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

M.M.M. Ashar,
No. 49/1A,
Kawdana Road,
Dehiwala.
Plaintiff

SC APPEAL NO: SC/APPEAL/171/2019
SC LA NO: SC/HCCA/LA/59/2018
HCCA MT. LAVINIA NO: WP/HCCA/MT. LAV/88/14/F
DC MT. LAVINIA NO: 2379/07/L

Vs.

T.H. Kareem,
No. 49/1B,
Kawdana Road,
Dehiwala.
Defendant

AND BETWEEN

T.H. Kareem,
No. 49/1B,
Kawdana Road,
Dehiwala.
Defendant-Appellant

Vs.

M.M.M. Ashar,
No. 49/1A,
Kawdana Road,
Dehiwala.
Plaintiff-Respondent

AND NOW BETWEEN

M.M.M. Ashar,
No. 49/1A,
Kawdana Road,
Dehiwala.
Plaintiff-Respondent-Appellant

Vs.

T.H. Kareem,
No. 49/1B,
Kawdana Road,
Dehiwala.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Lasitha Kanuwanaarachchi with Darshani Gampalage and Nipunika Rajakaruna for the Plaintiff-Respondent-Appellant.

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

Argued on: 10.11.2022

Written submissions:

by the Plaintiff-Respondent-Appellant on 01.06.2020.
by the Defendant-Appellant-Respondent on 23.04.2021.

Decided on: 22.05.2023

Samayawardhena, J.

Introduction

As crystalised in the issues, the plaintiff filed this action in the District Court of Mount Lavinia seeking a declaration of title to, ejectment of the defendant from, the land described in the second schedule to the plaint (which is part of the land described in the first schedule to the plaint), and damages. The defendant claimed prescriptive title to the land described in the second schedule to the plaint. After trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal of Mount Lavinia set aside the judgment of the District Court purely on the basis that the plaintiff did not prove title to the entirety of the land but only to 11/12 shares of the land. This appeal by the plaintiff is against the judgment of the High Court.

This Court has granted leave to appeal to the plaintiff on the following two questions of law:

(a) Did the High Court fail to consider that the defendant having entered the premises as a licensee of the plaintiff's predecessor in title cannot deny the ownership of the plaintiff?

(b) Did the High Court err in law by failing to consider that the defendant being a trespasser could be ejected even by a co-owner?

Thereafter, the defendant has framed the following two questions of law:

(a) Is the plaintiff entitled to seek ejectment of the defendant from the land described in the second schedule to the plaint without establishing that the land described in the second schedule to the plaint is part of the land described in the first schedule to the plaint?
(b) If the plaintiff failed to establish it, has the plaintiff's action been correctly dismissed by the High Court?

The District Court arrived at the finding that the defendant came into occupation of the house standing on the land in suit as a licensee of the father of Sithi Nazmy, namely Anzar, and continued in that capacity under Sithi Nazmy as well. It is from Sithi Nazmy the plaintiff purchased the land by the deed marked at the trial P3. The defendant in several places in his evidence admitted that he came into occupation of the house standing on the land described in the second schedule to the plaint at the invitation of Anzar, until Anzar repaid the money owed to him, and thereafter he has continued to occupy the house until now. The defendant has come into occupation of the house in 1978. The District Court dismissed the defendant's claim of prescriptive title to the property. The High Court did not state that the finding of the District Court that the defendant did not succeed in his claim of prescriptive title was erroneous. The High Court did not interfere with that finding at all.

The defendant cannot dispute the title of the plaintiff to the land

A defendant who enters into a land in a subordinate character such as a tenant, lessee or licensee of the plaintiff is estopped from disputing the

title of the plaintiff to the land. Section 116 of the Evidence Ordinance enacts:

> *No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.*

One of the reasons for this fetter is that a person need not necessarily be the owner of the subject matter to enter into such agreements with another. Despite want of ownership, such agreements create valid legal relationships such as landlord and tenant, lessor and lessee, licensor and licensee between them although they are not binding on the real owner. *Vide Imbuldeniya v. De Silva* [1987] 1 Sri LR 367, *Gunasekera v. Jinadasa* [1996] 2 Sri LR 115 at 120, *Pinona v. Dewanarayana* [2004] 2 Sri LR 11.

