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

Wahumpurage Ariyawansha of
Mahagedara , Udawatte, Batuwana, Niyadurupola
(Deceased)

Plaintiff

Vs.

Wahumpurage Elaris of Kumburegoda, Palambure,
Niyadurupola (Deceased)

SC (APP) No. 240/14
SC(SPL) LA No. 297/13
CA Appeal No.841/99 (f)
DC Kegalle No: 3465/L

1(i). Dewalayage Emalin of Kumburegama
Palambure, Niyandurupola
1(ii). Wahumpurage Sunil Premathilake,
Kumburegama Palambure, Niyandurupola
1(iii). Wahumpurage Wimalatissa of
Kumburegama, Palambure, Niyandurupola
1(iv). Wahumpurage Lionel Wickramaratne of
Kumburegama Palambure, Niyandurupola

Substituted Defendant

BETWEEN

1(iii). Wahumpurage Wimalatissa of
Kumburegama, Palambure, Niyandurupola

Substituted Defendants-Appellants

Vs.

1.Wahumpurage Ariyawansha of

Mahagedara, Udawatte, Batuwana, Niyandurupola

Plaintiff-Respondent (Deceased)

Wickramaarachchige Mallika Ranatunga

Udawatte,

Batuwana,

Niyadurupola

Substituted Plaintiff-Respondent

and

2. Dewalayage Emalin of Kumburegama

Palambure, Niyandurupola

3. Wahumpurage Sunil Premathilake,

Kumburegama Palambure, Niyandurupola

4. Wahumpurage Lional Wickramaratne of

Kumburegama Palambure, Niyandurupola

1(i), 1(ii) and 1(iv) Substituted

Defendants-Respondents

NOW BETWEEN

Wickramaarachchige Mallika Ranatunga of

Udawatte, Batuwana, Niyandurupola

Substituted Plaintiff-Respondent-

Petitioner-Appellant

Vs.

1.Wahumpurage Wimalatissa of Kumburegama,

Palambure, Niyandurupola

1(iii). Substituted Defendant-Appellant-Respondent

2. Dewalayage Emalin of Kumburegama

Palambure, Niyandurupola

1(i). Substituted Defendant-Respondent-Respondent

3. Wahumpurage Sunil Premathilake,

Kumburegama Palambure, Niyandurupola

1(ii).Substituted Defendant-Respondent-Respondent

4.Wahumpurage Lional Wickramaratne of

Kumburegama Palambure, Niyandurupola

1(iv).Substituted Defendant-Respondent-Respondent

Before **:** Jayantha Jayasuriya PC, CJ.

S. Thurairaja, PC, J.

E. A. G. R. Amarasekara, J

Counsel : Samantha Vithana with Ms. Nishanthi Mendis and Ms. S de Silva for the Substituted Plaintiff Respondent-Petitioner-Appellant.

M.S.M. Kamil for the 1(iii) Substituted Defendant-Appellant-Respondent.

Argued On : 04.03.2020

Decided On : 05.04.2024

E. A. G. R. Amarasekara, J

The original Plaintiff (now deceased) instituted an action in the District Court of Kegalle for a declaration of title and ejectment of the original Defendant from a portion of land in extent of around ¼ acre allegedly encroached by the said Defendant as explained in the Plaint dated 25.08.1985 from a land called Werellahena which is morefully described in the schedule to the Plaint as lot 2 of P. P. No. 4098 which is of 1 acre and 13 perches in extent. Later, this Plaint was amended by the amended Plaint dated 14.08.1990.

As per the amended Plaint, one Adiliya was the original owner of the said land Werellahena and on his demise the ownership had passed to Dina, and subsequently said Dina had transferred the ownership of the said land to the original Plaintiff Ariyawansa by executing the deed No. 10526 dated 17.01.1958. Paragraph 05 of the amended Plaint explains the cause of action as one arisen due to the encroachment of the land on 05.11.1984 and cutting down of 46 rubber trees. The encroached portion had been described as lot 1 of Plan No. 809 of D. Ratnayake L.S. which was made on a commission issued by the District Court. Hence, the original Plaintiff has prayed for a declaration of title, ejectment of the Defendant and for damages as relief.

