IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C.Appeal No.62/2011
S.C.[H.C] CALA No.225/2010
HCCA Western Province
[Avissawella] Case No.52/2008[F]
D.C.Homagama Case No.2741/L

Elvitigalage Don Lalith Chandrasiri
No.193/136, Maththegoda
Polgasowita

Plaintiff

Vs

1. Kodithuwakku Kankanamge Dayani Vinitha
No.116,Mabulgoda
Pannipitiya

Original Defendant

2. Kodithuwakku Kankanamge Sarath (Deceased)
No.116, Mabulgoda
Pannipitiya

Added Second Defendant

2A.Kodithuwakku Kankanamge Lalitha Dayangani
No.103, Maththegoda Road
Polgasovita

2A Defendant

AND BETWEEN

Kodithuwakku Kankanamge Lalitha Dayangani
No.103, Maththegoda Road
Polgasovita

2A Defendant-Appellant

Elvitigalage Don Lalith Chandrasiri
No.193/136, Maththegoda
Polgasowita

Plaintiff-Respondent

AND NOW BETWEEN

Elvitigalage Don Lalith Chandrasiri
No.193/136, Maththegoda
Polgasowita
Plaintiff-Respondent-Appellant

Kodithuwakku Kankanamge Lalitha Dayangani
No.103, Maththegoda Road
Polgasovita

At present –
No.116, Mabulgoda,
Pannipitiya
2A Defendant-Appellant-Respondent

BEFORE : **B.P.ALUWIHARE, PC, J.**
ANIL GOONARATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : Aravinda Athurupana with Ananda Senanayake
for the Plaintiff-Respondent-Appellant
Ranjan Suwandaratne with Anil Rajakaruna
for the 2A Defendant-Appellant-Respondent

ARGUED ON : **15.07.2016**

WRITTEN SUBMISSIONS ON : 02.11.2011 by the Substituted 2A Defendant-Appellant-Respondent
04.07.2011 by the Plaintiff-Respondent-Appellant

DECIDED ON : **08.09.2016**

CHITRASIRI, J.

Being aggrieved by the judgment dated 07.06.2010 of the learned Judges in the Civil Appellate High Court in Avissawella, the plaintiff-respondent-appellant (hereinafter referred to as the plaintiff) filed this appeal seeking *inter alia* to set aside the aforesaid judgment of the Civil Appellate High Court. Simultaneously, the plaintiff has sought to have the judgment dated 09.07.2002 of the District Court of Homagama, affirmed. This Court upon considering the material placed before it granted leave to appeal on the questions of law set out in sub-paragraphs (i) (iii) (iv) (vi) and (vii) in paragraph 16 of the petition of appeal dated 19.07.2010. Those questions of law are as follows:

(i) that the High Court failed to appreciate the effect and impact of the provisions of Section 68 of the Evidence Ordinance, and the fact that documents marked by the defendant had been led in subject to proof but had not been proved, and the fact that 2එ1 was only a photocopy, and that the plaintiff had in fact challenged it.

(iii) that the said High Court erred in law by failing to appreciate the admission made by 2A Defendant only witness, on the purported basis that such admission was not an "unqualified admission".

(iv) that the said High Court erred in law by failing to appreciate that the plaintiff had established his title not only by affirmative evidence of himself but also by what was elicited through the cross-examination of his opponent's only witness.

(vi) that the said High Court erred in law by failing to appreciate the uncontraverted evidence of the Plaintiff as to the subdivision of the Original larger land; and thereby coming to an erroneous finding that land in suit was only a portion of a larger land.

(vii) that the said High Court erred in law by failing to appreciate that, even if the land in suit had been a portion of a larger land and thereby making the Plaintiff a co-owner, a co-owner is entitled to seek the ejectment of a trespasser.

The aforesaid first 4 questions of law basically revolve around the law relating to the burden of proof, particularly when it comes to *rei vindicatio* actions. Learned District Judge, having accepted the evidence of the plaintiff was of the view that the plaintiff has successfully discharged the said burden cast upon him in order to prove his title to the land put in suit and decided the case in favour of the plaintiff. Learned High Court Judges were on a contrary opinion and held that the plaintiff has failed to discharge his burden. Accordingly, they reversed the decision of the learned District Judge and allowed the appeal of the 2A defendant.

In this case, the plaintiff has sought *inter alia* to have a judgment declaring that he is the owner of the land morefully described in the schedule to the amended plaint. He also has sought to have the 2A defendant evicted therefrom. He also has claimed damages from the defendant until he gain possession of the land in suit.