In *Ruberu v. Wijesooriya* [1998] 1 Sri LR 58 at 60, Gunawardana J. held:

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings*

> *in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.*

As was held by the Supreme Court in *Reginald Fernando v. Pubilinahamy* [2005] 1 Sri LR 31:

> *Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land.*

Vide also *Gunasinghe v. Samarasundara* [2004] 3 Sri LR 28, *Dharmasiri v. Wickrematunga* [2002] 2 Sri LR 218.

In a declaration of title action which is not a *rei vindicatio* proper and which is filed against a defendant such as a licensee or a tenant to recover possession, the plaintiff need not prove title to the land against the defendant. In such actions, the title is presumed to be with the plaintiff. Put differently, the defendant in such actions cannot frustrate the plaintiff's action on the basis that the plaintiff is not the owner of the property.

The present action is not a *rei vindicatio* action proper but a declaration of title action. Hence, the High Court is clearly wrong to have set aside the judgment of the District Court on the basis that the plaintiff does not have title to the entirety of the land but only to 11/12 shares of the land.

Once the Court decides that the defendant is a licensee of the plaintiff, and his prescriptive title is unsustainable, whether the plaintiff is the owner of the entire land or part of it or has no title at all is irrelevant.

Can a defendant who enters into a land in a subordinate character claim title to the land?

According to the Roman Dutch Law principles, a defendant who enters into a land in a subordinate character such as a lessee, licensee, tenant, mortgagee etc. cannot claim title to the land; if he wants to do so, he must first quit the land and then fight for his rights.

Voet 19.2.32 (Voet's commentary on the Pandects as translated by Percival Gane, Butterworth & Co. (Africa) Ltd 1956, Vol. 3, at page 447) states:

> *Lessee cannot dispute lessor's title, tho' third party can. Nor can the setting up of an exception of ownership by the lessee stay this restoration of the property leased, even though perhaps the proof of ownership would be easy for the lessee. He ought in every event to give back the possession first, and then litigate about the proprietorship.*

Maasdorp's Institutes of South African Law, Vol. III, 8th Edition (1970), p. 185 states:

> *A lessee, as already stated, is not entitled to dispute his landlord's title, and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of it. His duty in such a case is first to restore the property to the lessor and then to bring an action for a declaration of rights.*

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

> *The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.*

In *Alvar Pillai v. Karuppan* (1899) 4 NLR 321, the plaintiff sued the defendant to recover possession of the entire land on the basis that the term of lease had expired. The defendant refused to give up possession of the whole land on the basis that he was the tenant under the plaintiff only for a half of the said land. He set up a title under another person to the other half. Although the defendant was placed in possession by the plaintiff on the whole land, the District Judge entered judgment for the plaintiff only for his half share. On appeal, Bonser C.J. at page 322 stated:

> *Now, it appears that the plaintiff can only prove title to a half of the land. It is not necessary for the purposes of this case to state the devolution of the title, for even though the ownership of one-half of this land were in the defendant himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease. He must first give up possession, and then it*

> *will be open to him to litigate about the ownership (see Voet XIX. 2. 32).*

In *Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197 the Court took the same view.

In the Supreme Court case of *Wimala Perera v. Kalyani Sriyalatha* [2011] 1 Sri LR 182 it was held:

> *A lessee is not entitled to dispute his landlord's title by refusing to give up possession of the property at the termination of his lease on the ground that he acquired certain rights to the property subsequent to him becoming the lessee and during the period of tenancy. He must first give up possession and then litigate about the ownership he alleges.*

However, if an action is filed for ejectment against such defendant who originally entered into possession in a subordinate character claims prescriptive title to the property (which is an overly onerous task) by stating that he changed the character of possession from subordinate to adverse by explicit overt act (as the starting point of adverse possession) and continued such adverse possession for over 10 years as required by section 3 of the Prescription Ordinance, the rigidity of the said principle can be relaxed. In such a situation, the defendant cannot be directed to first surrender his possession in order for him to establish his prescriptive title.

Professor G.L. Peiris in his book *Law of Property in Sri Lanka*, Vol. I, 2nd Edition (1983), p.112, citing *inter alia Angohamy v. Appoo* (Morgan's Digest 281), *Government Agent, Western Province v. Perera* (1908) 11 NLR 337, *Alwis v. Perera* (1919) 21 NLR 321 states: "*The principle that an occupation which began in a dependent or subordinate capacity can be converted into "adverse possession" by an overt act or a series of acts*

indicative of a challenge to the owner's title, is clearly deducible from the decided cases."

