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

In the matter of an Appeal

Punchiralage Keerala
Pandikaramaduwa, Parinigama
Plaintiff

SC Appeal 188/2011
SC/HCCA/LA287/2010
NCP/HCCA/ARP/299/07
DC Anuradhapura Case No.16676/L

Keeralage Parakrama
Pandikaramaduwa, Parinigama
Substituted Plaintiff

Vs

1. W. M. Dingiribanda
   No. 39, Nuwaraeli Koliniya,
   Pandikaramaduwa, Parinigama

2. K.A. Chandralatha
   No.39, Nuwaraeli Koliniya
   Pandikaramaduwa, Parinigama

Defendants

AND

Keeralage Parakrama
Pandikaramaduwa, Parinigama
Substituted Plaintiff-Appellant

Vs

1. W. M. Dingiribanda

No. 39, Nuwaraeli Koliniya,
Pandikaramaduwa, Parinigama

2. K.A. Chandralatha
No.39, Nuwaraeli Koliniya
Pandikaramaduwa, Parinigama

Defendant-Respondents

AND NOW BEWEEN

K.A. Chandralatha
No.39, Nuwaraeli Koliniya
Pandikaramaduwa, Parinigama

2nd Defendant-Respondent-Petitioner-Appellant &
Substituted 1st Defendant-Respondent-Petitioner-Appellant

Vs

Keeralage Parakrama
Pandikaramaduwa, Parinigama

Substituted Plaintiff-Appellant-
Respondent-Respondent

Before : Sisira J de Abrew J
Priyantha Jayawardena PC J
Murdu Fernando PC J

Counsel : Shamith Fernando for the 2nd Defendant-Respondent-Petitioner-Appellant.
Rohan Sahabandu President's Counsel for the Substituted Plaintiff-Appellant- Respondent-Respondent

Argued on : 1.6.2018
Written Submission
Tendered on : 8.6.2018 by the 2nd Defendant-Respondent-Petitioner-Appellant
6.6.2018 by the Substituted Plaintiff-Appellant-
Respondent-Respondent

Decided on : 18.7.2018

Sisira J de Abrew J

This is an appeal against the judgment of the Civil Appellate High Court dated 22.7.2010 wherein the learned Judges of the Civil Appellate High Court set aside the judgment of the learned District Judge and gave judgment in favour of the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent). Being aggrieved by the said judgment the 2nd Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) has appealed to this court. This court by its order dated 28.11.2011 granted leave to appeal on questions of law set out in paragraphs 12(b),(d),(g),(i),(j),(k) and (m) of the Amended Petition of Appeal dated 14.9.2011which are set out below.

1. The learned Judges have erred in law by not considering the fact that the Respondent has failed to identify the corpus.

2. The learned Judges have failed in law in applying Section 103 0f the Evidence Ordinance to this case.

3. The learned Judges have erred in law by granting damages whereas no evidence had led in this case with regard to damages.

4. The learned Judges have erred in law by not giving any reason in their judgment for dismissing the Petitioner's counter claim.

5. The said judgment is against the weight of the evidence placed before the court.

6. The judgment is contrary to legal precedents created by superior courts in similar circumstances.

7. The said judgment is inconsistent with the evidence transpired during the trial and thus bad in law.

The Plaintiff-Respondent filed this case against the Defendant-Appellant seeking a declaration that he is the lawful permit holder of the lands described in the 1st and the 2nd schedules of the plaint. He also sought an order to eject the Defendant-Appellant from the land described in the 2nd schedule of the plaint and compensation amounting to Rs.20,000/- per month from the year 1992. The land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The land described in the 1st schedule of the plaint has been given to the Plaintiff-Respondent by a permit (P1) given by the State in terms of Section 19(2) of the Land Development Ordinance on 2.12.1991. This fact has been proved by the Plaintiff-Respondent. The learned District Judge by his judgment dated 1.6.2005 dismissed the case of the Plaintiff-Respondent on the basis that the corpus had not been identified. Is the judgment of the learned District Judge correct? I now advert to this question. The land for which the Plaintiff-Respondent seeks a declaration of title has been described in the plaint by reference to physical metes and bounds. According to Section 41 of the Civil Procedure Code the land must be described in the plaint so far as possible by reference to physical metes and bounds **or** by reference to a sufficient sketch, map or plan. The word '**or**' is important. Section 41 of the Civil Procedure Code expects the plaintiff to describe in the plaint the land by reference to physical

