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

SC. APPEAL No. 87/16

In the matter of an application for Leave to Appeal against the judgment dated 28th October 2014 of the Civil Appellate High Court of the Western Province holden in Mt. Lavinia in Case No. WP/HCCA/MT/113/2012 (f).

SC.HCCA.LA. No. 648/14
H/C Case No.
WP/HCCA/MT/113/2012(f)
DC Moratuwa Case No. 543/L

Dilrukshi Dissanayake
No. 20, Old Galwala (Quarry) Road,
Mount Lavinia.

Represented by her
Power of Attorney
Viraj Anthony Jayakody
No. 20, Old Quarry Road,
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Plaintiff-Appellant-Appellant

Vs.

1. Beminihennadige Meulet Malini Fernando
   No. 307/1, Egoda Uyana Road,
   Moratuwa.

2. Nishantha Aponso
   No. 307/1, Egoda Uyana Road,
   Moratuwa.

Defendants-Respondents-Respondents

Before : B P Aluwihare PC J
Sisira J De Abrew J &
Prasana Jayawardena PC J

Counsel : Geoffrey Alagaratnam with Lueie Ganeshathasan
for the Plaintiff-Appellant- Appellant
No appearance for the Defendant-Respondent-Respondents

Written submissions
Tendered on : 29.6.2016 by the Plaintiff-Appellant-Appellant

Argued on : 1.11.2016

Decided on : 17.1.2017

Sisira J De Abrew J.

Notices on the 1st and the 2nd Defendant-Respondent-Respondents (hereinafter referred to as the 1st and the 2nd Defendant-Respondents) have been sent on several occasions by the Registrar of the Supreme Court but they have failed to respond to the notices. Hence the argument commenced without their participation. Learned President's Counsel for the Plaintiff-Appellant-Appellant made submission in support of his case.

This is an appeal filed by the Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff-Appellant) against the judgment of the High Court of Civil Appeal hereinafter referred to as the High Court). This court by its order

dated 4.5.2106, granted leave to appeal on questions of law set out in paragraph 24(a) and 24(b) of the petition dated 8.12.2014 which are set out below.

1. Did the learned High Court judges err in law in holding that the Appellant is not entitled to relief (b) of the Amended Plaint to obtain vacant and peaceful possession of the subject land especially considering the pleadings, admissions of parties and the order of the learned District Judge?
2. Did the learned High Court judges misdirect themselves on the facts in holding that the Appellant failed to prove that the Respondents are in possession of the subject land especially considering the admissions by the Respondents?

The Plaintiff-Appellant instituted action bearing No. 543/L in the District Court of Moratuwa seeking, inter alia, a declaration of title to lot No.2 in Plan No.1204 dated 20.12.1971 prepared by LRL Perera Licensed Surveyor morefully described in the 2nd schedule to the Amended Plaint and for ejectment of the Defendant-Respondents and all those holding under them from the said property. After trial, the learned District Judge delivered the judgment on 30.9.2011 in favour of the Plaintiff-Appellant granting only the relief prayed for paragraph (a) of the prayer to the Amended Plaint (that the Plaintiff-Appellant is the owner of the property in suit) but did not make an order to eject the 1st and the 2nd Defendant-Respondents (prayer (b) of the Amended Plaint). Being aggrieved by the said judgment of the District Court, the Plaintiff-Appellant appealed to the High Court and the High Court by its judgment dated 28.10.2014, affirmed the judgment of the District Court. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellant has appealed to this court. Both courts below observed that the Plaintiff-Appellant had failed to prove that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. I now advert to this question.

The 1st Defendant-Respondent, in her evidence at page 274 of the brief, says that at present her daughter is occupying the property in suit; and that she gave the property in suit on rent to the 2nd Defendant-Respondent. Further the 1st and the 2nd Defendant-Respondents, in their answer, admits that the 1st Defendant-Respondent had given the property in suit on rent to the 2nd Defendant-Respondent and that they are in occupation of the property in suit. The above facts clearly prove that the 1st and the 2nd Defendant-Respondents are in occupation of the property in suit.

The 1st and the 2nd Defendant-Respondents, in their answer, further take up the plea of prescription. The 1st and the 2nd Defendant-Respondents, in their answer sought a declaration of title to the property in suit. But the learned District Judge rightly rejected this claim and decided that they are not entitled to get a declaration of title to the property in suit. Then on what basis do the Defendant-Respondents claim that their occupation of the property in suit is lawful? There is no basis for this claim. The above facts demonstrate that the 1st and the 2nd Defendant-Respondents are in possession of the property in suit and that their possession is unlawful. Therefore it appears that there was clear evidence before the trial court to decide that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. Therefore both courts below were wrong when they decided that the Plaintiff-Appellant had failed to prove that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. The evidence led at the trial has clearly established that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. The learned District Judge, in her judgment declared that the Plaintiff-Appellant is the lawful owner of the property in suit. If the Plaintiff-Appellant was declared the owner of the property in suit by court and the Defendant-Respondents are in unlawful occupation of the property in suit, an order to eject the Defendant-Respondents and all those holding under them will have to be issued by court. In this connection I would like to

consider a passage of the judgment of Justice Gratiaen in Pathirana Vs Jayasundera 58 NLR 169 at page 172 wherein His Lordship observed thus:

> "In a *rei vindicatio* action proper the owner of the immovable property is entitled, on proof of 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."

Applying the principles lad down in the above legal literature, I hold that in an action for rei vindicatio, if the court declares that the plaintiff is the owner of the property and the defendant is in unlawful occupation of the property, it becomes the duty of court to issue an order for ejectment of the defendant from the property.

I have earlier held that the Defendant-respondents are in unlawful occupation of the property in suit. When I consider the above matters, I am of the opinion that the learned District Judge should have granted the relief sought in paragraph (b) of the prayer to the petition.

For the above reasons, I set aside the judgment of the learned District Judge and the judgment of the High Court with regard to the refusal to grant relief (b) prayed for in the Amended Plaint but I affirm the judgments of both courts relating to the granting of relief (a) prayed for in the Amended Plaint. I grant the relief (b) prayed for in the Amended Plaint. The learned District Judge is directed to enter judgment accordingly and amend the decree granting relief sought in paragraphs (a) and (b) of the prayer of the Amended Plaint.

Learned President's Counsel did not address with regard to the other prayers in the Amended Plaint. In view of the conclusion reached by me, I answer

the questions of law raised in the affirmative. The Plaintiff-Appellant is entitled to recover the costs in all three courts.

Judge of the Supreme Court.

BP Aluwihare PC J

I agree.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.