The presumption is that a person who commences his possession in a subordinate character continues such possession in that character. In order to show change of the character of possession, cogent and affirmative evidence is required.

In *Ran Naide v. Punchi Banda* (1930) 31 NLR 478, Jayawardene A.J. observed:

> *Where a person who has obtained possession of a land of another in a subordinate character, as for example as a tenant or mortgagee, seeks to utilize that possession as the foundation of a title by prescription, he must show that by some overt act known to the person under whom he possesses he has got rid of that subordinate possession and commenced to use and occupy the property ut dominus (Government Agent v. Ismail Lebbe (1908) 2 Weer. 29). It is for him to show that his quasi-fiduciary position was changed by some overt act of possession. This view was adopted by the Privy Council in Naguda Marikar v. Mohamadu (1903) 7 N.L.R. 91) and also by the Supreme Court in Orloff v. Grebe (1907) 10 N.L.R. 183).*

In *Seeman v. David* [2000] 3 Sri LR 23 at 26, Weerasuriya J. stated:

> *It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.*

Vide also *Thillekeratne v. Bastian* (1918) 21 NLR 12 at 19 and *Mitrapala v. Tikonis Singho* [2005] 1 Sri LR 206 at 211-212.

In the case of *De Soysa v. Fonseka* (1957) 58 NLR 501 at 502, Basnayake C.J. held:

> *There is no evidence that the user which commenced with the leave and licence of the owner of No. 18 was at any time converted to an adverse user. When a user commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour. There is no such evidence in the instant case.*

In the Privy Council case of *Siyaneris v. Jayasinghe Udenis de Silva* (1951) 52 NLR page 289, it was held:

> *If a person goes into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal.*

In *Naguda Marikar v. Mohammadu* (1898) 7 NLR 91, the Privy Council held that in the absence of any evidence to show that the plaintiff had got rid of his character of agent, he was not entitled to the benefit of section 3 of the Prescription Ordinance.

In the case of *Navaratne v. Jayatunge* (1943) 44 NLR 517, Howard C.J. remarked:

> *The defendant entered into possession of the lands in dispute with the consent and the permission of the owner. Being a licensee, she cannot get rid of this character unless she does some overt act showing an intention to possess adversely.*

In a more recent of *Ameen and Another v. Ammavasi Ramu* (SC/APPEAL/232/2017, SC Minutes of 22.01.2019), one of the questions to be decided was whether the defendant who was a licensee was entitled to put forward a plea of prescription. De Abrew A.C.J. (with M.N.B. Fernando J. and Amarasekera J. agreeing) stated:

> *When a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property.*

The defendant is a trespasser

Admittedly, the plaintiff in the instant action, having 11/12 shares in the land, is a co-owner of the land described in the first schedule to the plaint, whereas the defendant, having failed his prescriptive claim to a portion of the land, has no rights in the land. The defendant is a trespasser.

A co-owner can sue a trespasser

A co-owner can sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land.

In the leading case of *Hevawitarane v. Dangan Rubber Co. Ltd.* (1913) 17 NLR 49 at 53 Wood Renton A.C.J. declared:

> *Any co-owner, or party claiming under such a co-owner, is entitled to eject a trespasser from the whole of the common property. (Unus Lebbe v. Zayee (1893) 3 SCR 56, Greta v. Fernando (1905) 4 Bal. 100) Moreover, prima facie evidence of title is all that is required in such an action.*

It may be noted that, when it comes to a trespasser, Wood Renton A.C.J. remarked that "*prima facie evidence of title is all that is required in such an action.*" In the same case, Pereira J. stated at page 55:

> *As regards the rights of owners of undivided shares of land to sue trespassers, I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land (see section 12, Civil Procedure Code; Unus Lebbe v. Zayee (1893) 3 SCR 56; Greta v. Fernando (1905) 4 Bal. 100; Arnolisa v. Dissan 4 NLR 163).*

In *Hariette v. Pathmasiri* [1996] 1 Sri LR 358 at 362 and *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 at 403 the Supreme Court quoted the said principle of law with approval. This was reiterated in several decisions including *Rosalin Hami v. Hewage Hami and Others* (SC/APPEAL/15/2008, SC Minutes of 03.12.2010) and *Punchiappuhamy v. Dingiribanda* (SC/APPEAL/4/2010, SC Minutes of 02.11.2015).

