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

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff

SC APPEAL NO: SC/APPEAL/40/2014
SC LA NO: SC/HCCA/LA/244/2010
HCCA NO: UVA/HCCA/BDL/82/2003 (F)
DC BADULLA CASE NO: L/947

Vs.

A.C. Rajasingham,
No. 03/C, Bandarawela Road,
Badulla.
Defendant

AND BETWEEN

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff-Appellant

Vs.

A.C. Rajasingham,
No. 03/C, Bandarawela Road,
Badulla.
Defendant-Respondent

AND NOW BETWEEN

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff-Appellant-Appellant

Vs.

A.C. Rajasingham,
No. 03/C, Bandarawela Road,
Badulla.
Defendant-Respondent-Respondent
(deceased)

1. Jenita Margret Swarnabai,
   Rajasingham nee Rajamoni,
   No. 03, Bandarawela Road, Badulla.
2. Amanda Priyadarshani Rajasingham,
   No. 03, Bandarawela Road, Badulla.
3. Aaron Dhayalan Rajasingham,
   Presently at Flat 16 Building 8,
   Al Kharaib, Street 920, Najma,
   Doha Qatar.
   Substituted Defendant-Respondent-
   Respondents

Before: Vijith K. Malalgoda, P.C., J.
P. Padman Surasena, J.
Mahinda Samayawardhena, J.

Counsel: Jagath Wickramanayake, P.C., with Pujanee De Alwis for the Plaintiff-Appellant-Appellant.

H. Withanachchi with Shantha Karunadhara for the Defendant-Respondent-Respondent.

Argued on : 11.01.2023

Written submissions:

by the Plaintiff-Appellant-Appellant on 28.02.2014 and 13.10.2022

by the Defendant-Respondent-Respondent on 28.04.2017.

Decided on: 04.07.2023

Samayawardhena, J.

Introduction

The plaintiff (Bank of Ceylon) filed this action in the District Court of Badulla seeking declaration of title to, ejectment of the defendant from, the land described in the second schedule to the plaint, and damages. The defendant filed answer seeking dismissal of the plaintiff's action. After trial, the District Court dismissed the plaintiff's action. On appeal, the High Court of Civil Appeal of Badulla affirmed the judgment of the District Court. Hence this appeal by the plaintiff.

This Court granted leave to appeal against the judgment of the High Court on three questions suggested by the plaintiff (1st to 3rd below) and one suggested by the defendant (4th below). They read as follows:

(1) Did the High Court make a fundamental error in construing the nature of the action in view of the fact that the defendant not having claimed adverse title against the plaintiff?

(2) Did the High Court err with regard to standard of proof in an action for declaration of title when the defendant does not set up adverse title as against the plaintiff?
(3) Did the High Court err in the assessment of the title deed P1 produced at the trial?
(4) Can the plaintiff in a *rei vindicatio* action prove title by mere production of his title deed without predecessor's title being proved as in this action?

There is no issue regarding the identification of the land/premises in suit. No such issue was ever raised in the District Court. Therefore this Court cannot be misled by making submissions on the identification of the land.

The simple case for the plaintiff is that the plaintiff is the owner of the land by deed of transfer marked P1 at the trial and the defendant is in unlawful occupation of the land. He is a trespasser. The deed P1 was not marked subject to proof. The plaintiff did not think it necessary to prove the devolution of title, and rightly so. This is not a partition case to prove the pedigree. The defendant never claimed ownership of the property by deed or by prescription or any other mode. His position was that he occupied the premises in suit as an employee of Browns & Co. on payment of rent and Brown & Co. was closed down on 22.11.1994 and from that day he is not an employee of that company. He further admits that he is in unlawful occupation of the premises since 22.12.1994. He has been paid compensation for the termination of his employment by his former employer and thereafter that amount has been enhanced by the Labour Tribunal. It is clear that he thinks the compensation awarded was inadequate. This is the evidence of the defendant in that regard:

ප්‍ර: 1994 නොවැම්බර් මාසේ මොකද්ද සිදු වුනේ?

උ: බ්‍රවුන් සහ සමාගම වැහුවා. අපි තවදුරටත් එහි සේවකයන් නොවන බවට දැන්වූවා.