The original Defendant, Elaris had filed his amended Answer dated 07.11.1990 refuting the stance taken in the amended Plaint and the original ownership of Adiliya. Further he stated that Adiliya or any other person never had the possession of the land described in the schedule to the Plaint. The original Defendant had shown his entitlement to the land based on a different pedigree or a chain of title commencing from original owners Rankira, Sima and Sena. He had also claimed prescriptive title to the land and had referred to a land settlement done in accordance with the Land Settlement Ordinance No.20 of 1931. Hence, he has prayed for a judgment in his favour and for damages as he could not sell the trees that he fell down due to the Plaintiff's conduct. Thus, the original Defendant had prayed for relief that confirms his right to possess the land and for damages.

In the midst of the trial, the original Defendant died and his wife and 3 children were substituted in his place.

At the District Court trial, after the settlement of issues, the licensed surveyor who executed the commission issued by the learned District Judge and the Plaintiff had given evidence for the

Plaintiff. One of the Substituted Defendants had given evidence in support of the stance taken in the amended Answer.

D. Ratnayake L.S had made two plans based on the commission issued to him by the District Court, namely;

1. Plan No. 172 A, dated 20.01.1987 marked Y at the trial,

2. Plan No. 809, dated 02.11.1989 marked X at the trial.

As per the evidence given by the said surveyor, though he visited the land, he did not survey the land before making Plan No. 172A and in his report made for the said plan has stated that he prepared the said plan using a plan of the Surveyor General. However, the number or the date of such plan of the Surveyor General had not been revealed in the said report. As per the evidence of the said surveyor, after obtaining instructions from the Court, he had made the other Plan No.809 marked X at the trial. As per the report marked X1, the surveyor has not divulged in the said report the number of any previous plan that he used to identify the land or used in any superimposition done, but he has stated that he did a superimposition after surveying the land. However, during his evidence, the surveyor has marked a purported copy of a Plan No. pp4098 dated 10.01.1958 as P1. Though two signatures are placed at the bottom of the said copy without names and designations to indicate that it was prepared and examined by those two signatories, there is nothing on the document to show that it was prepared and examined by two authorized personnel of the Surveyor General's Department or qualified persons for that purpose. On the other hand, there is nothing mentioned on the said document marked P1 to say that it is a certified copy of the Plan No. pp4098 or it was issued by the Surveyor General's Department. The surveyor also had not stated in his evidence that he, being a qualified person, with permission prepared a tracing from the original plan available in the Surveyor General's Department or took steps to get a certified copy or true tracing of the original Plan No. pp4098 from the Surveyor General's Department or any Authority where the original was available. The Surveyor had not stated that he got this P1 verified as a true copy by any means. No witness from the Surveyor General's Department was called to give evidence to establish that P1 was a true copy made to scale from the original available in that Department. Thus, if it is P1 that he used to superimpose and identify the corpus as stated in his evidence (as said before it was not so stated in his reports), there was no proof to say that it was a true acceptable copy of the Plan No. pp4098 made in accordance to the scale mentioned in the original plan and it was prepared by qualified persons for that purpose or otherwise got its veracity ascertained by any means. It is true that P1 was marked without any objections but it does not give any sanctity to the document more than what is stated on the document itself. The surveyor himself had admitted that Plan No.172A (marked Y) made by him is an incomplete one as he made it without doing any survey and what is more correct is Plan No. 809 marked X

– vide evidence recorded at pages 88 and 89. On the other hand, though it is stated in the report relevant to said Plan No.172A marked Y1 that he made the plan in accordance to a plan made by the Surveyor General, details with regard to the said Surveyor General's plan was not mentioned in the said report. If it was the same plan marked P1 that he used in making Plan No. 172A (Y), as indicated above there is no proof to show that P1 was a plan made by the Surveyor General's Department or copied from a document available in the Surveyor General's Department. For the same reason, identification of the land in Plan No.809 (marked X) cannot be relied upon as it appears the surveyor D. Ratnayake used the same copy of the plan marked P1 in making the said Plan.

