provides that all official documents are presumed genuine and correct unless it is proved otherwise by adducing cogent evidence. Section 80 reads thus:

" Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the court shall presume -

- (i) That the document is genuine
- (ii) That any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true; and

(iii) That such evidence, statement or confession was duly taken.”

**P10** was an Application made by the 1<sup>st</sup> Defendant, **Nandasekera** to the Commissioner of National Housing, Mr. Karunaratne, on 11.05.1973 **stating that he was the tenant of the owner of the house on the land, namely, Gnanawathie Wijesiriwardene** and since it was an ‘excess house’/ ‘surplus house’, according to the Ceiling on Housing Property Law which came into being at that time, he should be allowed to buy the same as he was the tenant living in the house at that time. The original document P10 was not available but a copy was produced through the witness, Jinasena who had given evidence as an assistant manager of the National Housing Development Authority. While giving evidence at the trial on 17.05.1994 he had identified the signature of the Commissioner of National Housing, Mr. Karunaratne who had issued a certified copy of the document P10. This document P10 is clear evidence that Nandasekera the 1<sup>st</sup> Defendant accepted the ownership of the house and property by the Plaintiff’s predecessor in title, Gnanawathie Wijesiriwardena **as at 11.05.1973.**

The Plaintiff, Don Peter Ranasinghe had purchased the house and the property on **03.11.1975**. Since Nandasekera, the 1<sup>st</sup> Defendant was occupying the house allegedly, ‘unlawfully and without any legal right to remain so therein’, the Plaintiff had sent a notice through a lawyer to Nandasekera, demanding vacant possession thereof. This Notice was marked as **P13** and dated **31.05.1976**. Nandasekera in turn had sent a reply, P12, through his lawyers, Julius and Creasy, Attorneys at Law, explaining that the premises in question was a surplus house owned by Gnanawathie Wijesiriwardene, and that he had already applied to the Commissioner of National Housing for permission to purchase the same since it was within the Ceiling on Housing Property Law. **P12 is dated 25.06.1976**. P12 is a letter addressed to Herman J.C Perera by the legal firm Julius & Creasy, Attorneys at law on behalf of Nandasekera the 1<sup>st</sup> Defendant, informing that their client ‘Nandasekera had already applied to the Commissioner of National Housing under the Ceiling of Housing Property Law for permission to purchase the premises as the tenant thereof’. Accordingly, the **1<sup>st</sup> Defendant had admittedly claimed** to have been the **tenant of the Plaintiff’s predecessor** in title by the date **25.06.1976**. Polhena Hewage Harrison who had been the clerk of the said legal firm had given evidence and identified the document at the trial.

The Appellants argued that the Plaintiff was prescribed meaning that the Plaintiff had filed action after 10 years and 4 days taking the date of the rubber stamp placed on the Plaintiff by Court. The Plaintiff had averred in the Plaintiff that after he purchased the property, he had seriously fallen sick and that due to the problems with his health, he could not come to court any earlier than he had done by way of an action to evict Nandasekera. However in the pleadings before court that was **not taken up as an objection at the trial court by the Defendants**. Anyway the question of prescription does not arise for consideration with regard to filing action against the Defendant at that time, because the **Defendant Nandasekera had been the tenant of the Plaintiff's predecessor in title, according to P10, P12 and P13**.

As I understand, having gone through the evidence of the Plaintiff, the Defendant Nandasekera and a lot of other persons who had given evidence for both parties, Nandasekera had entered that house on the land with the leave and licence of Gnanawathie, the predecessor of the Plaintiff in title of the land and the house in the year 1952. The Defendant and his family lived there for a long time. When the Ceiling on House and Property Law came into being, the Defendant Nandasekera got the idea of applying to purchase the same divulging his position as a tenant hoping to get the ownership of the land and premises according to the said law. As such he replied to the quit notice through his lawyers informing that he was the tenant. Yet, when action was filed in the District Court by the Plaintiff, he filed answer claiming that he is the owner by prescription under Sec. 3 of the Prescription Ordinance. It is obvious that he has taken two contradictory positions, one as tenant before the Commissioner of National Housing and another as a person who had acquired prescriptive title before the District Court.

Nandasekera could not prove that he commenced prescriptive possession after an **overt act against the owner** of the house and the land. The District Judge had come to the finding that he had **not proven his prescriptive title according to law**.

In the case of ***Orloff Vs Grebbe 10 NLR 183 FB***, it was held that when a person enters into occupation of property belonging to another with the latter's consent and permission, he cannot acquire title by prescription to such property unless he gets rid of the character in which he commenced to occupy by doing some overt act showing an intention to possess adversely to the owner.

In the case of ***Siyaneris Vs Jayasinghe 52 NLR 289***, the Privy Council held that if a person goes into possession of a land for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principle.

