

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

In the matter of an Appeal with Special Leave to Appeal granted by the Supreme Court against the Judgment dated 27.07.2009 of the Provincial High Court of Civil Appeals of the Sabaragamuwa Province.

S.C. Appeal No. 04/2010

S.C.HC.CA.LA. No. 215/09
SP/HCCA/KAG No. 257/2007(F)
D.C. Mawanella No. 282/L.

1. J.R.Punchiappuhamy
2. J.R. Ratnasiri Senarath Bandara
Both of Arama, Aranayake.

Plaintiffs

Vs.

J.R. Dingiribanda of Galaudawatta,
Arama, Aranayake.

Defendant

And then Between

J.R. Dingiribanda of Galaudawatta,
Arama, Aranayake.

Defendant-Appellant

Vs.

1. J.R.Punchiappuihamy
2. J.R. Ratnasiri Senarath Bandara
Both of Arama, Aranayake.

Plaintiff-Respondents

And Now Between

1. J.R.Punchiappuihamy
2. J.R. Ratnasiri Senarath Bandara
Both of Arama, Aranayake.

Plaintiff-Respondent-Appellants
Vs.

J.R. Dingiribanda of Galaudawatta,
Arama, Aranayake.

Defendant-Appellant-Respondent

* * * * *

BEFORE : **Priyasath Dep, PC.,J.**
S. Eva Wanasundera, PC.J .&
Sisira J.de Abrew, J

COUNSEL : Dr. S.F.A. Cooray for Plaintiff-Respondent-Appellants.
S.N. Vijithsingh with Laknath Seneviratne for Defendant-
Appellant - Respondent.

ARGUED ON : **21.07.2015**

WRITTEN SUBMISSION
FILED : By the Respondent on 01.09.2015

DECIDED ON : **02.11.2015**

* * * * *

Eva Wanasundera, PC.J.

This appeal is from the judgment dated 27.7.2009 of the Provincial High Court of Civil Appeal of the Sabaragamuwa Province holden at Kegalle. By that judgment the Civil Appellate High Court reversed the judgment dated 11.02.2005 of the Additional District Judge of Mawanella and dismissed the Plaintiff's action without costs.

This Court granted Leave to Appeal on the question of law set out in paragraph 6(a) and 6(b) of the Petition dated 07.09.2009 and added another question as raised by the Counsel for the Respondent as 6(c). They are as follows:-

- 6(a) Have the Honourable Judges of the Provincial High Court erred by coming to the finding that the principle of law that, “the fact that the Plaintiff has prayed for a greater relief than what he is entitled to, should not prevent him from getting a lesser relief which he is entitled to” has no application to this case?
- 6(b) Have the Honourable Judges of the Provincial High Court erred in holding that the principle of law enunciated in the decision of Your Lordships’ Court in *Attanayake v. Ramyawathie* has no application to this case?
- 6(c) Is the Appellant entitled to eject the Respondent in view of Deed bearing No. 5151 dated 25.11.1997?

The facts observed by this Court and elicited in evidence in the present case can be summarised as follows:- Two Plaintiffs, father and son, filed action in the District Court of Mawanella on 22.10.1997 regarding a land described in the schedule to the plaint named ‘Bilinchagahamula Hena’. The extent of the land is not mentioned in the schedule but boundaries are described. In evidence, it was disclosed that the extent of the land is about 1 acre. In the plaint they claimed title together for 11/24th share of the said land on title **gained by deeds and the rest of the land by prescription**. They alleged that the Defendant, the brother of the 1st Plaintiff is a trespasser who came into the land illegally on 03.10.1993 and was continuing to occupy one part of the land.

The prayer was for **a declaration of title to the whole land** and ejectment of the defendant and damages. The Defendant filed answer on 30.03.1998 and claimed that if the Defendant entered the land as a trespasser legal action should have been taken against him by the Plaintiffs in 1993 which they had failed to do and that he had been on the land except the 11/24th share belonging to the Plaintiffs **on title received from deeds as well as prescription**. The Defendant further pleaded that the troubles started with some quarrels between the parties and that the possession of land as co-owners is difficult and therefore the solution would be a partition action. **Defendant**

prayed that the parties should be ordered to partition the land. He further stated that the Defendant's son, Senaratne by deed No. 5151 dated 25.11.1997 has now obtained title by deed as well to the part of the land occupied by them, which is 13/24th share of the whole land. Thus, **the Defendant also claimed paper title along with his son and prescriptive title to 13/24th share of the whole land.** The 1st Plaintiff and the Defendant are brothers. The Plaintiffs **claim** that they being the father and son are occupying the whole land. The Defendant claims that he and his son are occupying 13/24th share of the same land.

The District Court heard the trial. The 1st Plaintiff and 2nd Plaintiff, father and son both gave evidence. The Defendant also gave evidence. Other witnesses were not allowed for the defence because the names of the witnesses were not by name listed, in the list of witnesses. Judgment was given on 11.2.2005 to the effect that the Plaintiff was entitled to the ownership of the whole land and that he can get possession of the whole land meaning that the Defendant can be ejected from the land.