In the original plaint of the plaintiff, only the 1st defendant Kodithuwakku Kankanamge Dayani Vinitha was made a party to the action. Thereafter, her brother was added as the 2nd defendant to the case by the plaintiff. Upon the death of the said added 2nd defendant, 2A defendant was substituted in his place. In the amended plaint dated 28.07.1998, plaintiff averred that Elvitigalage Don Simon Singho was the original owner to the land in question. Having stated so, the plaintiff has described the manner in which he became entitled to the land. Accordingly, the plaintiff gave evidence at the trial supporting the said devolution of title that he has averred in his amended plaint.

2A defendant-appellant-respondent [hereinafter referred to as the 2A defendant] in her answer dated 15.02.2000 has taken up the position that the original owner to the land was not the aforesaid Elvitigalage Don Simon Singho but he was one Omattage Themis Perera. In that answer, she also has stated that the said Omattage Themis Perera by deed bearing No.1474 dated 23.06.1963 has sold 1/2 share of the land to the said Elvitigalage Don Simon Singho. Accordingly, the position taken up by the 2A defendant was that the original owner disclosed by the plaintiff had title, only to 1/2 share of the land and not to the entirety of it. Therefore, the crux of the issue in this case is to determine whether or not the plaintiff was successful in establishing the fact that Elvitigalage Don Simon Singho was the original owner to the entire land referred to in the schedule to the amended plaint.

It is trite law that the burden, in an action for a declaration of title, lies on the plaintiff to prove that he/she has dominium over the land put in suit. At the same time, it is to be noted that it is not the duty of the defendant to show that the plaintiff has no title to the land that he claims. It is also an accepted principle that it is necessary to have strict proof in such an action to establish title. Following are some of the decisions by which the aforesaid position of the law had been accepted and established.

- **Peeris Vs. Savunhamy (1951) 54 NLR 207**
- **Muththusamy Vs. Seneviratne (1946) 31 CLW 91**
- **Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167**
- **Sarachchandra Vs. Dingiri Menika (2004) BLR 77**
- **Jayatissa Vs. Gunadasa (2008) BLR 295**

In this case, learned District Judge having accepted the pedigree of the plaintiff has concluded that it is the burden of the 2A defendant to prove the aforesaid deed 1474 marked 2V1, if she needs to disprove the original ownership of Simon Singho who was the original owner according to the plaintiff. At the time the aforesaid deed 1474 was marked in evidence, the plaintiff has moved that it be produced subject to proof which the 2A defendant has failed to comply with. Accordingly, learned Counsel for the plaintiff contended that the defendant has failed to prove the said deed 1474 as required by Section 68 of the Evidence Ordinance and therefore the original ownership of Jemis Perera as alleged by the 2A defendant should stand as not proved. It was the view of the learned District Judge as well.

Manner in which a document that requires an attestation, be used in evidence is referred to in Section 68 of the Evidence Ordinance. It stipulates thus:

> *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."*

The aforesaid section 68 of the Evidence Ordinance show the way in which a document that required by law to be attested could be admitted in evidence. The manner in which such a document is to be used in evidence under Section 68 of the Partition Law is quite different to the way it is referred to in the aforesaid Section 68 of the Evidence Ordinance though both the Sections speak of the way a document attested by a notary is to be used in evidence. I do not wish to examine the said difference between the two Sections in this judgment since it is the Section 68 in the Evidence Ordinance that is applicable in this instance. Admittedly, the 2A defendant has failed to prove the deed 1474 [2V1], as required by Section 68 of the Evidence Ordinance.

However, the issue here is to determine whether the inadmissibility of the aforesaid deed 1474 marked 2V1 in evidence, would entitle the plaintiff to say that he has proved the fact that Simon Singho was the original owner to the entire land referred to in the schedule to the amended plaint. The first deed produced on behalf of the plaintiff is the deed bearing No.74 marked P2 by which Simon Singho has gifted his title to Elvitigalage Don Jemis Singho who was the predecessor-in-title of the plaintiff. Then the question arises as

to why the plaintiff concealed the deed 1474 [2V1] despite the fact that it is the deed by which the original owner Simon Singho became entitled to the land in question. Indeed the said deed 1474 had being referred to in the very first paragraph of the plaintiff's deed P2 by which he has sought to establish the original ownership of Simon Singho. Plaintiff's failure to produce the deed 1474 itself shows that he has not proved that he had dominium over the property that he has claimed.