The greater includes the less

In the impugned judgment of the High Court, the High Court refers to *Hevawitarane v. Dangan Rubber Co. Ltd. (supra)* to reiterate the well-settled law that a co-owner can sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land but refuses to apply this principle in this action stating that the plaintiff filed the action seeking a declaration of title to the entire land. This is a wrong approach.

Firstly, a careful reading of the prayer to the plaint will reveal that the plaintiff filed this action seeking a declaration of the plaintiff's title to the land and not seeking a declaration of title to the entire land. ("පහත 02 වන උපලේඛනයේ විස්තර වන ඉඩම සහ දේපළ තුළ පැමිනිලිකරුගේ අයිතිය ප්‍රකාශ කරන ලෙසත්")

Secondly, even if the plaintiff sought a declaration of title to the entire land, if the Court finds that the plaintiff is not entitled to the entire land but only to a portion of it, the Court need not dismiss the plaintiff's action *in toto*.

It is a recognised principle that when a plaintiff has asked for a greater relief than he is entitled to, it should not prevent him from getting the lesser relief which he is actually entitled to. *Non debet cui plus licet quod minus est non licere*, also known as, *Cui licet quod majus non debet quod minus est non licere*: the greater includes the less. This is a well-established principle in law and also in consonance with common sense. *Vide King v. Kalu Banda* (1912) 15 NLR 422 at 427, *Rodrigo v. Abdul Rahman* (1935) 37 NLR 298 at 299, *Police Sergeant, Hambantota v. Simon Silva* (1939) 40 NLR 534 at 538, *Ibealebbe v. The Queen* (1963) 65 NLR 433 at 435, *Abeynayake v. Lt. Gen. Rohan Daluwatte and Others* [1998] 2 Sri LR 47 at 55, *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 260-261, *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 at 409.

In *rei vindicatio* actions, defendants tend to rely on *Hariette v. Pathmasiri (supra)* to argue that when a plaintiff in a *rei vindicatio* action seeks a declaration of title to the entire land, his action must fail if he fails to prove that he is the sole owner of the entire land. This is a misinterpretation of the judgment. In *Hariette's* case the Supreme Court at pages 362-363 held as follows:

However, it has to be borne in mind that our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land. In the case of Hevawitarana v. Dangan Rubber Co. Ltd 17 NLR 44 at 55, Pereira, J. stated as follows:-

"I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land".

In this case the Plaintiff is not seeking a declaration of title to her undivided share in the land described in schedule 1 and for the ejectment of the Defendant from that land. She has pleaded that she possessed the land described in schedule 2 for and in lieu of her undivided share and seeks the ejectment of the Defendant from that land. Therefore the case for the Plaintiff cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2.

Since the prescriptive title to schedule 2 has not been proved by the plaintiff, the Supreme Court affirmed the judgment of the Court of Appeal and dismissed the appeal.

If I may repeat for emphasis, in *Hariette's* case the plaintiff sought to eject the defendant from the portion of land described in the second schedule to the plaint (which was part of the larger land described in the first

schedule to the plaint) on the basis that she possessed the portion of the land described in the second schedule to the plaint in lieu of her undivided shares described in the first schedule to the plaint. The Supreme Court held that the plaintiff failed to establish that she acquired prescriptive title to that portion of land by ouster and therefore the plaintiff's action cannot succeed.

Hariette's case was followed by the Supreme Court in *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 where facts were similar. The Supreme Court at page 403 summarised the issue in that case in the following manner:

> *It was agreed by both counsel at the hearing, that the only issue that has to be gone into is whether a co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action if he instituted action as the sole owner of the premises.*

This question was answered emphatically in the affirmative. Bandaranayake J. (later C.J.) stated at page 409:

> *I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for a lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief. However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence.*
>
> *In such circumstances the question raised by the counsel for the appellant is answered in the following terms. A co-owner of a land who*

> *sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to.*

However, as in *Attanayake's* case, the Supreme Court was not inclined to grant relief to the plaintiff-appellant because the plaintiff failed to prove that he was entitled to the land described in schedule B to the plaint. The reason was that the plaintiff sought a declaration of title and ejectment of the defendant from the land described in schedule B to the plaint.