ප්‍ර: එහෙම නම් 94 නොවැම්බර් මාසෙන් පසුව ඔබ බ්‍රවුන් සමාගමේ තවදුරටත් සේවකයෙක් නොවන බවයි කියන්නේ?

උ: ඔව්.

ප්‍ර: ඔබ මෙම පරිශ්‍රයේ රැඳී සිටියේ බ්‍රවුන් සහ සමාගම සේවකයෙක් වශයෙන් නේද?

උ: ඔව්.

ප්‍ර: මම ඔබට යෝජනා කරනවා ඔබ බ්‍රවුන් සහ සමාගමේ සේවකයෙක් ලෙස කටයුතු කිරීම අවසන් වුනාට පසුව තවදුරටත් ඔබට නීත්‍යානුකූල අයිතියක් නැහැ කියා මෙම ස්ථානයේ රැඳී සිටීමට?

උ: ඔව්.

ප්‍ර: 1992 වසර සඳහා වූ වැටුප් ලැයිස්තු වී.1අ, වී.1ආ, වී.1ඇ වශයෙන් ලකුණු කරපු ලේඛණ 92 වර්ෂ සම්බන්ධයෙන් නිකුත් කළ ඒවා?

උ: ඔව්.

ප්‍ර: මම යෝජනා කරනවා නඩුවට අදාල ස්ථානයේ ඔබට පදිංචිවීමට තවදුරටත් නීත්‍යානුකූල කිසිම අයිතියක් නැහැ කියා?

උ: වෙන්න පුළුවන්.

(pages 59-60 of the appeal brief)

In my view, this should end the matter. But unfortunately, the District Court thought that the plaintiff did not prove his title in the manner a plaintiff in a *rei vindicatio* action ought to have proved. What is this standard of proof the District Court expected from the plaintiff and on what basis? The District Court states that the mere production of the title deed of the plaintiff is not sufficient but the plaintiff shall prove his predecessors' title as well. In other words, the plaintiff in a *rei vindicatio* action shall prove the chain of title as in a partition case. In elaborating the basis for this very high standard, citing *Pathirana v. Jayasundera* (1955) 58 NLR 169, the District Judge states that, since a *rei vindicatio* action is filed against the whole world, the plaintiff shall prove title to the property strictly. This is what the District Judge states: "පතිරණ එදිරිව ජයසුන්දර නඩුවේ (58 නව නීති වාර්තා 169) එච්.එන්.ජී ප්‍රනාන්දු විනිසුරුතුමා දැන්වූයේ රේවින්ඩිකාටියෝ නඩුවක පැමිණිල්ල හිමිකම සම්බන්ධ තදබල ලෙස ඔප්පු කළ යුතු බවයි.

එමෙන්ම එම නඩුවේදී ග්‍රේෂන් විනිසුරුතුමා දැන්වූයේ රේවින්ඩිකාටියෝ නඩුවක් ලෝකයටම එරෙහිව නිසා හිමිකම් තදබල ලෙස ඔප්පු කළ යුතු බවයි". In reference to the defendant's evidence quoted above, citing *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167, the District Judge states that, in a *rei vindicatio* action, the defendant's evidence can never be used to support the plaintiff's case. The High Court affirmed these findings unhesitatingly. I must state that those findings are misconceived in law. In summary, the correct position is as follows:

(a) A *rei vindicatio* action is not an action filed against the whole world. In modern law, *rei vindicatio* action is an action *in personam* and not an action *in rem* in the popular sense.
(b) In a *rei vindicatio* action, the plaintiff needs only to prove his case on a balance of probabilities, and no higher degree of proof is required.
(c) If there is no challenge, in a *rei vindicatio* action, the mere production of the title deed is sufficient to prove title to the property.
(d) The Court can consider the defendant's evidence in a *rei vindicatio* action.

Let me elaborate on these matters in greater detail.

Burden of proof in a *rei vindicatio* action

The burden of proof in a *rei vindicatio* action is overwhelmingly shrouded in misconceptions and misconstructions.

In order to succeed in a *rei vindicatio* action, first and foremost, the plaintiff shall prove his ownership to the property. If he fails to prove it, his action shall fail. This principle is based on the Latin maxim "*onus probandi incumbit ei qui agit*", which means, the burden of proof lies with

the person who brings the action. Section 101 of the Evidence Ordinance is also to a similar effect.