At this stage, it is necessary to note that in a vindicatory suit, the law requires to have strict proof as to the title claimed by a plaintiff. This requirement of strict proof had been discussed in the cases of **Wanigaratne Vs. Juwanis Appuhamy, [65 NLR 167] Samarapala Vs. Jagoda [1986 (1) SLR] and Jayatissa Vs. Gunadasa. [2008 BLR at page 295]** Therefore, merely because the 2A defendant has failed to prove the deed 1474 in terms of Section 68 of the Evidence Ordinance, it will not become a reason for the plaintiff to escape from his burden to prove title to the land in question. Accordingly, the matters mentioned above show that the plaintiff has failed to prove his case in accordance with the law pronounced in those cases referred to above.

I also have carefully looked at the judgment of the Civil Appellate High Court and found that the learned Judges in that Court has correctly applied the relevant law to the facts in this case. In that judgment learned Civil Appellate High Court Judges have held thus:

"Besides, it appears that the land in suit has been merely described as a defined portion depicted as Lot 3C in the plan prepared in 1993 (P1). But it is not described in the pleadings as to how such distinct portion came into existence though the title deeds marked as P2 and P3 in evidence show that the land in suit is a subdivided land depicted in a plan prepared in the year of 1989. The learned counsel for the 2A Defendant has contended that it is not worthy to act upon the said plan marked P1 as it was prepared just one year previous to the bringing of the instant action. At the same time the learned counsel for the Plaintiff has argued that such matter cannot be raised first time in appeal since it is an issue based on a question of fact. We are of the opinion that albeit such issue had not been raised in a specific form at the trial, such aspect falls within the purview of the Plaintiff's initial burden of proving the title to the land in suit together with its identification. Therefore we are inclined to the opinion that the Plaintiff whilst establishing the title to the land in suit which is apparently a subdivided portion of a larger land it should be pleaded and proved that the predecessor-in-title of the Plaintiff had entitled to the entirety of such larger land without merely describing the subject matter as a divided and separate portion. In other words in deciding whether the predecessor-in-title of the Plaintiff namely the aforesaid Jamis had become entitled to convey such defined portion, it should have been proved that the said Jamis was none other than the sole owner of such larger land. It seems that in such process the Plaintiff has relied on a title deed marked P2 to establish that the said donor Simon has gifted entirety of the land called Lot 3 depicted in the plan No.1137 dated 24.12.1989 (not produced in evidence) to the aforesaid Jamis immediate predecessor-in-title of the Plaintiff. However, the deed by which the said Simon said to have got title to such land has not been submitted by the Plaintiff within the course of the trial. Particularly in the presence of the assertion of the 2A Defendant that the aforesaid Jamis by that deed had conveyed only an undivided half share of the original

land, we are of the view that it is the burden of the Plaintiff to prove at least the said Simon and his donee Jamis had exclusively possessed such distinct land in a manner sufficient enough to presume that they had acquired prescriptive title to the same together with their paper title."

The above reasoning of the learned High Court Judges shows that they have carefully addressed their minds to the issue and have applied the law correctly.

The remaining issue is on the question of law raised in paragraph 16(vii) of the petition of appeal. In law, it is correct to state that a co-owner is entitled to have a trespasser evicted from the land though that co-owner is entitled only to a fraction of it. This position in law had been clearly set down in the case of **Hevawitarane et.al Vs. Dungan Rubber Company Ltd. [17 NLR 49]** The plaintiff in his evidence has stated that his predecessor in title had permitted one Jemis to take charge of the possession of this land and thereafter the said Jemis had handed over possession to the 1st defendant. (Vide proceedings at page 96 in the appeal brief). The 1st defendant who gave evidence on behalf of the 2A defendant also has said that it was through Jamis that the defendants came into possession of the land. No evidence is forthcoming to establish that the aforesaid permission given to Jamis was terminated at any stage.

Accordingly, the defendants have denied that they are trespassers to the land. 1st defendant in her evidence has said that the defendants were in possession of this land since 1984 having built a boutique with the permission obtained from the Pradeshiya Sabha. Documents to support such a

proposition also have been marked in evidence. Under such circumstances, defendants cannot be treated as trespassers. Therefore, it is clear that the plaintiff has failed to establish that the 2A defendant is a trespasser to the land in suit. In the circumstances, it is my opinion that the plaintiff is not in a position to evict the defendant in accordance with the law referred to in **Hevawitarane et.al Vs. Dungan Rubber Company Ltd. [supra]** since it would apply only to the trespassers.

For the reasons set out above, I answer all the questions of law in favour of the 2A defendant. Accordingly, this appeal is dismissed with costs. Judgment of the Civil Appellate High Court in Awissawella to stand as it is.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC, J.

I agree

JUDGE OF THE SUPREME COURT

ANIL GOONARATNE, J.

I agree

JUDGE OF THE SUPREME COURT