> *The facts in the present case are very much similar to that of Harriette's case. As referred to earlier in the instant case the appellant (the original plaintiff) had instituted action in the District Court for a declaration of title and for ejectment from the land morefully described in the Schedule B to the plaint of the respondent therefrom. [page 406] However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence. [page 409]*

These two judgments (*Hariette v. Pathmasiri* and *Attanayake v. Ramyawathie*) unequivocally admit that a co-owner is entitled to:

(a) file an action seeking a declaration to his undivided rights of the land and ejectment of a trespasser from the whole land; and

(b) successfully sue a trespasser for a declaration of title and ejectment notwithstanding that he instituted the action as the sole owner of the premises. This latter entitlement is based on the common-sense principle that the greater includes the less.

If a co-owner of a land as the plaintiff can successfully sue a trespasser for ejectment from the whole land notwithstanding that he initially instituted the action as the sole owner of the land based on the common-sense principle that the greater includes the less, the plaintiff's action in my view cannot and should not be dismissed if he seeks to eject a trespasser from an identified portion of the whole land on the basis that he filed the action as the sole owner of the identified portion of the land but he is in fact a co-owner of that identified portion of the land. In such an event, the Court can declare that the plaintiff is a co-owner of the whole land or of that identified portion of the land and eject the trespasser on that basis.

Why reluctant to apply "the greater includes the less"?

Two main reasons why some judges and lawyers think that the general principle "the greater includes the less" is inapplicable in *rei vindicatio* actions seem to be:

(a) No Court can grant relief to a party what has not been prayed for in the prayer to the pleadings. In other words, the Court can grant reliefs only in the manner prayed for in the prayer to the pleadings (plaint/answer/replication etc) – neither more nor less.
(b) In a *rei vindicatio* action, the plaintiff must prove title of the property strictly in the exact manner pleaded in the plaint.

Can the Court grant relief not prayed for in the pleadings?

The popular view that no Court can grant relief what has not been prayed for in the prayer to the pleadings (*Surangi v. Rodrigo* [2003] 3 Sri LR 35, *Sopi Nona v. Karunadasa* [2005] 3 Sri LR 237) is not an absolute rule of law.

Even if a particular relief has not been prayed for in the prayer to the pleadings, if it has been raised as an issue that has been accepted by Court, the Court cannot refuse to grant the relief on the basis that it has not been prayed for in the prayer to the pleadings.

A case is not tried on the pleadings or on the reliefs as prayed for in the prayer to the pleadings but on issues raised and accepted by Court on which the right decision of the case appears to Court to depend. Once issues are raised and accepted by Court the pleadings (which include reliefs prayed) have no place; they recede to the background. Hence, what has been prayed for in the prayer to the pleadings is not decisive. *Vide Hanaffi v. Nallamma* [1998] 1 Sri LR 73 at 77, *Dharmasiri v. Wickrematunga* [2002] 2 Sri LR 218, *Gunasinghe v. Samarasundara* [2004] 3 Sri LR 28, *Kulatunga v. Ranaweera* [2005] 2 Sri LR 197, *Peiris v. Siripala* [2009] 1 Sri LR 75 at 78.

In *Begum Sabiha Sultan v. Nawab Mohd. Mansur Ali Khan & Ors* (Appeal Civil 1921 of 2007 decided on 12.04.2007), the Supreme Court of India stated:

> *There is no doubt that at the stage of consideration of the return of the plaint under Order VII Rule 10 of the Code, what is to be looked into is the plaint and the averments therein. At the same time, it is also necessary to read the plaint in a meaningful manner to find out the real intention behind the suit. In Messrs Moolji Jaitha & Co. Vs. The Khandesh Spinning & Weaving Mills Co. Ltd. [A.I.R. 1950 Federal Court 83], the Federal Court observed that: "The nature of the suit and its purpose have to be determined by reading the plaint as a whole."*
>
> *It was further observed:*

> *"The inclusion or absence of a prayer is not decisive of the true nature of the suit, nor is the order in which the prayers are arrayed in the plaint. The substance or object of the suit has to be gathered from the averments made in the plaint and on which the reliefs asked in the prayers are based."*
>
> *It was further observed:*
>
> *"It must be borne in mind that the function of a pleading is only to state material facts and it is for the court to determine the legal result of those facts and to mould the relief in accordance with that result."*
>
> *This position was reiterated by this Court in T. Arivandandam Vs. T.V. Satyapal & Anr. (1978) 1 S.C.R. 742 by stating that what was called for was a meaningful – not formal – reading of the plaint and any illusion created by clever drafting of the plaint should be buried then and there.*