metes and bounds **or** by reference to a sufficient sketch, map or plan. In the present case the land has been described in the plaint by reference to physical metes and bounds. The son of the Plaintiff-Respondent gave evidence and also produced the permit marked P1which describes the land by reference to physical metes and bounds. His evidence was not challenged by the Defendant-Appellant. The son of the Plaintiff-Respondent was not cross-examined by the Defendant-Appellant. This shows that the Defendant-Appellant has admitted the boundaries of the land of the Plaintiff-Respondent. When I consider all the above matters, I hold that the Plaintiff-Respondent has complied with Section 41 of the Civil Procedure Code with regard to the land for which he sought a declaration of title and has proved the identification of corpus. The learned District Judge has concluded that the land for which the declaration of title is sought has not been identified. I must mention here that there was not even an issue on the question whether corpus has not been identified. When I consider all the above matters, I hold that the conclusion reached by the learned District Judge is wrong.

The Plaintiff-Respondent's son, in his evidence, stated that the Defendant-Appellant encroached on to his land described in the 1st schedule of the plaint; that the encroached area of the land is described in the 2nd schedule of the plaint; and that the land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the plaint. The Defendant-Appellant did not cross-examine the above witness. This shows that the Defendant-Appellant has not challenged the evidence of the Plaintiff-Respondent. Therefore it appears that the Plaintiff-Respondent has proved that the Defendant-Appellant has encroached to his land and that the encroached area has been described in the 2nd schedule of the plaint. Further the Plaintiff-Respondent has proved that the land described in the 2nd schedule of the plaint is a part of the land described in the 1st schedule of the

plaint. The Defendant-Appellant did not give evidence. The learned District Judge decided that the Permit of the Plaintiff-Respondent (P1) has been proved by him. When I consider the evidence led at the trial, I am of the opinion that the Plaintiff-Respondent has proved that he is the lawful permit holder of the land described in the plaint. If the Plaintiff-Respondent is the permit holder of the land described in the plaint, he can maintain a rei-vindicatio action. In Palisena Vs Perera 56 NLR 407 it was held that a permit holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain vindicatory action against a trespasser. In Bandarnayke Vs Karunawathi [2003] 3SLR 295 it was held that a permit holder under the LDO enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser. In Dharnadasa Vs Jayasena [1997] 3SLR 327 GPS de Silva CJ held that in a rei vindicatio action, the burden is on the plaintiff to establish the title pleaded and relied on by him. In the present case the learned District Judge also decided that the permit of the Plaintiff-Respondent had been proved by him. Considering all the above matters, I hold that the Plaintiff-Respondent has established his title to the land to maintain a vindicatory action.

The Defendant-Appellant has however raised an issue on prescription in respect of his land. According to the conclusion of the learned District Judge, this issue has not been proved. What is the intention of an encroacher to a land? His intention is to secretly possess and acquire lands for which he has no title and to expand the area of encroachment day by day. His intention is secret and dishonest. A person who possesses a land with a secret intention cannot claim prescription in terms of Section 3 of the Prescription Ordinance because his possession cannot be considered as an adverse possession. Even a co-owner who possesses a co-owned land cannot claim prescription in terms of Section 3 of the Prescription Ordinance. This view is supported by the judgment delivered by the Privy Council in Corea Vs

Appuhamy 15 NLR 65 and the judgment of Basnayake CJ in the case of Gunawardene Vs Samarakoon 60 NLR 481.

> *In Corea vs Appuhamy (supra) Their Lordships held as follows. 'A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result'.*
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> *In Gunawardene Vs Samarakoon (supra) Basnayake CJ held that possession qua co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.*

An Encroacher starts encroaching upon lands for which he has no title and continues to possess the encroached portion of the land with a secret and dishonest intention. Therefore his possession in the encroached portion of the land cannot be considered as an adverse possession. Such a person cannot claim prescriptive title to the encroached area of the land under Section 3 of the Prescription Ordinance because his possession is not an adverse possession. 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 or immovable property, by a title adverse to or independent of that 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 acknowledgment 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 herein before 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:

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 the parties so claiming acquired a right of possession to the property in dispute.

