

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

K.R.W.Dalpadadu,
No.237, Diggala Road,
Keselwatta, Panadura.

Plaintiff

SC Appeal No:-69/2015

SC(HC) CALA 14/2012

WP/HCCA/KAL/74/2004

D.C.Panadura Case No:-1073/M

V.

Badanasinghe Nangallage Punyasiri
221/2, Diggala Road, Keselwatta,
Panadura.

Defendant

AND

Badanasinghe Nangallage Punyasiri,
221/2, Diggala Road, Keselwatta,
Panadura.

By his Attorney

Badanasinghe Nangallage Jayatissa

No. 5/3, Temple Road, Keselwatta,
Panadura.

Defendant-Respondent-Appellant

V.

K.R.W.Dalpadadu,
No.237, Diggala Road,
Keselwatta, Panadura.

Plaintiff-Appellant-Respondent

BEFORE:-PRIYASATH DEP, PCJ.

UPALY ABEYRATHNE, J. &

H.N.J.PERERA, J.

**COUNSEL:-N.Mahendra with D.Pathirana for the Defendant-
Respondent-Appellant**

**Ikram Mohamed PC with M.S.A.Wadood for the Plaintiff-
Appellant-Respondent**

ARGUED ON:-21.06.2016

DECIDED ON:-30.11.2016

H.N.J.PERERA, J.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff) instituted action bearing No. 1073/M against the Defendant-Respondent-Appellant (hereinafter referred to as Defendant) in the district Court of Panadura praying inter alia for judgment in a sum of Rupees Two Million as damages from the Defendant for wrongfully

ejecting the Plaintiff from Lot 1 shown in plan No.12643 made by B.M.C.Caldera, Licensed Surveyor marked P1, having purchased Lot 2 and 8 in the said plan at the execution of the decree entered in Mortgage Bond case No. 2148/MB.

The Plaintiff pleaded inter alia that the Mortgage Bond action No 2148/MB was filed in the District Court of Panadura against Mrs.Y.D.Charlotte Pieris , the mother of the Plaintiff on Mortgage Bond No. 7627 dated 6th June, 1985 attested by Lasantha G.A.Estambu, Notary Public . In terms of the decree entered in the said action lots 2 and 8 along with the buildings depicted in plan No 12643 made by D.N.F.Caldera, Licensed Surveyor were sold by way of Public auction and the same was purchased by the Defendant.

In execution of the writ of possession by the Fiscal of the District Court, the Plaintiff was ejected from premises standing on lot No.1 of the said plan No.12643 unlawfully and maliciously. The Plaintiff who is a medical practitioner claimed damages in this action in a sum of Rs2 Million.

The Defendant filed his answer pleading inter alia that the Plaintiff has not demanded any compensation from the Defendant by way of Notice of action, and accordingly he cannot maintain this action and that the Defendant purchased Lots 2 and 8 along with the residential house from the Registrar of the District Court of Panadura at the Public Auction and the Defendant in the Mortgage Bond action, namely Charlotte Peiris was ejected from the premises in execution of the Writ of Possession.

It was the position of the Defendant that the Plaintiff was never ejected by the Fiscal, but it was the mother of the Plaintiff who was ejected by execution of the Writ of Possession. It was also the position of the Defendant that he is in possession of the land that he purchased at the auction held in terms of the decree entered in the District Court of Panadura Case No. 2148/MB and was placed in possession by the steps

taken by Court according to law. The Defendant prayed for the dismissal of the Plaintiff's action. After trial the learned District judge delivered judgment on 01.03.2004 dismissing the Plaintiff's action with costs. The Plaintiff appealed from the said judgment to the Civil Appellate High Court of Kalutara and the Civil Appellate High Court after hearing the submissions of parties by its judgment dated 6th December 2011 allowed the appeal filed by the Plaintiff and set aside the judgment of the Learned District Judge of Panadura awarding a sum of Rupees Five Hundred Thousand being damages to the Defendant.

Being aggrieved by the said judgment of the Civil Appellate High Court of Kalutara dated 6th December 2011 the Defendant filed an application for leave to appeal to the Supreme Court and when the said application for leave to appeal came up for hearing on 31st March 2015 the Supreme Court granted leave to appeal on the following questions of Law:-

- (a) Did the High Court fall into grave error when it failed to consider the evidence of the Respondent and the documents tendered on behalf of the Petitioner (Appellant)?
- (b) Did the High Court fall into grave error when it awarded damages to the Respondent who failed to establish his residence at the Premises?
- (c) Did the High Court fall into error when it held that the Respondent had been ejected from the premises due to the gross negligence or bad faith of the Petitioner?
- (d) Did the High Court in awarding damages to the Respondent erred, When it held that liability may be imposed on the Petitioner Because he was guilty of fraud or bad faith or he knew that his

Act would prejudicially affect the Respondent?