In the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95 at 100, Kulatunga J. observed: "*The law does not require that the plaint should make out a prima facie case which is what the defendants-appellants appear to insist on, nor are the plaintiffs required to state their evidence by which the claim would be proved.*"

In *Jane Nona v. Padmakumara* [2003] 2 Sri LR 118 the question was whether the Court can grant relief for ejectment when there was no such specific relief prayed for in the prayer to the plaint. The Court answered this in the affirmative on the basis that when the plaintiff averred in the body of the plaint that a cause of action has accrued to him to obtain an order of peaceful possession of the land and damages, and prayed that he be granted damages until possession is restored to him, it is implicit that the plaintiff seeks ejectment as well.

In *Weerasinghe v. Heling and Others* (SC/APPEAL/91/2013, SC Minutes of 26.02.2020) the question was whether the plaintiff could seek ejectment of the defendants from the land in suit without a specific prayer for declaration of title. This Court answered it in the affirmative. De Abrew J. citing with approval *Jayasinghe v. Tikiri Banda* [1988] 2 CALR 24, *Dharmasiri v. Wickramatunga* [2002] 2 Sri LR 218 and *Pathirana v. Jayasundara* (1955) 58 NLR 169 held "*in an action for ejectment of the defendant from the property in dispute, once the plaintiff's title to the property is proved, he (the plaintiff) is entitled to ask for ejectment of the defendant from the property even though there is no prayer in the plaint for a declaration of title.*"

In *Jayasinghe v. Tikiri Banda* [1988] 2 CALR 24 Viknaraja J. held "*where title to the property has been proved, as in this case the fact that one had failed to ask for a declaration of title to the property will not prevent one from claiming the relief of ejectment.*"

What is important is whether the relief has been sought in the pleadings and not whether the relief has been sought in the prayer to the pleadings.

In *Dharmasiri v. Wickramatunga* [2002] 2 Sri LR 218 the plaintiff sought ejectment of the defendant but there was no prayer for a declaration of title. However the Court held that the absence of a specific prayer for a declaration of title causes no prejudice if the title is pleaded in the body of the plaint and issues are framed and accepted by Court on the title so pleaded.

In *Charlot Nona v. Kuruppu* (SC/APPEAL/54/2011, SC Minutes of 17.06.2015), the High Court had dismissed the application for leave to appeal on the basis that in the prayer to the petition there was no such relief sought. On appeal, the Supreme Court set aside the judgment of the High Court holding that the absence of a specific prayer for leave to

appeal cannot be considered as a ground for dismissal of an application for leave to appeal when such petition contains a statement in the body of the petition moving the Court to grant leave to appeal.

This position can also be defended from a different point of view. 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

In a *rei vindicatio* action, if the Court holds with the plaintiff, the Court accepts that he is the owner of the property. The owner of the property has the inherent right to possess the property. In other words, the right to possession is an essential attribute of ownership. Hence the plaintiff automatically gets the entitlement to the right to possession whether or not he has prayed for ejectment in the prayer to the plaint once the Court

decides that he is the owner of the property. *Vide Kamalawathie v. Premarathne* (SC/APPEAL/118/2018, SC Minutes of 2.6.2021).

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 172 Gratiaen J. held "*In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.*"

Let me also add that even if an issue or issues have not been raised using the real legal terms, if the issue or issues raised in fact cover the situation intended by the legal terms, the Court cannot be found fault with for granting the relief using the legal term. In *Pushpakumara v. Marmet* [2003] 2 Sri LR 244 the District Court *inter alia* granted divorce on the ground of malicious desertion despite there being no issue framed on malicious desertion. When this matter was raised on appeal, the finding was upheld on the basis that "*Despite the fact that the legal term malicious desertion is not referred to in the said issue however the issue raises the factual question as to whether the 1st defendant-respondent's conduct amounted to constructive malicious desertion.*"

As has been stated by Suresh Chandra J. in the case of *Elias v. Gajasinghe* (SC/APPEAL/50/08, SC Minutes of 28.06.2011):

> *For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged*

> *from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law.*

Courts should not be swayed by high-flown technical objections in meting out substantive justice to litigants unless such objections shatter the very foundation of the case.