Macdonell C.J. in *De Silva v. Goonetilleke* (1960) 32 NLR 217 at 219 stated:

> *There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action rei vindicatio plaintiff must have ownership actually vested in him". (1 Nathan p. 362, s. 593.) ... The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.*

In *Pathirana v. Jayasundera* (1955) 58 NLR 169 at 172, Gratiaen J. declared:

> *"The plaintiff's ownership of the thing is of the very essence of the action." Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

In *Mansil v. Devaya* [1985] 2 Sri LR 46, G.P.S. De Silva J. (later C.J.) stated at 51:

> *In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership.*

In *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 352, Marsoof J. held:

> *An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title.*

Having said the above, it needs to be emphasised that the plaintiff in a *rei vindicatio* action has no heavier burden to discharge than a plaintiff in any other civil action. The standard of proof in a *rei vindicatio* action is on a balance of probabilities.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition (2007), states at page 539:

> *To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration.*

In *Preethi Anura v. William Silva* (SC/APPEAL/116/2014, SC Minutes of 05.06.2017), the plaintiff filed a *rei vindicatio* action against the defendant seeking a declaration of title to the land in suit and the ejectment of the defendant therefrom. The District Court held with the plaintiff but the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to prove title of the land. The plaintiff's title commenced with a statutory determination made under section 19 of the Land Reform Law in favour of his grandmother, who had bequeathed the land by way of a last will to the plaintiff, with the land being later conveyed to the plaintiff by way of an executor's conveyance. No documentary evidence was tendered to establish that the last will was proved in Court and admitted to probate in order to validate the said executor's conveyance. The District Court was satisfied that the said factors were proved by oral evidence but the High Court found the same insufficient to discharge the burden that rests upon a plaintiff in a

rei vindicatio action, which the High Court considered to be very heavy. The Supreme Court reversed the judgment of the High Court and restored the judgment of the District Court, taking the view that the plaintiff had proved title to the land despite the purported shortcomings. In the course of the judgment, Dep C.J. (with De Abrew J. and Jayawardena J. agreeing) remarked:

> *In a rei vindicatio action, the plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the plaintiff discharged the burden on balance of probability.*

What is the degree of proof expected when the standard of proof is on a balance of probabilities? This is better understood when proof on a balance of probabilities is compared with proof on beyond a reasonable doubt.

On proof beyond a reasonable doubt, in *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning declared at 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is*

> *proved beyond reasonable doubt, but nothing short of that will suffice.*

In relation to proof on a balance of probabilities, it was stated at 374:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.*

In consideration of the degree of proof in a *rei vindicatio* action, we invariably refer to the seminal judgment of *Pathirana v. Jayasundara* (1955) 58 NLR 169. In that case the plaintiff sued the defendant on the basis that the defendant was an overholding lessee. The defendant admitted the bare execution of the lease but stated that the lessors were unable to give him possession of the land. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment on the footing that his rights of ownership had been violated. The Supreme Court held:

> *A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action rei vindicatio if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title*.

In the course of the judgment the Court distinguished an action for declaration of title (based on the contractual relationship between the plaintiff and the defendant) from an action *rei vindicatio* proper. In

general terms, in both actions, a declaration of title is sought – in the former, as a matter of course, without strict proof of title, but in the latter, as a peremptory requirement, with strict proof of title. H.N.G. Fernando J. (later C.J.) at page 171 explained the distinction between the two in this way:

> *There is however the further point that the plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule in estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a rei vindicatio. But this choice can I think be properly exercised only by clearly setting out the claim of title and sounding in delict.*

The term "strict proof of the plaintiff's title" used here does not mean that the plaintiff in a *rei vindicatio* action shall prove title beyond a reasonable doubt or a very high degree of proof. The term "strict proof of the plaintiff's title" was used here to distinguish the standard of proof between a declaration of title action based on a contractual relationship between the plaintiff and the defendant such as lessor and lessee, and a *rei*

vindicatio action proper based on ownership of the property. In a *rei vindicatio* action, if the plaintiff proves on a balance of probabilities that he is the owner, he must succeed.