It was contended on behalf of the Plaintiff that the only matter in issue is whether the Plaintiff had been ejected from Lot 1 and if so whether he is entitled for damages for wrongful ejection. It was submitted, the Plaintiff's evidence that he was ejected from Lot 1 stood un-contradicted and the Defendant has not given or adduced evidence to show that in execution of the decree Lot 1 was not affected at all. It was the position of the Plaintiff that the house was a two storied building which was on Lot 1 extended to Lot 2 as well. And when the Plaintiff was at work the Plaintiff had been ejected from Lot 1 and all his belongings were thrown out, and that there was a large crowd gathered when he came home after work which embarrassed and ridiculed him.

It was contended by the Counsel for the Defendant, that the judgment of the Civil Appellate High Court was on the basis that what was sold to the Defendant at the auction was Lots 2 and 8 and not Lot 1 and therefore the Defendant cannot evict the Plaintiff from the house. It was further submitted that the learned Judges of the Civil Appellate High Court misdirected themselves when they failed to consider the fiscal's Conveyance marked (A) by which the Defendant purchased this property on a Judicial sale and also failed to consider document V3 which is the estimate done by an Officer of Court upon the direction given by Court and the conditions of sale which was imposed by the Court. It was the contention of the learned Counsel for the Defendant that the Civil Appellate High Court failed to consider what was purchased by the Defendant at the auction was Lot 2 and 8 along with the residential house.

It was also submitted by the learned Counsel for the Defendant that the Civil Appellate High Court has failed to consider the oral evidence given by the Plaintiff wherein he stated that the house abuts Lot 1 also, that

there is no boundary between Lot 1 and 2 and that part of the building is in Lot 1 and the other part is in Lot2.

There is no dispute between the parties that by judgment dated 1.8.1988 In case No.2148/MB (V8) lots 2 and 8 described in its schedule, had been decided to be sold out in public auction to recover the money borrowed by the defendant (the mother of the Plaintiff) in that case. The Notice published in a National newspaper concerning the plots of land scheduled to be sold in auction (V1), the precept on possession issued to the Fiscal by the District Judge of Panadura dated 28.09.1992(V19), the report issued by the Fiscal on handing over the possession of the land purchased by the Defendant dated 16.10.1992 (V20) are also not challenged by any party to this case.

According to the judgment dated 1.8.1998 in case No.2148/MB only Lot 2 and 8 depicted in plan No. 12643 dated 4.8.1941 made by Mr. Caldera Licensed Surveyor had to be auctioned in order to recover the money borrowed by the defendant (Plaintiff's mother) in the said case. According to the schedule of the said judgment (V8), the Lot No.1 does not constitute a part of Lot No.2 which was the subject matter of the said action. It is clearly seen that Lot No.1 is outside Lot No.2.

According to the Plaintiff, he and his mother lived in the two storied building standing on lot 1. It is stated in the said schedule that lot No.2 is bounded on North by lot No.1 and boundary wall of the land belonging to D.Hendrick Pieris. Therefore it is very clear that lot No1 did not constitute a part of the land that had to be sold out in public auction.

Subsequently, the Defendant who had purchased the said lot No.2 and 8 as depicted in the aforesaid plan moved in the District Court that a writ of possession be issued in order to take over vacant possession of lot2 and 8. On the application of the Defendant the District judge of Panadura issued a writ of execution on the Fiscal. On perusal of the order P19 it is

seen that P19 clearly states that only lot No.2 and 8 in plan bearing No. 12643 had to be sold out in public auction.

Therefore it is very clear that lot No.1 in the said plan is not a part of lot no.2 and was not subjected to public auction. There is no dispute between the parties as to the lots subjected to the said auction, that it was only lot 2 and 8 in plan 12643. The parties do not dispute the fact that lot no 1 in the said Plan 12643 was not to be auctioned.

The learned judges of the Civil Appellate High Court have held that the evidence of the Plaintiff clearly revealed that he was ousted from building situated in lot No.1 and his belongings that were inside the said house was thrown-out by Fiscal by breaking doors and in turn handed over the building to the Defendant. The learned judges of the Civil Appellate High Court had referred to the Fiscal's Report marked V20 and had stated that the said report reveals that the Defendant, the purchaser had shown the land described in the schedule and that thereafter steps were taken to remove all articles kept inside the building in lot No.1 and the same were handed over to the Defendant.

