IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an Appeal from the High Court of Civil Appeal, Chilaw.

Daya Jayaratne,(nee Agampodi Silva), No. 24, Vanderwert Place, Dehiwela.

S.C. Appeal 105/2013

Plaintiff

S.C.(HC) C.A.L.A. Application No. 478/2011
H.C. (Civil) Appeal No. NWP/ HCCA/KUR/149/2004(F) and NWP/HCCA/150/2004/F
D.C.Chilaw No. 25218/F

Vs

1.Singha Arachchige Ajith Thilaksiri
2.Weerasinghe Mudiyanselage Dayawathie
3.Kuranage Densil Anton Perera
4.Adhikari Mudiyanselage Seneviratne
5.Suduwa Dewage Ranjith Gunaratne
6. Wijesuriya Arachchilage Lionel
7. Suduwa Dewage Nimal Rathne
8.Asarappulige Lalith Mahinda
9.Dapanage Chandana Pradeep Appuhamy
10.Hewawasam Hakgalage

Karalinahamy

11.Ranepura Hewage Gunajeeva
12. Hikkaduge Sunil Fernando
13. Jayasuriya Arachchige Don Lakshman Jayantha
14. Jayasuriya Arachchige Don Asoka Jayasinghe
15. Sebastian Lawrence
16. N.Joseph Michael Royala
17. Doresamy Kandasamy
18. Suriya Arachchige Sampath Appuhamy
19. Mutthai Waduwei Sarawanamuttu
20. Jayasuriya Arachchige Pelician Perera
21. Suduwa Dewage Lushan Fernando
22. Muthugalage Sisira Sarath
23. Sebesthian Pulle Selwaniathi
24. Hewabattage Premadasa Ediriweera
25.Madurasinghage Don Grace Ethala
26. Chakrawarthige Lal Fernando
27. Deepal Aravinda Suduwa Dewage
28. Kanvedige Velupille
29. W. Magrat
30.Ranathunga Arachchi Rohan Ajith Kumara
31. Ranathunga Arachchi Shantha Jagath
32.Dissanayakage Karunaratne
33. Suduwa Dewage Wijeratne
34. Kandai Shantha Kumaran
35. Peter Neville Patrick
36. Maheepala Mudalige Somaweera Chandradasa
37. Udunuwara Kankanamage Upali Ranjith

38. Polwatte Wickramasinghalage Siriwardena

39. Sethunga Mudalige Berti Joseph Perera
40. Ramasamy Kumaraswamy Selvadorai
41. Amarasingha Arachchige Keerthirathne
42. Nishanka Arachchige Janaka Chaminda Lal
43. Mattusamy Kanagaratnum
44. Kurana Arachchi Stanly Rodrigo
45. Kuruppu Arachchige Mary Agnes Rodrigo
46. Allimuttu Jeganathan
47. Warnakulasuriya Jude Nilantha Fernando

All of Musafar Estate alias Ebert Silva Estate, Chilaw.

Defendants

AND

1. Singha Arachchige Ajith Thilaksiri
2. Weerasinghe Mudiyanselage Dayawathie
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9. Dapanage Chandana Pradeep

Appuhamy

10.Hewawasam Hakgalage Karalinahamy

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Defendants Appellants

AND

Daya Jayaratne,(nee Agampodi Silva), No. 24, Vanderwert Place, Dehiwala.

Plaintiff Respondent Petitioner

Vs

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All of Musafar Estate alias
Ebert Silva Estate,
Chilaw.

Defendants Appellants Respondents

BEFORE: PRIYASATH DEP PCJ.
S. EVA WANASUNDERA PCJ.
B.P.ALUVIHARE PCJ.

COUNSEL: Kapila Liyanagama for Plaintiff Respondent Petitioner
M.U.M. Ali Sabry, PC. with Nuwan Bopage for 3rd to 21st Defendants Appellants Respondents

ARGUED ON : 30. 05. 2016.

DECIDED ON: 08. 08. 2016.

S. EVA WANASUNDERA PCJ.

On the 10th of July, 2013, this Court had granted Leave to Appeal in this matter on one question of law, which was raised by the Counsel for the Plaintiff Respondent Appellant. It reads as follows:-

1. Did the Civil Appellate High Court err in dismissing the original action merely on the ground of misjoining of the parties and causes of action, having decided all other matters in favour of the Plaintiff Respondent Appellant?