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, makes it clear at page 304:

> *It must be emphasized, however, that the observations in these cases to the effect that the plaintiff's title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition actions. … It is clear that a standard characterized by this degree of severity does not apply to the proof of a plaintiff's title in a rei vindicatory action.*

(Justice) Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", Vol 2, International Property Investment Journal 217 at pages 243-244:

> *In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant. See de Silva v. Gunathilleke, 32 N.L.R. 217 (1931); Abeykoon Hamine v. Appuhamy, 52 N.L.R. 49 (1951); Muthusamy v. Seneviratne, 31 C.L.W. 91 (1946). Once title is established, the burden shifts to the defendant to prove that by adverse possession for a period of 10 years he has acquired prescriptive title. Siyaneris v. Udenis de Silva, 52 N.L.R. 289 (1951). In rei vindicatory action once the plaintiff proves he was in possession but then he was evicted by the defendant, the burden of proving title will shift to the defendant. In Kathiramathamby v. Arumugam 38 C.L.W. 27 (1948) it was held that if the plaintiff alleges that he was forcibly ousted by the*

> *defendant the burden of proving ouster remains with the complainant. As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property*.

The view of Dr. Tambiah "*As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property*" shall be understood in the context of his view expressed at the outset that "*In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant.*"

The recent South African case of *Huawei Technologies South Africa (Pty) Limited v. Redefine Properties Limited and Another* [2018] ZAGPJHC 403 decided on 29.05.2018 reveals that the burden of proof of a plaintiff in a *rei vindicatio* action is not unusually onerous. In this case it was held that what the plaintiff in a *rei vindicatio* action needs to prove is that he is the owner of the property (which the Court stated could be done by producing his title deed) and that the defendant is holding or in possession of the property. Once this is done, the onus shifts to the defendant to establish a right to continue to hold against the owner. Cele J. declared:

> *The rei vindicatio is the common law real action for the protection of ownership. C.P. Smith, Eviction and Rental Claims: A Practical Guide at p. 1-2; Graham v. Ridley 1931 TPD 476; Chetty v Naidoo 1974 (3) SA 13 (A). It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in*

> *possession of the res. The onus is on the Defendant to allege and establish a right to continue to hold against the owner. Chetty v. Naidoo (supra) at 20 A–E. A court does not have an equitable discretion to refuse an order for ejectment on the grounds of equity and fairness. Belmont House v. Gore NNO 2011 (6) SA 173 (WCC) at para [15]. In the case of eviction based on an owner's rei vindicatio, the owner has only to prove his ownership which can be done by producing his title deed indicating that the property is registered in his name. Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd [1999] ZASCA 208; 1993 (1) SA 77 (A) at 82 A–C.*

The requirement of proof of chain of title which is the norm in a partition action is not applicable in a *rei vindicatio* action. If there is no challenge to the title deed of the plaintiff on specific grounds, the plaintiff can prove his ownership to the property by producing his title deed.

This view was expressed by Professor Wille (op. cit. at page 539) when he stated that "*In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name*."

When the standard of proof is on a balance of probabilities, the Court is entitled to consider whose version – the plaintiff's or the defendant's – is more probable.

Banda v. Soyza [1998] 1 Sri LR 255 is a *rei vindicatio* action filed by a trustee of a temple seeking a declaration of title, the ejectment of the defendant and damages. The Court of Appeal set aside the judgment of the District Court and the plaintiff's action was dismissed on the ground that the plaintiff had failed to establish title to the subject matter of the action or even to identify the land in suit. But the Supreme Court set aside the judgment of the Court of Appeal and restored the judgment of the District Court on the basis that there was "*sufficient evidence led on*

behalf of the plaintiff to prove the title and the identity of the lots in dispute." G.P.S. de Silva C.J. laid down at page 259 the criterion to be adopted in a *rei vindicatio* action in respect of the standard of proof in the following manner:

> *In a case such as this, the true question that a court has to consider on the question of title is,* ***who has the superior title?*** *The answer has to be reached upon a consideration of the totality of the evidence led in the case.*

Dr. H.W. Tambiah (op. cit. at p. 244) refers to proof of superior title by the defendant as a defence to a *rei vindicatio* action.