On perusal of the said Fiscal's report marked V20 it is very clear that the learned judges of the Civil Appellate High Court have misdirected themselves as to the contents of the said Report marked V20. It is to be noted that nowhere in the said report the fiscal has stated that he took steps to remove all articles kept inside the building in lot No.1. The Fiscal in his report has very clearly stated that he explained the contents of the Writ of possession to the Defendant (the mother of the Plaintiff) and to her agents. And thereafter he removed the articles in the house which was inside the schedule to the case and gave possession of the land described in the schedule 1 , in extent of 1 Rood and 28 Perches and the land described in the schedule 2 , in extent of 1 ½ Perches to the Defendant in this case namely B.N.Punyasiri. The Fiscal has not stated

anywhere in his report that he removed articles from the house which was in lot No.1 in the Said Plan 12643.

Further it is very clearly seen that the Plaintiff was not present at the time when the Fiscal executed the said writ. In his plaint dated 03.09.1993 in paragraph 4 he has stated that although he informed that the said lot No1 and the house standing thereon is not subject to the seizure in case No.2148/MB, the Defendant without considering the same has evicted the Plaintiff illegally and maliciously by force in front of all the neighbours that were gathered at the time of execution.

But in giving evidence before Court he has admitted that he was not at home at the time and came to know about it later.

The documents tendered by the parties in this case clearly establish the fact that the writ of execution marked V19 was only in relation to the lots No.2 and 8 in the Plan 12643. The other documents issued by the District Court of Panadura does not support the fact that possession of the Lot No1 in the said Plan No.12643 was given to the Defendant in this case. The documents marked in this case establish the fact that the Defendant had purchased this property at an auction held by the District Court of Panadura and that he has purchased lot 2 and 8 in the said plan 12643. These documents do not support the fact that the Plaintiff was evicted from lot No.1 in the said Plan 12643.

The Plaintiff in his evidence has stated that a part of the house is in lot No.1. And also is in lot no.2. There is no plan before this court to verify the same. Only a true copy of the plan made in the year 1941 marked P1 has been tendered to court.

The Plaintiff has not taken steps to take out a commission to identify the said lot No. 1 in plan 12643. Although the plaintiff has stated that the house is situated in both lots, he has failed to lead evidence and prove

the same before court. The Plaintiff could have easily taken out a commission to superimpose and show the said lots in a Plan. This would have enabled the court to see how the said building is situated whether it is in lot 1 or 2 or what part of the building comes within lot 1 in plan No.12643. Whether a major part of the said building comes within the said lot 2.

The plaintiff has filed this action against the Defendant claiming damages on the basis that he has been evicted from lot No.1. The burden is on the Plaintiff to prove the same. The documents tendered in this case establish that the Defendant has been placed on possession by the Fiscal of the District Court of Panadura in lot No.2 and 8 only. The burden is on the plaintiff to prove that in fact the Fiscal ejected him from lot No.1.

Section 101 of the Evidence Ordinance reads thus:-

101. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Therefore in the instant case, the burden is clearly on the Plaintiff to prove that in fact the Fiscal ejected him from the house standing therein in lot No.1 in Plan 12643.

The Plaintiff has categorically stated that the house abuts Lot No.1 also, that there is no boundary between Lot 1 and 2 and part of the building is in Lot 1 and the other part is in Lot 2.

The fiscal had the clear authority to execute the said writ of possession and hand over lot 2 and 8 with the buildings and plantation standing therein in the said Plan 12643 to the Defendant. According to the Fiscal's Report the Fiscal has clearly confined himself to lot 2 and 8 in plan 12643. The mother of the Plaintiff has been ejected by the Fiscal from the said two lots. The Mother of the Plaintiff was the Defendant in the said case and the writ was against her and her agents. The Plaintiff if at all if he had possession in lot2, that was in the capacity as an agent of his mother. The plaintiff cannot be heard to complain from being ejected from lot 2 and 8 in the said plan. His position is that he was ejected from lot 1. It is for him to prove it before Court by placing cogent evidence. The evidence if believed, given by the Plaintiff clearly shows that he was also living with his mother and other sisters and brothers in the said house in lot 2. It is not the Plaintiff's position that the entire building falls within lot no.1. The Fiscal has proceeded to eject the mother of the Plaintiff and her agents from the said premises and give possession of lot 2 to the Defendant. This could have resulted in ejecting the Plaintiff and removal of his belongings as well from the said lot No.2. The fiscal had the authority and power to do so in executing the writ of possession in lot No 2 and 8 in plan 12643.It was for the Plaintiff to prove that he was in fact ejected from lot 1 and not from lot 2. In my view the Plaintiff had clearly failed to lead evidence and prove the same to the satisfaction of Court.

