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

In the matter of an application for Leave to appeal under Article 128 of the Constitution of Democratic Socialist Republic of Sri Lanka

Terrace Linton Percival Tirunayake
No. 7/1, Menerigama Place,
Mt. Lavinia
PLAINTIFF

-Vs-

SC Appeal No. 18B of 2009
Supreme Court Leave to Appeal No. 160/2008
High Court Application No. NWP/HCCA/KUR/141/2001 F
DC Kurunegala Case No. 4694/L

M.S.R. Fernando
No. 222, Puttalam Road
Kurunegala.

DEFENDANT

M George Anthony Fernando
No. 220, Puttalam Road,
Kurunegala.
SUBSTITUTED DEFENDANT

AND BETWEEN

M. George Anthony Fernando
No. 220, Puttalam Road.
Kurunegala.
SUBSTITUTED DEFENDANT

APPELLANT

-vs-

Terrace Clinton Percival Thirunayake
No. 7/1, Menerigama Place.
Mt. Lavinia.

PLAINTIFF RESPONDENT

AND

Terrace Clinton Percival

Thirunayake

No. 7/1, Menerigama Place,
Mt. Lavinia.
PLAINTIFF RESPONDENT

PETITIONER

-Vs-

M. George Anthony Fernando
No.220, Puttalam Road,
Kurunegala.
SUBSTITUTED DEFENDANT
APPELLANT RESPONDENT

Before: Saleem Marsoof PC, J
Sathyaa Hettige PC, J
Rohini Marasinghe J

Counsel: Mr Ranjan Suwandaratne for the Plaintiff-respondent- appellant.
Mr Chula Bandara for the defendant -petitioner- respondent

Argued on: 6/12/2011, 23/03/2012 and 17/02/2014
Decided On: 07.03.2014

SATHYAA HETTIGE P.C. J

This is an appeal from a Judgment of the Civil Appellate High Court of North Western Province holden at Kurunegala delivered on 5th November 2008.

LEAVE TO APPEAL

The Supreme Court granted leave to appeal on the 27th March 2009 on the following questions of law ;

(i) Have the learned High Court Judges of the Civil Appellate High Court erred in law by holding that the petitioner has failed to identify the corpus of the said District Court action in arriving at their final conclusion?

Have the learned High Court Judges erred in law by failing to consider the evidence given by the Surveyor with regard to the identity of the corpus in arriving at their findings?

The plaintiff respondent petitioner (hereinafter referred to as the petitioner) instituted a rei vindicatio action in the District Court of Kurunegala by the plaint dated 06.09.1994 for the following reliefs:

(I) for a declaration of title that the petitioner is the owner of the land morefully described in the second schedule to the plaint

(II) to eject the defendant respondent (hereinafter referred to as the respondent) and his agents occupying a portion of the said land

(III) damages in a sum of Rs.15000/- up to date of the plaint and damages calculated at the rate of Rs 500/ per year until possession is restored to the petitioner.

BRIEF OUTLINE OF FACTS

The position of the appellant is that he has derived title to the land in question from the final decree entered in the year 1965 in DC Kurunegala case No.1798/P (marked 'P6') and became entitled to lots 2A and 2B of Plan No 686 dated 1982.01.08 (marked P'3') and is described in the 1st Schedule to the plaint. In paragraph 5 of the plaint the Appellant has stated that the corpus involved in the case has been sub divided into several other portions bearing assessment numbers 222, 222/1, 222/2, 222/3, and 222/4. The portion of the land subject to the dispute is the sub divided portion of land bearing assessment number 222.

It is also to be mentioned that the appellant took up the position that, as averred in the plaint , the appellant 's predecessor permitted the respondent to construct a carpentry shed on the land on payment of a ground rent, but the respondent disputes the appellant's title and claimed that the property described in the schedule to the plaint belongs to him on the basis of prescription and prevented the appellant from entering the land in suit. The appellant has also testified in the original court that he sold lot 2 A leaving lot 2 B behind.

The Learned Counsel for the respondent submitted that the appellant failed to give any explanation as to why he failed to take steps to obtain possession of the land after the final decree.

DISTRICT COURT TRIAL

The respondent further stated that the corpus as stated in the plaint was different and the land he had been in possession for a long period of time has been described in the schedule to the answer and there were two buildings bearing assessment numbers 220 and 222.

It can be seen from the evidence that has been elicited in the District Court the appellant had produced the final Decree entered in the D.C. Kurunegala case no. 1798/P and testified that by virtue of the final decree he identified the property occupied by the deceased defendant respondent as the property bearing assessment no. 222.

It is pertinent to note that the appellant has filed the present rei vindicatio action No. 4694/L after 29 years from the final decree and also filed separate D.C. action No 4010/L against the other occupants who were residing in lot 2B. The respondent argues that appellant has failed to explain as to why he did not take steps under section 344 of the Civil Procedure Code.