To claim prescriptive title in terms of Section 3 of the Prescription Ordinance, the claimant's possession to the land should be an adverse possession. This is one of the conditions that should be proved by the claimant. This view is supported by the judgment of Weerasuriya J in the case of Seeman Vs David [2000] 3 SLR 23 wherein His Lordship held as follows. "The proof of adverse possession is a condition precedent to claim prescriptive rights". Considering all the above matters, I hold that an encroacher to a land is not entitled to claim prescriptive title

in terms of Section 3 of the Prescription Ordinance to the encroached area of the land or to the entire land. In fact when a person encroaches upon lands for which he has no title, he acquires status of a trespasser in respect of the encroached area of the land. Trespasser starts possessing lands for which he has no title and continues to possess the land secretly. As I pointed out earlier, to claim prescriptive title in terms of Section 3 of the Prescription Ordinance claimant's possession should be an adverse possession. A person who possesses a land with secret intention cannot claim that his possession is an adverse possession. Possession of a land by a person with secret intention cannot be considered as an adverse possession in terms of Section 3 of the Prescription Ordinance. Thus a trespasser who violates the law of the land and possesses the land cannot claim benefit of the law of the land. Thus a trespasser cannot acquire prescriptive title in terms of Section 3 of the Prescription Ordinance. Same principle applies to an encroacher. Considering all the aforementioned matters, I hold that an encroacher cannot claim prescriptive title in terms of Section 3 of the Prescription Ordinance.

In a rei vindicatio action, once the court decides that the plaintiff is the owner of the land and that the defendant has encroached on to the land of the plaintiff, the court must declare that the plaintiff is the owner of the land and also make an order for the ejectment of the encroacher (the defendant) since possession of the encroacher becomes an unlawful possession. This view is supported by the judicial decision in Pathirana Vs Jayasundera 58 NLR 169 wherein Gratiaen J at page 172, held that 'in rei vindicatio action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.' In the same way, in a case where the plaintiff seeks a declaration that he is the lawful permit holder of the land given to him in terms of Section 19(2) of the Land

Development Ordinance, once the court decides that the plaintiff is the lawful permit holder of the land and that the defendant has encroached on to the land of the plaintiff, the court must make an order declaring that the plaintiff is the lawful permit holder of the land and also must make an order to eject the encroacher (the defendant). In the present case the Plaintiff-Respondent has established that he is the lawful permit holder of the land described in the 1st schedule of the plaint and the Defendant-Appellant has encroached upon the said land. Therefore it becomes the duty of the court to make an order ejecting the Defendant-Appellant.

Learned counsel for the Defendant-Appellant contended that the area alleged to have been encroached by the Defendant-Appellant has not been identified by the Plaintiff-Respondent by way of a plan and that therefore the case of the Plaintiff-Respondent should fail.

In Gunasekara Vs Punchimenika [2002]2 SLR 43 the Court of Appeal observed the following facts.

> *"The plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion- the encroached portion was not described with reference to physical metes and bounds or by reference to any map or sketch. The matter was fixed for ex-parte trial; after ex-parte trial an application was made to issue a commission to survey the land and identify the same. The ex-parte trial did not end up in a judgment. After the return of the commission, the plaint was amended, a fresh ex-parte trial was thereafter held. After the decree was served, the defendant-appellant sought to purge default, which was refused."*

Court of Appeal held as follows.

> *"The Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon – section 46(2)(a) read together with section 41 of CPC."*

What happens when a plaint is rejected on the basis that the encroached area has not been described by way of a plan or a sketch in a case where a plaintiff seeks a declaration of title to his land (main land) described in his plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan? Then the encroacher would be placed at an advantageous position and would continue to possess the land without any legal right. Further encroacher may later make a claim for prescriptive title to the encroached area on the ground that his right to possess the land has been recognized by court since the plaintiff's case had earlier been rejected. However it is a question whether the encroacher in such a case would be successful in his claim. Thus, when the plaint is rejected in a case of this nature on the aforementioned ground the encroacher who violates the others' legal rights would be placed at an advantageous position and the owner of the land would be placed at a disadvantageous position. Thus if orders of this nature are permitted to stand, an encroacher who does not respect the law of the land and violates the others' rights would be protected by orders of court and the rights of lawful owners of properties would not be protected by courts. At this juncture it is pertinent to consider observation made by Sansoni J in the case of M. Kanapathipillai Vs M. Meerasaibo 58 NLR41 at page 43 wherein His Lordship observed as follows: "There is a well-established rule that the law will presume in favour of honesty and against fraud." The learned District Judge, before making the impugned order in this case, should have been mindful of the above