Thereafter Court allowed another question of law which was formulated as follows by the Counsel for the Defendant Appellant Respondent:-

2. In a situation where a Court is inclined to the view that there has been a misjoining of parties and / or causes of action, could it have made any order other than dismissal, for the purpose of properly adjudicating the matter in issue in the case between the relevant parties?

The facts of this Appeal can be summarized in this way. The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted this action in the year 1999, in the District Court of Chilaw seeking inter alia a declaration of title and ejectment of the 47 defendants who were occupying the land. The land in question is of an extent of 6 Acres 2 Roods and 3 Perches which is Lot 5 of Plan No. 454 dated 6.9.1981 with a servitude over Lot 3 of the said Plan No. 454,

according to the Plaint dated 1st October, 1999. All the 47 Defendants were occupying different portions of this large land. The 3rd to 21st Defendant Appellant Respondents (hereinafter referred to as the Defendants) filed a joint answer seeking the dismissal of the Plaint. Some other defendants also had filed answers as well. The District Judge granted the reliefs prayed for in the Plaint and further **placed a condition** to the effect that the Defendants are entitled to purchase their respective areas of land on which they were living at the rate of Rs. 6500/- per perch of the land within three months from the date of the judgment. The failure to buy the land by the occupants would entitle the Plaintiff to eject them in compliance with the judgment.

Both the Plaintiff and the Defendants appealed to the Civil Appellate High Court of the North Western Province holden in Kurunegala on different grounds.The two Appeals were amalgamated and heard as one case before the High Court. The Plaintiff pleaded that **the condition** placed in the judgment of the District Judge giving an entitlement to purchase parts of the land was **not prayed for in the Plaint and such relief was not claimed for in the plaint.** The Defendants pleaded that the Plaintiff had **misjoined the parties and misjoined the causes of action** which was decided by the District Judge in **the negative**.

The High Court held **that the District Judge had erred in granting to the Defendants what was not prayed for by the Plaintiff.** Further, the High Court considered the main ground pleaded by the Defendants against the Judgment appealed as **'misjoinder of parties and causes of action'**. The Plaintiff had pleaded in the answer that the 47 Defendants **acted in concert in entering upon the land in question.** The District Judge had held there was **no misjoinder of parties or causes of action** considering as the reason, **the basis** that all the defendants had claimed one million rupees each as damages in their seperate answers as well as in their joint answers. Many occupiers of the land had given evidence stating the year and the month they first came into the land which varied from one person to another and claimed prescriptive title to the different areas of the land commencing from various different years. The Civil Appellate High Court held that even though it was pleaded by the Plaintiff that the Defendants had acted in concert in entering upon the land in question, **she had not proved the same**. Further more, the High Court held that the District Judge was wrong in having held that there was no misjoinder of parties and causes of action having acted on a wrong basis about all of them claiming the same

amount as damages. Therefore the High Court held again that the **District Court had erred**. On both grounds as aforementioned the **High Court set aside the judgment of the District Judge and dismissed the action filed by the Plaintiff on the ground that there is a misjoinder of parties and causes of action**.

The High Court allowed both Appeals on different grounds **and confirmed that the District Judge was wrong and set aside the judgment of the District Court** as well as dismissed the Plaint. The Plaintiff is before this Court on the ground of dismissal of the Plaint.

I observe that the two questions of law revolves around "misjoinder of parties and causes of action". The Plaintiff Respondent Appellant argues that on the simple ground of misjoinder of parties and causes of action, no action instituted in the District Court can be dismissed. The Defendant Appellant Respondent argues that when the parties and causes are misjoined , no court can adjudicate on the matters in issue before court properly and in such an instance, there is no other order that can be granted but dismissal of the action.

I observe that Sections 14, 17, 18,22 and 36 of the Civil Procedure Code deal with joining of parties and causes of action with regard to cases filed in the District Court. I would like to reproduce them for clarification:

Sec. 14:
All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Sec. 17:
No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

If the consent of anyone who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint.

Sec.18:

(1)The Court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.

(2) Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named with the designation " added party " in all pleadings or processes or papers entitled in the action and made after the date of the order.

Sec. 36:

(1) Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action.