The section 344 of the Civil procedure Code deals with " *all questions arising between the parties to the action in which the decree was passed , or their legal representatives, and relating to the execution of the decree , and not by separate action."*

In the case of **Silva v Sellohamy 25 NLR 113** it was observed by court that " the policy of the Code is where possible, to grant relief in the same action instead of referring parties to a separate action"

The learned District Judge gave judgment in favour of the plaintiff on 29th August. 2001 and held that the appellant was entitled to the property in suit and ordered ejectment of the respondent.

CIVIL APPELLATE HIGH COURT

The respondent appealed the judgment of the District Court to the Civil Appellate High Court on the basis that the appellant has not adduced evidence to establish and identify land in dispute and the respondent has prescribed to the land. The Civil Appellate High Court allowed the appeal and dismissed the judgment of the learned District Judge on the basis that the land in dispute has not been precisely identified and the land described in the schedule to the plaint is different in that the land is a larger land in

extent of 1 rood and 30 perches whereas the respondent was occupying only a premises in extent of 12.05 perches.

At the hearing of this appeal it transpired that the appellant did not call for a commission on a Surveyor to identify the corpus. However, the appellant ` summoned a surveyor , one C. Kurukulasuriya to produce a plan made in 1994 on a commission issued by court in a different case No. 4009/L. The respondent contended that the plan No. 2346 dated 07/01/1994 produced by the appellant in the original court through Mr Kurukulasuriya did not contain the signature of the learned District Judge which is a failure on the part of the appellant to procure the said plan from the original case record marked in a different case. Therefore, the respondent contended that the plan marked P1 has not been accepted by the learned District Judge.
It appears from the evidence in the original court that the title of the land is not in dispute and in fact the respondent has admitted the title of the appellant.(paragraph 3 of the answer). However, the respondent claims that he is entitled to the corpus based on the ground of prescription.

It is also to be noted that when the appellant gave evidence in the original court and testified at page 87 of the brief that the all the lots shown in the 2nd schedule to the plaint belonged to the appellant In that there are 6 lots bearing assessment numbers 221/1, 222/2, 223/3, 224/4, 220 and 222. And what is relevant to the subject matter of this case are the assessment numbers 220 and 222. The respondent is residing in premises No. 222.
However, the appellant has included in the schedule to plaint only assessment No. 222 whereas there are other several lots in total extent of 1 rood and 30 perches including the assessment nos. 220 and 222 in lot 2B in plan no. 686 dated 1982-01-08 within the boundaries shown therein.

It must be stated that in a rei vindicatio action claiming a declaration of title and ejectment it is a paramount duty on the part of the petitioner (Appellant in this case) to establish correct boundaries in order to identify the corpus. (See Peiris v Saunhamy 54 NLR 207) .Therefore, it is obviously clear that the appellant has failed to produce evidence to identify the land in dispute. The land in dispute in the present case forms part of several other lots containing several assessment Nos. and the Respondent has been in exclusive possession of premises No. 222. This being an action *rei vindicatio* there is a greater and heavy burden on the part of the Appellant to prove not only that he has a *dominiun* to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title. (See also **Abeykoon Hamine Vs. Appuhamy** (1950) 52 NLR

49). Therefore, it is obviously clear that the appellant has failed to produce evidence to identify the land in dispute.

The respondent submitted that the extent of the premises occupied by him is only 12.05 perches and the land is completely different from the land described in the schedule to the plaint which is extent of 1 rood and 30 perches. It was strongly submitted by the counsel for the respondent that the appellant has failed to comply with the provisions contained in section 41 of the Civil procedure Code.
Section 41 of Civil Procedure Code provides as follows:
"*When the claim made in the action for some specific portion of land , 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.*"

It is to be emphasized that in a claim of title ,the land or premises in suit must be described with precision and definiteness and there should not be any discrepancy as to the identity of the land in dispute.

CONCLUSION
Therefore, I agree with the submissions of the learned counsel for the respondent that the land in dispute has not been precisely and definitely described in the schedule to the plaint in terms of the law and my view on the two questions of law raised by the appellant, is that the Civil Appellate High Court has made no error of law and correctly decided the High Court appeal . In the circumstances I conclude that the appeal of the appellant is without any merit and should fail .
For the reasons set out above, having considered the oral arguments and the written submissions of the counsel for both parties I am not inclined to grant any reliefs to the appellant and I affirm the judgment of the Civil Appellate High Court holden in Kurunegala dated 05.11.2008.
Accordingly, I dismiss the appeal with no costs.

JUDGE OF THE SUPREME COURT

Saleem Marsoof PC.J
I agree

JUDGE OF THE SUPREME COURT

Rohini Marasinghe J
I agree

JUDGE OF THE SUPREME COURT