The failure of the Fiscal to accompany a Surveyor to identify the said lots or the fact that the Defendant has shown him the said land cannot be held against the defendant to prove that he has acted maliciously in getting possession of the said lots. If the Fiscal had any difficulty about

identifying the said lots he should have reported the same to Court and got the services of a Surveyor for that purpose. The Defendant had purchased the said lots from a sale conducted by the District Court of Panadura. He has moved Court to place him in possession of the said lots through the Fiscal. The Defendant has accordingly been placed in possession by the Fiscal of the District Court Panadura. The Defendant has come into possession of the said lots lawfully. The Defendant's position is that he purchased the said lots with the buildings and plantation thereon. The documents tendered by parties in this case support that position.

There is nothing in the said Fiscal Report marked V20 to show that the Fiscal had handed over the house which is in Lot No. 1 to the Defendant. The Fiscal has further stated that as shown by the Defendant he visited the premises described in the schedule and explained the contents of the Writ of Possession to the Defendant and her agents in case No.2148/MB. In my opinion there is no material to infer that the Defendant and her agents in the said case 2148/MB was ousted by the Defendant in this case due to gross negligence or bad faith as stated by the learned Judges of the Civil Appellate High Court in their judgment. The learned Judges of the Civil Appellate High Court misdirected and erred in law when they held that the Defendant has acted maliciously and/or negligently by showing the house to the Fiscal.

The Plaintiff has clearly stated that a part of the house was situated in lot No.2. There was nothing wrong in Defendant showing 2 lots he has bought from the Fiscal sale with the house to the Fiscal. The Plaintiff in this case has clearly failed to prove that a part of the house abuts lot 1. In his evidence the Plaintiff has clearly admitted the fact that there was nothing on the ground to separate the lots 1 and 2. The Plaintiff's mother seems to have possessed the two lots together as one land. Even in 1941 when the Plan P 1 was made there was nothing to separate lot 1 from lot

2. There is a building shown in lot 1 in P1. The said building shown in P1 does not extend up to lot 2.

The Mortgage Bond marked P2 the schedule 1 refers to the lot 2 in Plan 12643 and the buildings and plantation standing thereon. The Mortgage Bond is dated 6th June 1985. The schedule to the Plaintiff in the said case No 2148/MB marked P3 also refers to the buildings and plantations standing in lot No 2. It is clear that the building referred to in P2 and P3 is not the building shown in P1 in 1941. Thus it is patently clear that the building which the Plaintiff's mother has mortgaged by P2 is in lot 2. The Plaintiff is not the owner of the said house. His sister one Nalini Dalpadadu has claimed ownership to the said lot 1 and 2 before the District Court Panadura.

After examination of the evidence and the judgments, I am of the view that the findings of the District Judge were not unreasonable. The Civil Appellate High Court should not have set aside his findings and consequently should not have reversed his decision.

In *De Silva and Others V. Seneviratne and Others* (1981) 2 S.L.R 7, it was held :-

(1) Where an Appellate Court is invited to review the findings of a trial Judge on questions of fact, the principles that should guide it are as follows:-

(a) Where findings on questions of fact are based upon the credibility of witnesses on the footing of the trial Judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial Judge has failed to make the full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced

by the plainest considerations that it would be justified in doing so;

- (b) That however where the findings of fact are based upon the trial Judge's evaluation of facts, the Appellate Court is then in as good a position as the trial Judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial Judge;
- (c) Where it appears to an Appellate Court that on either of these grounds the findings of fact by a trial Judge should be reversed then the Appellate Court "ought not to shrink from that task".

In my view there was no reason for the Civil Appellate High Court to interfere with the decision of the learned District Judge. However the findings of fact of the Civil Appellate High Court are based on evaluation of facts. No sanctity attaches to such findings of fact by the said Court. In my view the learned Judges of the Civil Appellate High Court had misdirected themselves in holding that the Plaintiff had been ejected from lot No1 in Plan 12643 and that the plaintiff was ejected from the said premises due to the gross negligence or bad faith of the Defendant. The inferences drawn by the Civil Appellate High Court are not supported by evidence. (Gunewardene V.Cabral and others (1980) 2 Sri.L.R 220). On an examination of the evidence and the judgments, I am of the view that the findings of the District Judge were not unreasonable. He had the advantage of seeing and hearing witnesses giving their evidence. The Civil Appellate High Court should not have disturbed the findings of the learned District Judge and consequently should not have reversed his decision.

Therefore I answer all the questions of law raised in this case in favour of the Defendant-Appellant. I allow the appeal, set aside the judgment of the Civil Appellate High Court Kalutara dated 06.12.2011, and affirm the judgment of the District Court of Panadura for the reasons set out. The Defendant-Appellant will be entitled to costs in this Court and in the Civil Appellate High Court.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree.

JUDGE OF THE SUPREME COURT