> *In a vindicatory action, the defendant has numerous defenses, which include: denial of the plaintiff's title; establishment of his own title, in the sense of establishing a title superior to that of the plaintiff; prescription; a plea of res judicata; right of tenure under the plaintiff – for example usufruct, pledge or lease of land; the right to retain possession subject to an indemnity from the plaintiff under peculiar conditions; a plea of exception rei venditae et traditae; and, ius tertii.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 adverted to **superior title** and **sufficient title** and held that the plaintiff in a *rei vindicatio* action shall prove that he has title to the disputed property and that such title is superior to the title, if any, put forward by the defendant, or that he has sufficient title which he can vindicate against the defendant.

The plaintiff in *Jinawathie*'s case filed a *rei vindicatio* action against the defendants relying upon a statutory determination made under section 19 of the Land Reform Law, No. 1 of 1972. The defendants sought the dismissal of the plaintiff's action on the basis that the alleged statutory determination did not convey any title on the plaintiff and that in the

absence of the plaintiff demonstrating dominium over the land, the plaintiff's action shall fail. Both the District Court and the Court of Appeal held with the plaintiff and the Supreme Court affirmed it. Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J., Wanasundera J., Atukorale J., and Tambiah J., whilst emphasising that in a *rei vindicatio* action proper, the plaintiff's ownership of the land is of the very essence of the action, expressed the view of the Supreme Court in the following terms at page 142:

> *This principle was re-affirmed once again by Gratiaen J. in the case of Palisena v. Perera (1954) 56 NLR 407 where the plaintiff came into court to vindicate his title based upon a permit issued under the provisions of the Land Development Ordinance (Chap. 320). In giving judgment for the plaintiff, Gratiaen, J. said: "a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser had prevented him from entering upon the land does not afford a defence to the action."*
>
> *In a vindicatory action the plaintiff must himself have title to the property in dispute: the burden is on the plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the defendant in occupation. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence.*
>
> *On a consideration of the foregoing principles – relating to the legal concept of ownership, and to an action rei vindicatio – it seems to me that the plaintiff-respondent did, at the time of the institution of these proceedings, have, by virtue of P6 [statutory determination], "sufficient" title which she could have vindicated against the defendants-appellants in proceedings such as these.*

In the Supreme Court case of *Khan v. Jayman* [1994] 2 Sri LR 233 the plaintiff sued the defendant for ejectment from the premises in suit and damages on the basis that the defendant was in forcible occupation of the premises after the termination of the leave and licence given to the defendant. The defendant claimed tenancy. The District Court dismissed the plaintiff's action on the basis that the plaintiff failed to establish that the defendant was a licensee and the Court of Appeal affirmed it. On appeal, the Supreme Court held that the plaintiff shall succeed since the defendant failed to establish a "better title" to the property after the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title. Kulatunga J. with the agreement of G.P.S. De Silva C.J. and Wadugodapitiya J. stated at page 235:

> *The plaintiff did not pray for a declaration of title or raise an issue on ownership, presumably because no challenge to his ownership was anticipated. Indeed the defendant's answer did not deny the plaintiff's title. At the trial, the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title to the premises in suit. This action is, therefore, a vindicatory action i.e. an action founded on ownership. Maasdorp's Institutes of South African Law Vol. II Eighth Edition page 70 commenting on the right of an owner to recover possession of his property states –*
>
> *"The plaintiff's ownership in the thing is the very essence of such an action and will have to be both alleged and proved …"*
>
> *He also states –*
>
> *"The ownership of a thing consists in the exclusive rights of possession … and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession*

*from anyone who cannot set up a **better title** to it and warn him off the property, and eject him from it".*

The argument of the defendant that he was prejudiced in his defence as the plaintiff did not sue the defendant as the owner of the premises was rejected by the Supreme Court. Kulatunga J. stated at 239:

Learned Counsel for the defendant-respondent also submitted that in view of the fact that this was not a case of the plaintiff suing as owner simpliciter and in the absence of an issue on ownership, the defendant would not have known the case he had to meet and was prejudiced in his defence. I cannot agree. As stated early in this judgment, the plaintiff pleaded his ownership and clearly set out his case, including the fact that the defendant was in occupation of a room of the premises in suit by leave and licence. The defendant too set out his case in unambiguous terms viz. that he was a protected tenant from 1971. In the end, the plaintiff proved his case whilst the defendant failed to establish a better title to the property. As such, the question of prejudice does not arise.

When the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property.

In *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289 the Privy Council held:

In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant.