But if it appears to the court that any such causes of action cannot be conveniently tried or disposed of together, the court may, at any time before the hearing, of its own motion or on the application of any defendant, in both cases either in the presence of, or upon notice to, the plaintiff, or at any subsequent stage of the action if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

(2) When causes of action are united, the jurisdiction of the court as regards the action shall depend on the amount or value of the aggregate subject matters at

the date of instituting the action, whether or not an order has been made under the second paragraph of subsection (1).

I find that the Plaintiff in this action claim a declaration of title to, and the ejectment of the Defendants. She alleges in paragraph 11 of the Plaint that all the 47 Defendants have built temporary buildings and are living on the land as tresspassers. **In paragraph 12, the Plaintiff alleges that they are acting in concert** contesting her title while they are possessing the land.

When an action is filed before the trial court , the Judge who sits in judgment has to get the issues raised and hear the evidence before deciding on each issue. For any matter to be decided the Judge has to make up his mind as to what the problem is, and which parties are affected by what reason. In other words the Judge has to identify the proper parties clearly and also identify the proper causes of action which he has to decide upon. I opine that no judge can just hear the case for the sake of hearing what is before him because it is the judge who is responsible for his judgment. When the problem is with regard to land, the extent of the land on which the alleged trespassers are occupying and why they are occupying in the manner which they are doing so has to be determined. In the case in hand, according to the evidence of the occupiers, it is clear that they had come into the land with different opinions, such as it is some abandoned state land and believing that they will some day get concessions from the state. Most of them did not know each other at all and whereabout each other were living on the land and which year or when they had entered the land. They were not friends. They had not done **anything together** with regard to building on the land, fencing the plots they are occupying or cultivating on the land etc. Each person had come and landed there **on their own**. Nobody had been acting in concert. The Plaintiff had totally disregarded what she herself had pleaded in her plaint in paragraph 12, that the occupiers had acted in concert in entering upon her land which is the subject matter of this case.

In fact this big land had been rather abandoned for quite some time without any owner coming into the site or looking after the interests. The Plaint explains in the

first 10 paragraphs, how the larger land of 50 Acres 2 Roods and 30 Perches which is morefully described in the first Schedule to the Plaint was the subject matter of a Testamentary case No. 16127/T before the year 1960. It is only in 1981 that the Plan No. 454 was drawn and an amicable Partition deed was written amongst all the parties who inherited from Agampodi Nomis de Silva at the end of the said testamentary case. It is only on 21.12.1994 that the Plaintiff got her rights by deed No. 67 attested by C.S.M.L. Perera, Notary Public, from one of the parties to the Partition Deed by way of a deed of gift . However, even though the District Judge had decided that the Defendants had prescribed to the land on their assertion while giving evidence, the High Court had over ruled the decision of the District Judge and opined that the Defendants have failed to establish their claim based on title by prescription.

It is an argument of the Plaintiff that while holding with the Plaintiff when the High Court Judges ruled out prescriptive title of the Defendants then there is no reason for the High Court Judges to dismiss the Plaint. It is observed by me that the High Court Judges has taken up every point and reached their decision.

The High Court held that the Defendants have failed to establish prescriptive title to the land. I find that the evidence does not point to that end because some of the Defendants had given evidence to the effect that they commenced their occupation in 1985 and 1987. On a balance of probability, when considering the evidence of the Plaintiff, the correct position is that some of them have prescribed and some of them have not. If there were separate actions against those who had built permanent buildings etc. it would have been not so difficult whether they had prescribed to the land or not. If court was enlightened on the extent of the portions of land the occupiers were holding onto, it would have been different. I opine that the High Court was wrong to have held that the occupiers had failed to establish prescriptive title.

The High Court had next analysed the other point and reached the decision that the Plaintiff had misjoined the parties and causes of action and dismissed the action for different reasons. The Plaintiff had given evidence to the effect that she did not know whether some of the parties to the action were on the land in 1985, 1987 etc. and also that she did not know how many more parties are on the land other than the 47 Defendants who are parties to this action.She did not know how many of the buildings were temporary and how many buildings were

permanent. The 13th Defendant, the 41st Defendant and the 33rd Defendant had given evidence to the effect that they came into the land in 1986, 1985 and 1987. I observe that some of the Defendants had proven prescriptive title over ten years but some have not but it is to my surprise that the Plaintiff's evidence was not good enough to prove her possession of the land at any time before 1994. She **specifically had given evidence that she came to find out about the land only after she got title in 1994**. I therefore conclude that the Plaintiff has different reasons to plead for ejectment of some of the Defendants who had been there for a short period and others who had been there for longer periods as against her paper title which she got in 1994. It would have been different if she proved her predecessor's possession to different parts of the land which were occupied by different Defendants.

