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

In the matter of an Appeal in terms of Article 128 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Agampodi Kamalawathie De Soysa,
2. Indrani Gunasekera nee De Soysa.
   Both of 430/1, Maligawa Pedesa,
   Boralasgamuwa

Plaintiff

SC APPEAL 88/2018
SC/SPL/LA 227/2014
CA CASE 16/04(F)
DC Colombo 18714/L

Vs.

Ranamuka Devage Siri Wijaya,
479/1, Sudharma Road,
Wanawasala. Kelaniya

Defendant

AND

1. Agampodi Kamalawathie De Soysa,
2. Indrani Gunasekera nee De Soysa.
   Both of 430/1, Maligawa Pedesa,
   Boralasgamuwa

Plaintiffs- Appellants

Vs.

Ranamuka Devage Siri Wijaya,
479/1, Sudharma Road,
Wanawasala. Kelaniya

Defendant- Respondent

AND NOW BETWEEN

1. Agampodi Kamalawathie De Soysa,
2. Indrani Gunasekera nee De Soysa.
   Both of 430/1, Maligawa Pedesa,
   Boralasgamuwa

Plaintiffs- Appellants- Appellants

Vs.

Ranamuka Devage Siri Wijaya,
479/1, Sudharma Road,
Wanawasala. Kelaniya

Defendant- Respondent- Respondent

BEFORE: **MURDU N.B. FERNANDO, PC, J.**
K.KUMUDINI WICKREMASINGHE, J.
A.L. SHIRAN GOONERATNE, J.

COUNSEL: Dr. Jayatissa De Costa PC with Chanuka Ekanayaka for the Plaintiff-Appellant- Appellant

M.D.J. Bandara for the Defendant- Respondent- Respondent

WRITTEN SUBMISSIONS: Written submissions of the Appellant on 03.07.2018 and 08.11.2022

Written Submission of the Respondent on 26.06.2020 and 12.12.2022

ARGUED ON: 10.10.2022

DECIDED ON: 07.10.2024

K. KUMUDINI WICKREMASINGHE, J.

The application for special leave to appeal was preferred by the Plaintiff Appellant Appellant against the judgment of the Court of Appeal dated 27.10.2014 affirming the judgment of the District Court of Colombo. Aggrieved by which the Plaintiff Appellant Appellant appealed to the Supreme Court.

Accordingly, this court by order dated 14.05.2018 granted special leave to appeal on the following questions of law:

1. Have the Court of Appeal and the District Court erred in not considering the presumption of title in favour of the Plaintiffs on the proof that the Plaintiffs had enjoyed an earlier peaceful possession and that subsequently they were ousted by the Defendant?
2. Have the Court of Appeal and the District Court erred in not considering that in an action for declaration of title, the Court has the jurisdiction to declare the undivided share of the Plaintiffs and eject a trespasser from the land in dispute even though the action has been brought on the basis that the Plaintiffs are the owners of the land in dispute?

The facts of the case briefly are as follows:

This action was instituted by the Plaintiffs in the District Court of Colombo seeking inter alia;

a) A declaration that they are co-owners of the land morefully described in the schedule of the plaint,
b) An order ejecting the Respondent and those under him from the land morefully described in the schedule to the plaint.
c) Damages.

The Defendant filed an answer denying the position of the Plaintiffs and seeking dismissal of the action on the basis that;

a) Ranamuka Devege John Fernando who is the predecessor in the title of the Plaintiffs had five brothers and sisters
b) The subject matter is still a co-owned property in as much as a partition deed had not been executed even though a partition plan No.14/1932 dated 12.06.1932 prepared by H.S. Perera, Licensed Surveyor had been prepared.
c) The Defendant had acquired prescriptive title to the land.

Having heard the evidence led and the documents produced at the trial, the Learned District Court Judge delivered her judgment dismissing the action of the Plaintiff on the basis that the cause of action being prescribed and that the Plaintiffs are only co-owners and they do not own it solely.

Aggrieved by the decision, the Petitioners appealed to the Court of Appeal against the judgment of the Learned District Judge. After considering the evidence led, the Honorable Justice of the Court of Appeal delivered his judgment dismissing the Petitioners appeal. The Court of Appeal held that, the Plaintiff Appellants had failed to place any evidence to show how John Fernando became entitled to the entire land described in the schedule of the plaint, the Plaintiff Appellants came to court on the basis that they were the owners of the land described in the schedule of the plaint and that the Court cannot agree with the submissions made on behalf of the Plaintiff Appellants that the Learned District Judge had erred in law in not granting the lesser relief that the reliefs asked for by the Plaintiff Appellants and the ejectment of the Defendant Respondent.

Aggrieved by the decision of the Court of Appeal the Plaintiff Appellant Petitioner by petition dated 24th November 2014 sought special leave to appeal from this court. Accordingly, special leave to appeal was granted by this court on 14th May 2018.