In *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222, Sharvananda C.J. stated:

> *In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession.*

This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227 at 229 and reiterated in *Candappa nee Bastian v. Ponnambalam Pillai* [1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah* [1999] 1 Sri LR 53, *Gunasekera v. Latiff* [1999] 1 Sri LR 365 at 370, *Jayasekera v. Bishop of Kandy* [2002] 2 Sri LR 406 and *Loku Menika v. Gunasekara* [1997] 2 Sri LR 281 at 282-283.

Maasdorp's Institutes of South African Law (Vol II, 8th Edition (1960), p. 27) states the rights of an owner are *"comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition".* He goes on to say that *"these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time".*

As stated in K.J. Aiyar's Judicial Dictionary, 11th Edition (1995), page 833, it is not possible to give a comprehensive definition to the rights of ownership. Traditionally, those rights include:

> *Jus utendi* – the right to use of the thing
> *Jus possidendi* – the right to possess a thing
> *Jus abutendi* – the right to consume or destroy a thing

Jus despondendi vei transferendi – the right to dispose of a thing or to transfer it as by sale, gift, exchange etc.
Jus sibi habendi – the right to hold a thing for oneself
Jus alteri non habendi or *Jus prohibendi* – the right to exclude others from its use

These rights unmistakably point to the conclusion that a person having paper title to the property need not necessarily possess it in order for him to protect his ownership intact. The right to possession is an essential attribute of ownership. Either he can possess it or leave it as it is. That is his choice. He will not lose title to the property if he does not possess it. Conversely, he has the right to exclude others from its use.

In general, in a *rei vindicatio* action the plaintiff's case is based on his paper title whereas the defendant's case is based on prescriptive title. Prescriptive title necessarily commences and continues with violence, hostility, force and illegality. Court should not in my view encourage such illegal conduct. Court must resist converting illegality into legality unless there are cogent and compelling reasons to do so. As stated by Udalagama J. in the Supreme Court case of *Kiriamma v. Podibanda* [2005] BLR 9 at 11 "*considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action.*"

Evidence of the defendant in a *rei vindicatio* action

Whilst emphasising that (a) the initial burden in a *rei vindicatio* action is on the plaintiff to prove ownership of the property in suit and (b) the burden of proof in a *rei vindicatio* action is proof on a balance of probabilities, if the plaintiff in such an action has "sufficient title" or "superior title" or "better title" than that of the defendant, the plaintiff

shall succeed. No rule of thumb can be laid down on what circumstances the Court shall hold that the plaintiff has discharged his burden. Whether or not the plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.

In this process, the defendant's evidence need not be treated as illegal, inadmissible or forbidden. The oft-quoted dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167 that "*The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.*" shall not be misinterpreted to equate a defendant in a *rei vindicatio* action with an accused in a criminal case where *inter alia* his confession made to a police officer is inadmissible and he can remain silent until the prosecution proves its case beyond reasonable doubt.

I must add that even in a criminal case, if a strong *prima facie* case has been made out against the accused by the prosecution, the accused owes an explanation, if it is within the power of him to offer such explanation. This is in consonance with the dictum of Lord Elenborough in *Rex v. Cochrane* (Garney's Reports 479) which is commonly known as Elenborough dictum. In reference to this dictum, Dep J. (later C.J.) in *Ranasinghe v. O.I.C. Police Station, Warakapola* (SC/APPEAL/39/2011, SC Minutes of 02.04.2014) states:

> *This dictum could be applied in cases where there is a strong prima facie case made out against the accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against him.*

The dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy (supra)* is eminently relevant to the facts of that particular case but has no universal application to all *rei vindicatio* actions. Since it is a one-page brief judgment, the facts are not very clear. However, as I understand, the plaintiffs in that case had filed a *rei vindicatio* action against the defendant on the basis that the defendant was a trespasser notwithstanding that he (the defendant) had been in occupation of some portions of the land for some considerable period of time. From the following sentence found in the judgment, "*In this case, the plaintiffs produced a recent deed in their favour and further stated in evidence that they could not take possession of the* ***shares purchased by them*** *because they were resisted by the 1st defendant"*, it is clear that the plaintiffs, if at all, had only undivided rights in the land. It is also clear from the judgment that whether or not the defendant also had undivided rights was not clear to Court. It is in that context Herat J. states "*The learned District Judge, in his judgment expatiates on the weakness of the defence case; but unfortunately has failed to examine what title, if any, has been established by the plaintiffs.* ***No evidence of title has been established by the plaintiffs in our opinion***."