It is worthwhile to observe what the Plaintiff had said in his evidence with regard to how he obtained title to the land in dispute and how he obtained the purported Plan No. pp4098 marked P1 and included the said plan in the description of the land in his title Deed, marked P2. As per the evidence of the Plaintiff, the original owner of the land named Werrellahena of 1 acre and 13 perches in extent was one Adiliya and his rights have been devolved on his son Dina, and Dina has transferred his rights to the Plaintiff by Deed No. 10526 marked P2. It is only in this Deed marked P2 that there is a reference to the lot 2 of said Plan No.4098 is made to describe the land in dispute. As per the stance of the Plaintiff, up to Dina, devolution of title is shown by inheritance from father to son. No evidence was led to show that land owned and possessed by Adiliya and/or Dina were surveyed and identified according to a plan before executing Deed marked P2, especially according to a Plan No. pp4098. The Plaintiff described P1 as a plan he received through post from the Survey General's Department on a request made by him through post since his grandfather said to him to obtain a plan in that manner to execute the Deed - vide pages 120 and 130 of the brief. Neither such request letter addressed to the Surveyor General nor any covering letter that accompanied the purported plan P1 had been tendered in evidence by the Plaintiff. Hence, the evidence led before the learned District Judge shows only that the Plaintiff and his predecessor in title used the purported copy of Plan No pp4098 marked as P1 to describe the land when executing deed marked P2 but there is no proof to show that P2 plan is a true, acceptable copy of a plan made by the Surveyor General's Department under the given Plan No. pp4098. In fact, the Plaintiff himself, when cross-examined as to the legality of Plan marked P1, has stated that he does not know of its legality- vide page 119 of the brief.

As there is no Deed prior to P2 indicating the sole ownership to the land depicted in Plan No. pp4098 to any of the predecessors in title in the pedigree or the chain of title of the Plaintiff, mere reference to said plan in the Deed marked P2 to describe the boundaries cannot prove that the Plaintiff became the sole owner as per the chain of title shown by him. Moreover, it is clear that the Plaintiff used an uncertified copy of a plan purportedly prepared and examined by two unknown persons whose authority or skill to do such task properly had not been

established. Thus, it appears that the Plaintiff included a description of boundaries in his Deed marked P2 using P1 Plan which is not an acceptable copy of Plan No. pp4098. Any identification of a land or a purported encroachment of such land using an unacceptable copy cannot be accepted as a proper identification of the land. Hence, identification done by X and Y plans (if the Surveyor General's plan referred to in Y1 report is P1) cannot be treated as proper identification of the land or encroachment referred to therein in the said plans.