Now I will proceed to answer the 1st question of law on which special leave has been granted. Namely, “Have the Court of Appeal and the District Court erred in not considering the presumption of

title in favour of the Plaintiffs on the proof that the Plaintiffs had enjoyed earlier peaceful possession and that subsequently they were ousted by the Defendant".

In order to answer this question of law I must first evaluate how the ownership derived on the Plaintiff Appellants Appellants (hereinafter referred to as Appellant).

It was the Appellant's contention that one Ranamuka Devage John Fernando acquired title to the land which is the corpus of this action by virtue of Deed of Transfer No.16947 dated 20.10.1935 attested by L.J.E Cabral, Notary Public marked as **P1**. The Appellants in their written submissions contended that Ranamuka Devage John Fernando was entitled and/or possessed the said divided portion of 32.8 perches which was corroborated by the plan marked **V1**. The Appellants contended that Ranamuka Devage John Fernando kept on developing the said land and acquired the prescriptive title also. Thereafter, Ranamuka Devage John Fernando gifted the land to Agampodi Justin Soyza via Deed of Gift No.1151 dated 24.06.1947 attested by S. Wickramasinghe, Notary Public subject to life interest marked as **P2**. Following the death of Ranamuka Devage John Fernando, Agampodi Justin Soyza became the sole owner of the subject matter.

Agampodi Justin Soyza thereafter gifted the subject matter to the 1st Plaintiff under Deed of Gift No.318 dated 27.02.1962 attested by H. Milroy Fonseka Notary Public marked as **P3** at trial. The 1st Appellant gifted an undivided 22 perches from the corpus to the 2nd Appellant, her sister excluding two houses thereon under the Deed of Gift No.294 dated 26.10.1998 attested by Laxman Amarasinghe, Notary Public marked as **P4** at trial.

The Appellants further stated that having possessed the land in dispute uninterruptedly and against all others for a period exceeding 10 years, Plaintiffs and their Predecessor in title have acquired the prescriptive title also in the land.

It was the Appellant's contention that they became the owners of the corpus by way of the abovementioned deed and that the Respondents started possession of the same illegally and forcibly from the latter part of the year 1992.

The Honorable Justice of the Court of Appeal held that as per the deed P1 that has been led at the trial one John Fernando only became entitled to a share of 3/10 of the subject matter. Thereafter he has transferred the rights he purchased from deed P1 as well as the rights inherited to Agampodi Justin Soysa by deed marked **P2** however no proof has been led regarding the rights that have been inherited which led to the ownership of the entire land portion.

It is settled law that when a declaration of title is sought through a rei vindicatio action the onus is on the plaintiff to prove his title. This has been reiterated in many judgements including in the case of **De Silva vs. Goonetilleke [1960] 32 NLR 217 at p.219**, a Full Bench stated that "*in a rei vindicatio Action, "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*". More recently, Justice Mahinda Samayawardhena in **Ballantuda Achchige Don Wasantha v Morawakage Premawathie and Others [SC/Appeal/176/2014] decided on 17.05.2021** held that "*H.N.G. Fernando J. (later C.J.) in Pathirana v. Jayasundara (1955) 58 NLR 169 at 171 required "strict proof of the Plaintiff's title". But this shall not be understood that a Plaintiff in a rei vindicatio action shall prove his title beyond reasonable doubt such as in a criminal prosecution, or on a high degree of proof as in a partition action. The standard of proof of title is on a balance of probabilities as in any other civil suit. The stringent proof of chain of title, which is the norm in a partition action to prove the pedigree, is not required in a rei vindicatio action.*"

In **Wanigarathne Vs Juwanis Appuhamy [1962] 65 NLR 167** Justice Herat observed: "*In an action rei vindicatio the plaintiff must prove and 4 establish his title. He 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 other important principle would be as set out in **Karunadasa Vs. Abdul Hameed [1958] 60 NLR 352** per Sansoni J "*In a rei vindication action it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties*".

Thus, the Appellants are required to prove their title on a balance of probabilities. The Honourable Justices of the Court of Appeal held that the Appellants had failed to lead evidence and prove how the said John Fernando became entitled to the entire corpus and further stated that the Appellants had come to court on the basis that they were the owners of the land described in the schedule of the plaint.

It is the position of the Respondents that the Appellants have failed to prove title to the undivided portion of land as described in the schedule of **P2.**

It was the contention of the Respondents that the Appellants had intended to get a declaration in a rei vindicatio action as a co owner, they should have referred to it in the plaint, of them being co owners of the land in suit and they should have produced the partition plan no 14/1932 along with an amicable partition deed in order to prove the subject matter of the action being a co owned land dividing among the five brothers and sisters of John Fernando.

The Respondents further stated that the deed marked **P2** does not disclose from where John Fernando claims the rest of the undivided share of 7/10th share in the land in suit and not an iota of evidence is on record to establish title to the remaining said share and whatever that is referred in deed **P2** where the Vendee of the Appellants have not derived any title to the remaining undivided 7/10th share of the said land.