The Defendant appealed to the Civil Appellate High Court of Kegalle and the Civil Appellate Judges allowed the appeal setting aside the judgment of the District Court and dismissed the Plaintiff's action without costs by their judgment dated 27.7.2009.

Counsel for the Appellant had quoted the decision in ***Attanayake v. Ramyawathie 2003, 1 SLR 401 at page 409*** and argued in the Civil Appellate High Court that the principle of law namely "the fact that the Plaintiff has prayed for a greater relief than what he is entitled to, should not prevent him from getting a lesser relief which he is entitled to" should apply to the Plaintiff-Respondent AND therefore the Plaintiff is entitled to have got relief to eject the Defendant-Appellant in the Civil Appellate High Court. The High Court Judges had dismissed this argument by stating that the said case has no application to the facts of the present case. The Counsel for the Appellant in this forum also argued on the same lines.

I observe that in the present case, it was an accepted fact by both parties and also proven by the Plaintiffs with deeds that 11/24th share of 'Bilinchagahamula Hena' of an extent of about 1 acre belongs to the Plaintiffs. The ownership of 11/24th share of the land remains as such for ever. They claimed prescriptive title to this share of the land

together with the rest of the land, claiming that they possessed it without interference till 1993. They filed action to eject the Defendant and get a declaration that they are the owners of the rest of the land by prescription.

The following questions arise in my mind, when I try to understand the Appellants' argument. (1) What relief did the Plaintiffs pray for in the District Court? (2) What relief did they get in the District Court? (3) When the Defendant appealed to the Civil Appellate High Court, what was the relief granted to him? (4) What is the lesser relief that the Plaintiffs claim to be entitled to which they did not get at the end of the Appeal to the High Court?

The answers as I see, are (1) They prayed for a declaration of title to the whole land (2) They got a declaration of title to the whole land plus a right to eject the Defendant (3) The Civil Appellate High Court dismissed the Plaintiffs' action in the District Court thus reversing the judgment of the District Court. (4) As claimed by the Plaintiff-Appellants, the lesser relief can be identified as "a declaration of title to 11/24th share of the land".

The Provincial High Court has stated that ***Attanayake v. Ramyawathie* 2003, 1 SLR 401** has no application to this case. Let me analyse the said case. It was a Vindictory Action. The original Plaintiff sued the Defendant for a declaration of title to the land in suit and ejectment. The Plaintiff did not refer to himself being a co-owner of the land in dispute. The Defendant too claimed title to the same land. The evidence in suit was to the effect that the land should be divided among seven persons. The Plaintiff failed to prove exclusive (prescriptive) title to the larger land he claimed; nor was any issue suggested at the trial or in appeal in respect of the larger land.

It was held that, although the Plaintiff might have been entitled to a declaration of title to a portion of the land as co-owner of the entire land, she failed to adduce evidence of ownership for a portion or the larger land claimed by prescription or ouster. In the circumstances of the case, the Plaintiff was not entitled to the relief of a declaration of title. The appeal was dismissed in this case.

I fail to see any relevance of the present case to the stare decisis of the case in ***Attanayake v. Ramyawathie*** except that the Plaintiffs in the present case might have

been granted a declaration of title to a portion of the land as 'co-owner of the land', if the Plaintiff prayed for the same. The Plaintiff prayed for a declaration of title regarding the whole land in the District Court. The Civil Appellate High Court did not grant any declaration of title to the whole land or a part of the land which was the accepted "11/24th share as a co-owner" but dismissed the action. On this account, I agree that the Civil Appellate High Court should have granted 'a declaration of title to 11/24th share as a co-owner' to the Plaintiffs. Yet I observe that the ejectment of the alleged trespasser was what the High Court had prevented by dismissing the action of the Plaintiffs.

At pg. 407 of ***Attanayake v. Ramyawathie*** (supra) as obiter in this case, it is quoted by the Appellants (Plaintiffs) that "the fact that an Appellant has asked for a greater relief than he is entitled to should not prevent him from getting the lesser relief which he is entitled to". I take it as only that the Plaintiffs prayed for a declaration of title to a larger land but they should have been given a declaration of title to the lesser amount, ie. 11/24th share as co-owner.

The case ***Attanayake v. Ramyawathie*** (supra) cannot be interpreted to say that 'ejectment of an alleged trespasser' is a lesser relief than "a declaration of title to the whole land". These reliefs are different in nature and cannot be even compared to each other as "bigger" relief and "lesser" relief. The comparison of reliefs should be of the same sort on one band, like 'stone' with 'stone' and 'wood' with 'wood' and not otherwise.

On this argument, I hold that the Civil Appellate High Court should have declared that "the Plaintiffs are entitled to 11/24th share of the whole land". Other than that ***Attanayake v. Ramyawathie*** (supra) has no application to the facts of the present case.