In a rei vindicatio action: Who has the onus of proof?
What is the standard of proof?
Is strict proof of title in the manner pleaded in the plaint necessary?

The High Court states that since this is a declaration of title action, the plaintiff must prove title to the land in the manner she has pleaded in the plaint.

As I have already adverted to, there is a distinction between a *rei vindicatio* action proper and a declaration of title action. The present action is not a *rei vindicatio* action proper but a declaration of title action. The distinction between the two was lucidly explained by Gratian J. in *Pathirana v. Jayasundara (supra)* at 172-173:

> *In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*
>
> *The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract*

(whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

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.

Even if this is a *rei vindicatio* action proper, there is no necessity to prove the title of the plaintiff exactly in the same manner which the plaintiff has pleaded in the plaint. For instance, if the plaintiff in the plaint pleads title relying on one deed but at the trial marks several other deeds and documents (duly listed) to fortify his case, the Court should not disregard such deeds/documents and mechanically dismiss the plaintiff's action on the basis that the plaintiff in a *rei vindicatio* action must prove title strictly in the same manner which he has pleaded in the plaint.

Even in a criminal case or a partition case such stringent procedure is not adopted. This does not mean that a plaintiff in a *rei vindicatio* action can present a different case at the trial from what he has pleaded in his pleadings. Suffice it to say, even that is possible, if issues are raised in that direction and accepted by Court, for the case is tried not on pleadings but on issues.

The burden of proof and the standard of proof in *rei vindicatio* actions are overwhelmingly overshadowed by misinterpretations, misconstructions and misunderstandings. Let me elaborate on this as significant portion of the District Court work is on *rei vindicatio*/declaration of title actions.

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.

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 "*<u>sufficient evidence</u> 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; <u>establishment of his own title, in the sense of establishing a title superior to that of the plaintiff</u>; 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.

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 <u>title by prescription is an illegality made legal</u> due to the other party not taking action.*"

Can the defendant's evidence be considered 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 Herath 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, even the High Court accepts that the plaintiff is entitled to 11/12 shares of the land by deed of transfer No. 2411 marked at the trial P3. The defendant does not have paper title to the land. The prescriptive claim preferred by the defendant was rejected by Court.

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.*

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 fact that a *rei vindicatio* action is identified as an action *in rem* has unmistakably contributed to expect a high degree of proof of title from a plaintiff in such an action. Is this thinking correct?

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.

The defendant cannot raise questions of fact for the first time in the Supreme Court

After leave to appeal was granted to the plaintiff by this Court, the defendant has raised two purported questions of law which I quoted at the outset. By these purported questions of law the defendant seeks to argue that the plaintiff has not established that the land described in the second schedule to the plaint is part of the land described in the first schedule to the plaint. It is significant to note that this was not put in issue at the trial in the District Court. This is not a question of law but a question of fact. Any question which is not a pure question of law, but a question of fact or a mixed question of fact and law, cannot be raised for the first time in appeal. *Vide Hameed alias Abdul Rahman v. Weerasinghe* [1989] 1 Sri LR 217, *Leslin Jayasinghe v. Illangaratne* [2006] 2 Sri LR 39, *Simon Fernando v. Bernadette Fernando* [2003] 2 Sri LR 158, *Gunawardena v. Daraniyagala* [2010] 1 Sri LR 309, *Somawathie v.*

Wilmon [2010] 1 Sri LR 128, *Piyadasa v. Babanis* [2006] 2 Sri LR 17 at 24, *Leslin Jayasinghe v. Illangaratne* [2006] 2 Sri LR 39 at 47.

In any event, the defendant in his evidence has unequivocally admitted that the land described in the second schedule to the plaint is part of the land described in the first schedule to the plaint (*vide* page 242 of the brief) and therefore the matter should end there.

Conclusion

The two questions of law raised on behalf of the plaintiff are answered in the affirmative.

The two questions of law raised on behalf of the defendant are misleading questions: The first is answered "The land described in the second schedule to the plaint is admittedly part of the land described in the first schedule to the plaint." The second is answered "Does not arise."

I set aside the judgment of the High Court and restore the judgment of the District Court. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court