observation made by His Lordship Sansoni J in M. Kanapathipillai's case (supra). I do not doubt that Gunasekara's case (supra) would have been differently decided if the above material and legal principle enunciated by Sansoni J were considered. Thus if courts make orders of this nature (rejecting plaint on the basis that the encroached area has not been described by way of a plan or a sketch), the courts would be encouraging violators of law. Therefore, in my view when an owner of a land files a plaint seeking a declaration of title to his land and to eject an encroacher or encroachers from his land, he should describe his main land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan. In this regard one should not forget the fact that the plaintiff is seeking a declaration of title to his main land which has been described in the above manner which is in conformity with Section 41 of the Civil Procedure Code. The situation would have been different if an encroacher to a land seeks a declaration on prescription to the encroached area. Then such a portion of land should be described by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan in the plaint. Section 41 of the Civil Procedure Code reads as follows.

> *"When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only."*

What is the specific portion of land discussed in Section 41 of the Civil Procedure Code? It has to be noted here that in an action for declaration of title, the claim is

made for the main land. Therefore in an action for a declaration of title, 'the specific portion of land' discussed in Section 41 of the Civil Procedure Code is the land for which the plaintiff seeks a declaration of title. Therefore in an action for a declaration of title and ejectment of encroacher from the land, when the **land is described** in the plaint by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan, it is wrong for court to reject the plaint on the basis that the **encroached area has not been described in the plaint** by reference to a sufficient sketch, map or plan.

As I pointed out earlier, the intention of an encroacher is to expand his area of encroachment day by day. If the encroached area is described by way of a plan or sketch at the time of filing the case, it may not be the same encroached area at the time of conclusion of the case. Thus at the time of filing action for a declaration of title if a plan is annexed to the plaint describing the encroached area and the court makes an order ejecting the encroacher as per the plan, the encroacher would still be holding on to another portion of the land even after the order of ejectment is implemented because his area of encroachment at the time of ejectment may be larger than what was shown in the plan. In such an event the Plaintiff may have to file another case to eject the encroacher from the other portion of the land. Thus there would not be an end to litigation and this type of procedure would support the allegation of laws delays. Therefore it appears that the unwritten principle in law enunciated by Sansoni CJ in the case of H.A.M Cassim Vs Government Agent Batticaloa 69 NLR 403 that ***'there must be finality in litigation'*** would be violated if the courts of this country start rejecting plaints as discussed above. When I consider all the above matters, I feel that producing a plan describing the area of encroachment cannot be expected when the owner of a land files action seeking a declaration of title to his main land and for ejectment of encroacher. In an action

for a declaration of title, if the plaintiff establishes his case and the court gives judgment in favour of the plaintiff, and in the plaint an order for ejectment of encroacher or encroachers is also sought, it becomes the duty of court to make an order to eject the encroacher from the main land irrespective of the fact that the encroached area is described by way of metes and bounds or a plan or a sketch. Considering all the aforementioned matters, I hold the view that when the plaintiff who claims to be the owner of a land files a case seeking a declaration of title to his land and also an order to eject an encroacher or encroachers from his main land, what is expected by Section 41 of the Civil Procedure Code is to describe his main land by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan but the said section does not expect to describe the encroached area in the plaint by reference to physical metes and bounds **or** by reference to a sufficient sketch, map or plan.

But in the present case although learned counsel for the Defendant-Appellant contended that the encroached area has not been described by way of a plan, the encroached area has been identified by way of boundaries. In this connection Section 41 of the Civil Procedure Code is important.

In the present case, the encroached area by the Defendant-Appellant has been described in the 2nd schedule of the plaint by way of boundaries. Thus the encroached area has been described in the plaint by reference to physical metes and bounds. I therefore hold that the Plaintiff-Respondent has complied with Section 41of the Civil Procedure Code even with regard to the encroached area which is not necessary. When I consider all the aforementioned matters, I reject the contention of learned counsel for the Defendant-Appellant. When I consider all the above matters, I hold that the learned Judges of the Civil Appellate High Court

have come to the correct conclusion and the learned District Judge was wrong when he dismissed the Plaintiff's case. In view of the conclusion reached above, I answer the above questions of law No.1,3,4,5,6,7 in the negative. The question of law No.2 does not arise for consideration. For all the above reasons, I affirm the judgment of the Civil Appellate High Court and dismiss this appeal with costs. The Plaintiff-Respondent is entitled to the costs in all three courts.

Appeal dismissed.

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court

Murdu Fernando PC J

I agree.

Judge of the Supreme Court