The Counsel for the Plaintiff has quoted the following cases in favour of the stance taken by the Plaintiff that " no action should be dismissed for the reason that there is a misjoinder of parties or causes of action ".

1. Dingiri Appuhamy Vs Talakolawewe Pangananda Thero , 67 NLR 89.
2. Ameer Vs Kulatunga 1996, 2 SLR 398.
3. Adlin Fernando and Another Vs Lionel Fernando and Others 1995, 2 SLR 25.
4. Uragoda Vs Jayasinghe and Others 2004, 1 SLR 398.
5. J. M. Wimalasoma Vs E.D.Alapatha 45 CLW 67.

The Counsel for the Defendants has quoted the following cases in favour of the stance taken by the Defendants that " the failure of the Plaintiff to establish that the Defendants were acting in concert was fundamental to be proven, if the Defendants were to be joined in one action for one cause of action "

1. Lowe Vs Fernando 16 NLR 398.
2. J.M.Wimalasoma Vs E.D.Alapatha 45 CLW 67.
3. Uragoda Vs Jayasinghe and Others 2004 1 SLR 108.
4. Adlin Fernando and Another Vs Lionel Fernando and Others 1995, 2 SLR 25.

In the case of **Ameer Vs Kulatunga (supra),** it was a case of one Plaintiff who sued his tenant who occupied four premises at one and the same time. By mistake due to a typographical error, the Sinhala Plaint did not contain premises No. 71. It was

decided that there was no misjoinder of 'causes of action' and under Sec. 36 of the Civil Procedure Code, in one action, several different causes of action could be united against one Defendant by the Plaintiff. It is in this context that Court had held that court cannot dismiss an action merely on the ground of misjoinder of causes of action.

Justice G.P.S. de Silva referred to **Dingiri Appuhamy Vs Pagnananda Thero** (supra) in the aforementioned case. In this case, the Plaintiffs who were dayakayas of a Vihare, sued for a declaration that the 1st Defendant, who was a bhikku resident in the temple, was guilty of 'parajika' and had therefore , forfeited his right to be a bhikku. They also prayed for an order directing the 2nd Defendant, who had jurisdiction over the temple in his capacity as Mahanayaka Thero, to take the necessary measures if the 1st Defendant was declared to have forfeited his right to be a member of the Sangha. Justice Abeysundere in this judgment stated that, "I set aside the judgment and decree of the learned District Judge, **and I dismiss the action in so far as it is against the 2nd Defendant on the ground that there is a misjoinder of causes of action.** I direct the District Court of Kurunegala to give the Plaintiffs an opportunity to amend their plaint so that the action may be against the 1st Defendant only. " I observe that the Supreme Court in that case firstly decided that there was misjoinder and dismissing the same granted the Plaintiff to amend the Plaint.

In the case of ***Adlin Fernando and Another Vs Lionel Fernando and Others 1995, 2 SLR 25,*** the Plaintiff Petitioners instituted action against the Respondents jointly and severally for a declaration that several deeds of gift are null and void or, in the alternative, sought revocation of same and damages. The Petitioners, the donors alleged that the 1st Respondent acting jointly with the 2nd and 3rd Respondents obtained their signatures by deceit. **The Defendants raised the objection of misjoinder of parties and causes of action, which was upheld by Court.**

It is important to note that in this case, it was also held that "The provisions of the Civil Procedure Code relating to the **joinder of causes of action and parties are rules of procedure and not substantive law. Courts should adopt a common sense approach in deciding questions of misjoinder or non joinder."**

I quite agree with the said suggestion in Adlin Fernando case that courts should adopt a **common sense approach** in deciding questions of misjoinder.