In the case of ***Maduwanwala Vs Ekneligoda 3 NLR 213***, Bonser CJ held that a person who is let into occupation of property as a tenant, or as a licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in any other capacity. No secret act will avail to change the nature of his occupation. Bonser CJ in that case further said thus: “ Possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as the owner.”

In the case of ***Naguda Marikkars Vs Mohammedu 7 NLR 91***, it was held that in the absence of any evidence to show that a lessee got rid of his character of agent, he was not entitled to the benefit of Section 3 of the Prescription Ordinance. In this case, the tenant paid taxes, repaired the house, leased it to third parties and continued for 20 years. Still, Court held that such evidence was not sufficient to get rid of his character of agent.

In the case of ***Thilakarathne Vs Bastian 21 NLR 12***, Bertram CJ stated thus: “ 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.”

In ***Chelliah Vs Wijanathan 54 NLR 337***, Gratien J stated thus: “ 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.”

In the case of ***Hassan Vs Romanishamy 66 CLW 57***, Basnayake CJ stated thus: “ The payment of rates is by itself not proof of possession for the purpose of Section 3 of the Prescription Ordinance, for rates can be tendered by a tenant or

one occupying any premises with leave and license of the owner or by any other person.”

The contention of the Appellants was that it was not necessary to specifically prove ouster because the Defendant Nandasekera’s possession of the land and the house thereon, from 03.11.1975 is an admitted fact by the Plaintiff. It was also contended that the Plaintiff had filed action to evict the Defendant after another ten years lapsed and therefore it was accepted by the Plaintiff that the Defendant has got prescriptive title.

Just because Nandasekera was in possession of the house and the land for a long time from the year 1952, it cannot be concluded that he had acquired prescriptive title. Gnawathie Wijesiriwardena, the original owner had given Nandasekera leave and license to occupy the house and the land. It was an admitted fact. The question is when did Nandasekera show the owner his intention to own the property on his own and how did he do that? What was the overt act against the owner? In fact Gnawathie Wijesiriwardena had been paying rates and taxes to the local authority until the year 1975 according to the document P 14 and D.P. Ranasinghe the Plaintiff had been paying rates and taxes thereafter up to 1998 according to the document P15. If Nandasekera was holding the property from 1952 onwards with an intention to own it as his own, he could have commenced paying taxes long before 1998. In evidence for the Defendant Nandasekera, no person gave evidence to show that he had possessed the property adversely to the owner’s rights thereof. Without any demonstration of any overt act against the rights of the owner, court cannot recognize Nandasekera as a person who has acted as one holding prescriptive possession against the owner who had given him leave and license to step in and live there, no matter how long he had enjoyed the property. To activate the provision of law, Section 3 of the Prescription Ordinance, demonstration of an overt act is fundamental.

The Appellants contended once again, that the sons of Nandasekera , the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who received by way of two notarially executed deeds from Nandasekera , his alleged acquired prescriptive title, had also enjoyed the house and property more than ten years and therefore that they are holding the property on prescription. I do not agree with that contention because if Nandasekera did not have prescriptive title, he could not have passed any

acquired prescriptive title to anybody. I cannot see any proof of any overt act in evidence before the trial court having been led.

The Appellants have quoted two cases, within the questions of law, namely, ***Bandi Naide Vs Appu Naide et al 1923, 5 C.L.Rec. 192 and Cinnathamby Vs Chanmugam et al 1909 Current Law Reports 134.*** In both these cases , what is discussed is the stance of the added Defendants in an action and the decision arrived at, is that ‘the date of an action against an added party must be the date on which he was so added’. However, the Appellants contend that action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants can be only reckoned as having been brought against them only as from the date on which they were added as parties, i.e. 04.04.1995 and up to that time their adverse possession as from the date of their title deeds namely 18.11.1982 should ensue to their benefit. I am of the opinion that since the Appellant’s father, Nandasekera did not acquire prescriptive title to the property, those who received from Nandasekera cannot get any acquired prescriptive title at all. It is seen that Nandasekera had failed to demonstrate any overt act which had been done to commence any adverse possession.

Then again, counsel for the Appellants made submissions on two more authorities, namely ***Lucihamy Vs Hamidu 26 NLR 41 and Perera Vs Fernando 1999 3 SLR 259*** both of which are more pertinent to Partition Actions and in my opinion cannot be related to the case in hand with regard to prescription.

Accordingly , I conclude that the answers to the questions of law enumerated above stand in the negative. I affirm the Judgment of the Civil Appellate High Court as well as the judgment of the District Court. The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court.

Prasanna Jayawardena PCJ.

I agree.

Judge of the Supreme Court.

L.T.B. Dehideniya J.

I agree.

Judge of the Supreme Court.