As per the amended Plaint, the cause of action commenced on 05.11.1984 due to an encroachment and felling of rubber trees by the Defendant and the Plaintiff in evidence also had stated that the incident took place in 1984- vide pages 112 and 124 of the brief. However, the police complaint made by the original Plaintiff marked V1 and P3 refer to an incident that took place in November 1983. Document marked V2 proves that a Section 66 application in terms of the Act no 44 of 1979 was instituted in 1983 in the Primary Court. The Primary Court proceedings marked V3 shows that parties agreed before the Primary Court to possess as they possess and to file a civil action to resolve the dispute. If the Plaintiff was evicted as per the Police complaint within the period of two months prior to the filing of that Primary Court application, he would have proceeded first to get an order from the Primary Court without settling the matter in that manner. On the other hand, the Surveyor's report marked X1(report made for Plan No 809 marked X) clearly shows that the Defendant was in the possession of the surveyed land. In that backdrop, it is highly questionable why the learned District Judge disregarded the older Deeds, namely V4 and V5 of the Defendant which had been executed to transfer undivided shares of a land called Werellahena respectively described as a land of 8 lahas and 1acre and 13 perches in the said Deeds, especially when the Plaintiff's predecessors in title had no Deed establishing their sole ownership to the entire land in Plan No. pp4098 and where the Plaintiff has used an uncertified purported copy of the Plan No. pp4098 to indicate boundaries in the Deed marked P2 by which he got title from his predecessor in title. It is worthwhile to note that there was no evidence to show that Plaintiff or any of his predecessors in title got a survey done to show the land they owned before executing P2. While comparing boundaries the learned District Judge in his Judgment states that boundaries in V4 and V5 are contradictory and do not tally with the Plan marked X. These seems to be the reasons given by learned District Judge to reject the Defendant's Deeds and claim. As plan marked X was super imposed using Plan P1 which cannot be accepted as a true copy, identification done using such plan in plan X cannot be accepted. On the other hand, even though there is a difference in describing boundaries in V4 and V5 as far as the north east south and west orientation is concerned, both said Deeds describe Ambagahamulahena, a land belongs to a company (in V4 a company named Carson), and Bulugahahena as boundaries to Werellahena. Even the land surveyed in X plan finds Ambagahamulahena and estate belongs to Janawasama as its boundaries. Due to the nationalization of lands, land that belongs to a company would have become a estate belongs to Janawasama.

The matters discussed above establish that the learned Disrtrict Judge erred in following aspects as he has not considered certain important facts that were relevant to the matter in issue. Thus, he erred;

a) In recognizing the Plaintiff Deed marked P2 correctly describes the boundaries to the land in dispute and deciding in favour of the Plaintiff when there was evidence to indicate that the Plaintiff had used a copy of a Plan marked P1 which cannot be treated as a true and acceptable copy of Plan No. pp4098 to describe the land in the said Deed.
b) In recognizing that the Plan marked X depicts the land in dispute and purported encroachment correctly when the surveyor had used the said copy of the plan marked P1 to identify the land and encroachment.
c) In refusing to accept Deeds marked by the Defendant as relevant to the subject matter in dispute when the Defendant was in possession and when there is no evidence to show that prior to executing Deed marked P2 the Plaintiff or any predecessor in title got the land in dispute surveyed and got the Plan No. 4098 made accordingly.

However, the learned District Judge held in favour of the Plaintiff and when the said decision was appealed against by the 1(iii) Substituted Defendant, the Court of Appeal set aside the Judgment of the learned District Judge and dismissed the Plaintiff's action allowing the appeal. Anyhow, it is worthwhile to make the following observations with regard to the decision made by the Court of Appeal though its final conclusion is correct as per the reasons discussed above.

The amended Plaint is in accordance with the provisions of the Civil Procedure Code, especially section 41 as the Plaintiff had pleaded title with reference to Plan No.809 and explained the portion encroached – vide paragraph 2 to 5 of the amended Plaint and the schedule. Our Courts have decided that in a *rei vindicatio* action the Plaintiff need not pray for a declaration of title and it is sufficient to plead title and prove it to obtain the relief of ejecting the trespasser – vide **Dharmasiri V Wickrematunga (2002) 2 Sri L R 218, T.B. Jayasinghe V Kiriwanegedara Tikiri Banda (1988) 2 C A L R 24 and Gallage Saummehammy alias Somawathie V I. A.Dharmapala SC App. 184/14 SC minutes dated 08.09.2022**. Thus, it is observed that the Court of Appeal correctly decided against one of the contentions of the Defendant before Court of Appeal which appears to be that without pleading declaration of title to the entirety of the corpus, the Plaintiff cannot plead title to part of it and pray to eject the Defendant without indicating the part so encroached in a schedule and the plaint is of a kind that could have been refused in terms of section 46(2) of the Civil Procedure Code. However, as explained above, it is not an error in the Plaint that makes the Plaintiff's case a failure, but the unreliability and unacceptability of the copy of the Plan used to describe and identify the land and any alleged encroachment. However, while rejecting the above contention of the Defendant, the Court of Appeal had stated that it observed that the Plaintiff had proved title to the land described in the schedule to the Plaint- vide page 3 of the Court of Appeal Judgment. However, as for the