It may be noted that in *Wanigaratne's* case, the finding of the Supreme Court is that "*No evidence of title has been established by the plaintiffs*". The facts are totally different in the instant case. In the instant case, the plaintiff has established title to the land in suit by deed P1, which title was never challenged by the defendant; nor did the defendant ever make a claim for title to the land. He is admittedly in unlawful occupation.

As this Court held in *Wasantha v. Premaratne* (SC/APPEAL/176/2014, SC Minutes of 17.05.2021), the Court can in a *rei vindicatio* action consider the evidence of the defendant in arriving at the correct conclusion:

> *Notwithstanding that in a rei vindicatio action the burden is on the plaintiff to prove title to the land no matter how fragile the case of the defendant is, the Court is not debarred from taking into consideration the evidence of the defendant in deciding whether or not the plaintiff has proved his title. Not only is the Court not debarred from doing so, it is in fact the duty of the Court to give due regard to the defendant's case, for otherwise there is no purpose in a rei vindicatio action in allowing the defendant to lead evidence when all he seeks is for the dismissal of the plaintiff's action.*

This Court took the same view in *Ashar v. Kareem* (SC/APPEAL/171/2019, SC Minutes of 22.05.2023).

The finding of the District Judge that in a *rei vindicatio* action the Court cannot rely on the defendant's evidence to decide whether the plaintiff has proved his case is unacceptable.

Actio rei vindicatio* and action *in rem

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173 Gratiaen J. states:

> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*

The learned District Judge *inter alia* relying on the above observation of Gratiaen J. states that an action *rei vindicatio* is an action filed against the entire world (action *in rem*) and therefore the plaintiff in a *rei vindicatio* action must prove title to the land very strictly.

The phrase "*in rem*" requires an explanation rather than a definition. The Latin term "*in rem*" derives from the word "*res*", which means "*a thing or an object*" whether movable or immovable. Actions *in rem* were originally used as a means of protecting title to movables, especially slaves, because land was not at first the object of private ownership – Buckland and McNair, *Roman Law and Common Law Comparison* (Cambridge University Press, 1936) p. 6. Also, *in rem* jurisdiction is invoked in maritime cases where a party could bring an action *in rem* against a ship instead of the owner of the ship. It is the ship that suffers the consequences. The owner suffers the consequences if it is an action *in personam*.

Maasdorp's Institutes of South African Law, Vol II, 8th Edition (1960), p.70 states "*The form of action for the recovery of ownership was under the Roman law called vindicatio rei, which was an action in rem, that is, aimed at the recovery of the thing which is in the possession of another, whether such possession was rightfully or wrongfully acquired, together with all its accretions and fruits, and compensation in damages for any loss sustained by the owner through having been deprived of it*."

Black's Law Dictionary, 11th edition, defines the term "*in rem*" as "*Latin 'against a thing' – Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing*." It defines the term "*in personam*" as "*Latin 'against a person' – Involving or determining the personal rights and obligations of the parties. (Of a legal action) brought against a person rather than property*."

The following passage of Dr. H. W. Tambiah (op. cit. p. 242) explains why *rei vindicatio* is an action *in rem*.

> *The primary remedy granted to an owner against the person who disputes his ownership is rei vindicatio. This Roman-Dutch Law*

> *remedy has been adopted by the courts in Sri Lanka. Since the owner, as dominus, has a right of possession, occupation and use of the land, this action is in the nature of an action in rem. See Vulcan Rubber Ltd. v. South African Railways and Harbours, 3 S.A. 285 (1958); Hissaias v. Lehman, 4 S.A. 715 (1958). In this type of action, the owner of land whose title is disputed and who has been unlawfully ejected, may bring an action for a declaration of title and ejectment. If the owner has not been ejected but his title is disputed he is entitled to bring a declaratory action to dismiss any disputes to his title. Where an owner is unlawfully ejected he may bring an action for declaration of title for mesne profits, damages and ejectment.*

In the case of *Allis Appu v. Endris Hamy* (1894) 3 SCR 87, Withers J. categorised *rei vindicatio* both as an action *in rem* and action *in personam*:

> *Certain actions of an analogous nature apart, the action rei vindicatio is allowed to the owner and to him alone. Lesion to the right of property is of the very essence of the action and in that respect constitutes it an action in rem. Lesion to the personal right of the true proprietor properly constitutes a claim to compensation for the produce of which he has been deprived by the possessor and in that respect constitutes it an action in personam.*

In classical Roman Law although *actio rei vindicatio* is classified as an action *in rem* as opposed to an action *in personam*, the term "action *in rem*" shall not be understood in the popular sense that we conceive in contemporary society. An action *in rem* means an action against a thing whereas an action *in personam* means an action against a person. A partition action is considered an action *in rem* in that the judgment in a partition action has a binding effect on all persons having interests in the property whether or not joined as parties to the action. It transcends the

characteristic of an *inter partes* action and assumes the characteristic of an action *in rem* resulting in title good against the world. The scheme of the Partition Law is designed to serve that purpose. But the entire world is not bound by the judgment in a *rei vindicatio* action. The judgment in a *rei vindicatio* action binds only the parties to the action and their privies. In modern-day legal jargon, *rei vindicatio* is not an action *in rem* but an action *in personam*.

The fact that *rei vindicatio* is not an action *in rem* in the popular sense is reflected in the dicta of Dep C.J. in *Preethi Anura v. William Silva (supra)* where in reference to the standard of proof in a *rei vindicatio* action it was stated "*The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title.*"

In *Sithy Makeena v. Kuraisha* [2006] 2 Sri LR 341 at 344, Imam J. with Sriskandarajah J. in agreement stated "*It is well-settled law that only the parties to a rei vindicatio action are bound by the decision in such a case, as a rei vindicatio action is an action in personam and not an action in rem.*"

In the Supreme Court case of *Mojith Kumara v. Ariyaratne* (SC/APPEAL/123/2015, SC Minutes of 29.03.2016), the plaintiff filed action seeking declaration of title to the land in suit, ejectment of the defendants therefrom and damages. It was a *rei vindicatio* action proper. The defendants sought dismissal of the plaintiff's action. The plaintiff relied on a decree entered in his favour in a previous *rei vindicatio* action filed against a different party, but in respect of the same land. The District Court dismissed the plaintiff's action on the basis that the defendants before Court were not parties to the previous action and therefore they are not bound by that judgment. On appeal, the High Court set aside the

judgment of the District Court and held that the plaintiff can claim ownership to the land on the strength of the previous decree apparently on the basis that *rei vindicatio* is an action *in rem*. The Supreme Court held that the previous action is an action *in personam* and not an action *in rem* and therefore third parties are not bound by that judgment. Chitrasiri J. with the agreement of Aluwihare J. and De Abrew J. held:

> *A decree in a case in which a declaration of title is sought binds only the parties in that action. Such a proposition is not applicable when it comes to a decree in rem which binds the whole world. Effects and consequences of actions in rem and actions in personam are quite different. Action in rem is a proceeding that determines the rights over a particular property that would become conclusive against the entire world such as the decisions in courts exercising admiralty jurisdictions and the decisions in partition actions under the partition law of this country. Procedure stipulated in Partition Law contains provisions enabling interested parties to come before courts and to join as parties to the action even though the plaintiff fails to make them as parties to it. Therefore there is a rationale to treat the decrees in partition cases as decrees in rem.*
>
> *Actions in personam are a type of legal proceedings which can affect the personal rights and interests of the property claimed by the parties to the action. Such actions include an action for breach of contract, the commission of a tort or delict or the possession of property. Where an action in personam is successful, the judgment may be enforced only against the defendant's assets that include real and personal or movable and immovable properties. Therefore, a decree in a rei vindicatio action is considered as a decree that would bind only the parties to the action. In the circumstances, it is clear that the plaintiff cannot rely on the decree in 503/L to establish*

rights to the property in question as against the defendants in this case are concerned.

Conclusion

I answer the questions of law upon which leave to appeal was granted in the affirmative. The judgments of the District Court and the High Court of Civil Appeal are set aside. The defendant never challenged the evidence of the plaintiff on damages. I direct the District Judge to enter judgment as prayed for in the prayer to the plaint. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court