Therefore, in order to answer the first question of law, it must be considered whether a presumption of title existed on part of the Appellants owing to the Appellants enjoying peaceful possession prior to being ousted by the Respondents. As discussed above in order for a presumption of title to exist the Appellants when initiating a rei vindicatio action must prove their title. However in this case based on the deeds which have been led in evidence during the trial, the Appellants failed to prove the title to the entire land on which this action was initiated.

As correctly stated in the written submissions of the Respondents in order to seek a declaration of title for the entire land as per limb (1) of the prayer to the plaint the Appellants must prove their title to the whole land.

In the case of **Leisa and Another v Simon and Another [2002] 1 Sri L.R** it was held that "*The moment title is proved the right to possess it is presumed.*"

In the case of **Mudalihamy V. Appuhamy [1891] 1 CLR 67**, Burnside C.J observed that "*The Plaintiff was in the bonafide possession of the chena in question and had cleared it for sowing when the Defendant entered upon it sowed it and put the Plaintiff out. Now Prima facie, the Plaintiff having been in possession, he was entitled to keep it against all the world but the rightful owner, and* if *the Defendant claimed to be the owner, the burden of proving his title rested on him, and Plaintiff might have contended himself with proving his de facie possession at the time of the ouster ... "*

Therefore in light of the above, if the title had been proved by the Appellants, then the right to possess is presumed. However, in this case the Appellants have failed to establish title to the entirety of the land.

I will now proceed to answer the second question of law, namely "Have the Court of Appeal and the District Court erred in not considering that in an action for declaration of title, the Court has

the jurisdiction to declare the undivided share of the Plaintiffs and eject a trespasser from the land in dispute even though the action has been brought on the basis that the Plaintiff are the owners of the land in dispute?"

The important question is whether one co owner maintain a possessory action against the other co owner? The general principle which militates against the competence of one co owner to maintain a possessory action against the other co owners, derives from the consideration that each co owner, in the absence of an amicable partition or other informal arrangement, is entitled to possession of every part of the common property, so that the exclusion of a co owner from any portion of the common property is usually not warranted.

Upon perusal of the plaint of the Appellants that nowhere in the averments of the plaint have the Appellants referred to themselves as being co- owners of the land in suit in claiming title to undivided share of the said land. The instant action of the Appellants in fact was not initiated on a declaration of title to an undivided share of land in suit and ejectment of a trespasser from the whole land in suit.

As such it appears that the question of law mentioned above has been put forth in appeal for the first time and not in accord with the case presented by the Appellants in the District Court. It is the accepted standard as per the procedural law in Sri Lanka that a party to an action cannot put forward a ground of appeal for the first time in appeal unless it might have been put forward in the Court below and in other hand the matter in question should be on which deals with the pure question of law.

This position has been reiterated in the case of **Gunawardena Vs. Deraniyagala [2010] 1 SRL 309** where Justice Bandaranayake C.J.observed that "*that according to our procedure a new ground cannot be considered for the first time in appeal, if the said point has*

not been raised at the trial under the issues so framed. Accordingly the Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled.

a. the question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;

b. the question raised for the first time in appeal is an issue put forward in the Court below under one of the issues raised; and

c. the Court which hears the appeal has before it all the material that is required to decide the question."

In the case of **Talagala v Gangodawila Co-operative Stores Society Ltd [1947] 48 N.L.R. 472** Dias J held that " *it had clearly stated that as a general rule it is not open to a party to put forward for the first time in appeal a new ground unless it might have been put forward in the trial Court under one of the issues framed and the Court hearing the appeal has before it all the requisite material for deciding the question.*"

As per explanation 2 of Section 150 of the Civil Procedure Code Ordinance No. 02 0f 1889 as amended, a party is not entitled to make out a case for the first time in appeal different from

(a) The case already presented before trial court,
(b) The case in which they have placed on record.
(c) The case in which the trial has commenced.

In light of the above procedure and case law along with evidence led at trial, it is abundantly clear that the Appellants have failed to prove and establish title to the whole land and was not entitled to the relief prayed for in limb 1 of the prayer of the plaint and as such is not entitled in law to make a case materially different from that which they have placed on record and presented before the Trial Judge.

Therefore, considering all of the above factors in this appeal of the Plaintiffs Appellants Appellants, I am of the view that the Learned

District Court Judge and the Honourable Justice of the Court of Appeal had arrived at a correct conclusion that the Plaintiffs Appellants Appellants had failed to prove title to the entirety of the property described in the schedule of the plaint.

Accordingly, I answer the 1st and 2nd questions of law on which special leave to appeal has been granted in the negative. For these reasons, the Judgment of the Court of Appeal and that of the District Court of Colombo are affirmed. The Appeal of the Plaintiffs Appellants Appellants is hereby dismissed.

Judge of the Supreme Court

MURDU N.B. FERNANDO, P.C., J.

I agree.

Judge of the Supreme Court

A.L. SHIRAN GOONERATNE, J.

I agree.

Judge of the Supreme Court