In the case **of *Uragoda Vs Jayasinghe* (supra**), one Plaintiff who was supposed to have had tubercolosis according to the Doctor named Uragoda who acted in accordance with the report given by the Glass House and its workers filed action against Dr. Uragoda and the Glass House workers for negligence and damages. The Defendants pleaded misjoinder of Defendants and misjoinder of causes of action. In the context of this background, it was held that there was no misjoinder. It is important to note what Justice De Silva said about misjoinder of parties and causes of action. He said " It is abundantly clear from the above (meaning the wording in Sec. 14 of the CPC) that where a Plaintiff insists on proceeding with a trial on causes of action or defendants wrongly joined, Court has the discretion to give judgment in favour of one or more of the plaintiffs as may be entitled to the relief claimed on the evidence led at the trial under the provisions of Sec. 11 of the Code or give judgment against one or more defendants, as may be found to be liable according to their respective liabilities under Sec. 14. In other words it is the duty of court to deal with the matter in controversy so far **as regards the rights and interest of the parties actually before it ".**

In the case of ***J.M.Wimalasoma Vs E.D.Alapatha 45 CLW67***, the Plaintiff in one action sued two sets of defendants for a declaration of title to five lots of land possessed by the defendants separately. In his plaint he alleged that the defendants were acting in concert to deprive him of the entire land comprised of five lots, but was unable to substantiate it in his evidence. The issue of misjoinder of defendants and causes of action was raised at the commencement of the trial, but the learned District Judge at the conclusion of the trial on all the issues ruled against the defendants on the issue of misjoinder and also failed to discuss this point. The defendants appealed at at the conclusion of the argument in appeal, Counsel for the Plaintiff Respondent requested that the Plaintiff be allowed to amend his pleadings and restrict his claim against one set of defendants. Court held:

(1) That **the failure** of the Plaintiff to establish that **the defendants were acting in concert , was fundamental** to the recognition of his right to proceed

against all the defendants in the same proceedings, and as such, **there was a misjoinder of defendants and causes of action.**

(2) That the **discretion of the Court must be judicially exercised , after consideration of all relevant circumstances**, such as the conduct of the parties, and the belatedness of the application, and therefore, the application of the plaintiff to amend his pleadings should not be allowed.

Gratien J. in this judgment referred to the case of ***Lowe Vs Fernando1915, 16 NLR 389.*** In this case, it was held per Wood Renton J and Pereira J that where a plaintiff claimed the entirety of a block of land on one title and complained that the defendants were severally in possession of separate and defined portions of it, it would be misjoinder of defendants and causes of action to institute one action against all the defendants for the recovery of the whole block, **unless it could be shown that the defendants were acting in concert in depriving the plaintiff of the possession of the entire block.**

I observe that in the case in hand, the Plaintiff has pleaded in the Plaint that " the Defendants have **acted in concert** in occupying the land ". That is the reason for the Plaintiff to have filed one action against all the 47 Defendants together but the Plaintiff has **totally failed to establish that position** through oral evidence or otherwise. In that event, how could the Court 'deal with the matter in controversy so far as regards the rights and interest of the parties actually before it?'. It is my opinion that the trial judge should be placed in a position where he could give judgment in favour of the Plaintiff or in favour of any Defendant as may be found to be liable according to their respective liabilities. When each Defendant is an individual trying to place before court his position as against the Plaintiff in this case in hand and when the Plaintiff has failed to prove that all these 47 Defendants have acted in concert in having occupied the land, how can the trial judge deal with the matters in controversy amongst all the parties together? How can the Judge disect the case on his own when the Plaintiff has failed to prove that the Defendants have acted in concert? If the Plaintiff proved that all the Defendants got together and entered the land **acting in concert as pleaded by the Plaintiff ,** then the judge can decide **on the rights of the group of Defendants as against the Plaintiff**. Otherwise it is a task next to impossible to be handled by the judge even though there is provision in the Civil Procedure Code for a judge to order separate trials of any different causes of action on his own or at the instance of parties , if the parties agree to do so. In this case there had

been no application for such orders by any party at any stage of the hearing and the judge had not acted on his own. It is common sense to understand that the District Judge could not have suggested his method of amending the plaint and proceeding with several actions or dropping some defendants and proceeding against the others or any such solutions since the number of defendants are big in number and the specifics relating to the occupation of each defendant were not placed before court for the court to act judicially concerning the rights of parties connected to this matter.

In the circumstances, I hold that the High Court had decided correctly when it held that the Plaint should be dismissed on the ground of misjoinder of parties and causes of action because the Court could not have made any other order as the matters in issue between the relevant parties could not be legally adjudicated in any proper manner due to that reason. I answer the questions of law in favour of the Defendants Appellants Respondents and against the Plaintiff Respondent Appellant.

This Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Justice Priyasath Dep
I agree

Judge of the Supreme Court

Justice B.P.Aluvihare
I agree

Judge of the Supreme Court