reasons discussed above, I am unable to agree with that finding, if it is meant to state that the Plaintiff proved his title to the exclusion of any title the Defendant had to the land surveyed.

It appears that the Learned Court of Appeal Judge recognized the copy of the Plan No. pp4098 marked P1 as a photo copy and the surveyor stated it as a photo copy of the original plan- vide pages 3,4 and 5 of the Court of Appeal Judgment. Accordingly, the Court of Appeal, referring to the decision of **Gunasekera V Punchimenike and Others (2002) 2 Sri L R 43** has indicated that superimposition done using photo copies are inaccurate. It appears that it was the Plaintiff in his evidence admitted it as a photocopy- vide page 119 of the brief. The document marked P1 that had been made in 1958 is available in the District Court brief and it appears to be a print made on a fabric sheet. Therefore, I doubt whether the Court of Appeal was correct when it identified P1 as a photo copy of the original Plan. However, the Court of Appeal was correct in stating that P1 was an unsigned and uncertified document as to the correctness of the document. As said before in this Judgment, two unnamed persons have signed it to say that it was prepared and examined by them. As mentioned before, whether they are qualified to make such a copy was also not established. As explained above, no one was summoned from the Surveyor General's Department or any authority to prove that the existence of an original Plan No. pp 4098 and to say that P1 was a correct copy of that. Neither the Surveyor had stated in evidence that he got the correctness of P1 verified by perusing the original nor that he got a correct tracing or a copy from the original. Hence, P1 remains as a purported uncertified copy of a Plan No. pp4098 of which the existence was not established before Court. Thus, as explained above in this Judgment, Plaintiff's case must fail, since this affects the reliability of accepting the description of the land in the Plaint and in the amended Plaint as well as the identification of the land and its alleged encroachment. Thus, the setting aside of the District Court Judgment and allowing of the appeal made to it by the Court of Appeal is correct in law.

For the forgoing reasons, the questions of law allowed by this Court have to be answered in the negative as follows;

Q. a) Has His Lordship of the Court of Appeal erred in law by holding that the Plaintiff has failed to identify the corpus in dispute?

A. answered in the Negative.

Q. b) Has His Lordship of the Court of Appeal erred in Law as he failed to take into consideration that the portion of land encroached by the Defendant has been identified as Lot 1 in Plan No.809 dated 02.11.1989 made by D. Ratnayake Licensed Surveyor?

A. Answered in the Negative.

Q. c) Has His Lordship of the Court of Appeal erred in law as he failed to take into account that the portion of the encroached land has been depicted as Lot 1 in Plan No.809 dated 02.11.1989

made by Mr. D Ratnayake Licensed Surveyor and the Plaintiff has complied with Section 41 of the Civil Procedure Code?

A. Answered in the Negative. The Court of Appeal has correctly held that Plaintiff had complied with said Section 41 but the Court of Appeal has not erred in refusing to accept the identification of the encroached portion.

Q. f) Has His Lordship erred in law as His Lordship failed to take into account that the Learned District Judge has correctly answered issue No.05 in favour of the Plaintiff?

A. Answered in the Negative.

Hence, this Appeal is dismissed with Costs.

Appeal Dismissed.

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Judge of the Supreme Court.

Hon. Jayantha Jayasuriya PC, CJ.

I agree.

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The Chief Justice.

Hon. S. Thurairaja, PC, J.

I agree.

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Judge of the Supreme Court.