The Civil Appellate High Court had analysed the evidence of the Plaintiffs and Defendant and held that the 2nd Plaintiff became the owner of a part of the whole land in 1988 which is a fact proven by his title deed and by 1997 when action was filed, he had been the co-owner only for 9 years. The 1st Plaintiff, father might have been there for longer but both of them together as Plaintiffs cannot claim prescription together to

the same land for a longer period. The father might have prescribed to the portion of land he occupied definitely for a longer period than the son because he is very much younger than the father. Them being joint Plaintiffs have stood against them regarding prescription.

Moreover, I observe that the evidence of the Defendant on record shows that he also had been there for very long, ie. over 30 years or so. The 1st Plaintiff and the Defendant being brothers had inherited from their mother and father separately different shares at different times. The evidence of the Plaintiffs did not prove that the Defendant was a trespasser. It is apparent that they had been enjoying parts of the whole land without demarcating them. The evidence when analysed brings me to that conclusion.

I observe that Deed 5151 dated 25.11.1997 shows that the Defendant's son has bought ½ of the whole land of 'Bilinchagahamula Hena'. The Defendant and his son are at present enjoying what was bought by the son. This means that now they have a valid title deed from the other co-owner transferring 12/24th share of the whole land. I cannot see the Defendant as a trespasser as he and his son are together on a part of the land with a title deed granting title to the son.

The Counsel for the Defendant-Respondent argued that he is in agreement with the decisions of this Court *in Hewavitharana vs. Dungan Rubber Company Ltd.* (1913) 17 NLR 49 and *Harriette Vs. Pathmasiri* (1996) 1 SLR 358. The *Ratio Decidendi* of *Hewawitharana vs. Dungan Rubber Company* (supra) is "one out of several co-owners may without joining with any other co-owner in the action sue a trespasser for a **declaration of his undivided share**, ejectment and damages. **There is no doubt that the owner of an undivided share of land is entitled to sue a trespasser. In the process he could claim to have his title to the undivided share declared and could eject the trespasser from the whole land."**

In *Harriette vs. Pathmasiri* (supra) Sarath N. Silva, J. (as he then was) cited the aforementioned principal with approval and adopted the same. It was held in that case that "our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land

because the owner of the undivided share has an interest in every part and portion of the entire land”.

Accordingly, I observe that the Plaintiffs being admittedly the co-owners of an undivided 11/24th share of the entire land surely have a right as co-owners of the land to sue a trespasser, to have their title to the undivided share declared and for ejection of the trespasser from the whole land. **The question is whether the Plaintiffs have proved that the Defendant is a trespasser? The evidence shows that they have failed to prove that the Defendant is a trespasser.**

On a balance of probabilities of the evidence before court, I observe that on record the Plaintiffs and the Defendant and his son have been on the land for a length of time as co-owners and in 1993 they have quarreled. It is only then that the Plaintiffs have filed action to eject the Defendant from the entire land. It is a re-vindicatio action. The Plaintiffs have failed to prove title to the whole land but proved title by deeds to only an undivided 11/24th share. It was their burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster which they have failed to do.

Furthermore, the Defendant's son has obtained title to half of the whole land by deed 5151 dated 25th November, 1997. That deed was not challenged at the trial. It was written about one month after this action was filed in the District Court on 22.10.1991. Yet the reality at present is that the Defendant and his son who owns half of the entire land are on the land. They cannot be named as trespassers any more and this Court does not see the Defendant as a trespasser.

The Appellants' counsel at the hearing suggested that this matter should be heard by a Bench of 5 Judges. I see no reason whatsoever as a basis for such a suggestion. The case law referred to by counsel are not in any conflict in their reasoning by the judges who heard the said cases.

I am of the view that the Judges of the Civil Appellate High Court should have granted a declaration of title only to 11/24th share of the co-owned land of Belinchagahamula Hena to the Plaintiffs instead of dismissing the action altogether. I hold that the Appellants are only entitled to that relief and no more. Since it was not proved that the Defendant was a trespasser, he cannot be ejected by the Plaintiffs. Now that the

Plaintiffs are enjoying the same land as co-owners with the Defendant and his son, it is the right time to file a partition action and demarcate the portions of land so that it would be peaceful thereafter. It is only an incidental suggestion of Court.

I vary the judgment of the Civil Appellate High Court dated 27.07.2009 and state that the Plaintiffs are entitled to a declaration of 11/24th share of the Belinchagahamula Hena which is of about one acre in extent. However they are not entitled to ejectment of the Defendant from the land.

I answer the aforementioned questions of law in the negative and thus in favour of the Defendant-Appellant-Respondent. The Appeal is dismissed subject to the aforementioned variation. However, I order no costs.

Judge of the Supreme Court

Priyasath Dep, PC.,J.

I agree.

Judge of the Supreme Court

Sisira J. de Abrew, J

I agree.

Judge of the Supreme Court