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

1. Morawakage Premawathie,
2. Ballantuda Achchige Padmini,
3. Ballantuda Achchige Rohini,
   All of
   350, Katuwana Road,
   Homagama.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/176/2014
SC LA NO: SC/HC/CALA/24/2013
HCCA AVISSAWELLA NO: WP/HCCA/AV/242/2008/F
DC HOMAGAMA NO: 2673/L

Vs.

1. Ballantuda Achchige Jayasena
   (Deceased)

1A. M. Hemawathie,

1B. Ballantuda Achchige Lal
   Chandrasiri,

1C. Ballantuda Achchige Don
   Wasantha,

1D. Ballantuda Achchige Don
   Malkanthi,
   All of
   308, Narangaha Hena,
   Katuwana, Homagama.

2. Ballantuda Achchige Don
Wasantha,
308, Narangaha Hena,
Katuwana, Homagama.
Defendants

AND BETWEEN

Ballantuda Achchige Don
Wasantha,
308, Narangaha Hena,
Katuwana, Homagama.
1C and 2nd Defendant-Appellant

Vs.

1. Morawakage Premawathie,
2. Ballantuda Achchige Padmini,
3. Ballantuda Achchige Rohini,
All of
350, Katuwana Road,
Homagama.
Plaintiff-Respondents

1. Ballantuda Achchige Jayasena
(Deceased)
1A. M. Hemawathie
(Deceased)
1B. Ballantuda Achchige Lal
Chandrasiri,
1D. Ballantuda Achchige Don
Malkanthi,
All of

308, Narangaha Hena,
Katuwana, Homagama.
Defendant-Respondents

AND NOW BETWEEN

Ballantuda Achchige Don
Wasantha,
308, Narangaha Hena,
Katuwana, Homagama.
1C and 2nd Defendant-Appellant-
Appellant

Vs.

1. Morawakage Premawathie,
2. Ballantuda Achchige Padmini,
3. Ballantuda Achchige Rohini,
   All of 350, Katuwana Road,
   Homagama.
   Plaintiff-Respondent-Respondents

1. Ballantuda Achchige Jayasena
   (Deceased)

1A. M. Hemawathie
   (Deceased)

1B. Ballantuda Achchige Lal
   Chandrasiri,

1D. Ballantuda Achchige Don
   Malkanthi,
   All of 308, Narangaha Hena,
   Katuwana, Homagama.
   Defendant-Respondent-
   Respondents

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Thishya Weragoda with Prathap Welikumbura for the 1C and 2nd Defendant-Appellant-Appellant.
Arjuna Kurukulasuriya for the Plaintiff-Respondent-Respondents.

Argued on : 12.02.2021

Further written submissions

by the Respondents on: 02.03.2021

by the Appellant on: 15.03.2021

Decided on: 17.05.2021

Mahinda Samayawardhena, J.

The Plaintiffs filed this action against the Defendant in the District Court of Homagama seeking a declaration of title to the land described in the schedule to the plaint, the ejectment of the Defendant therefrom, and damages. After the death of the original Defendant, namely Jayasena, his widow and children were substituted in his place. The Defendants filed answer claiming prescriptive title to the land. After trial, the District Court entered Judgment for the Plaintiffs and, on appeal, the High Court of Civil Appeal affirmed it. The Defendants have now come before this Court against the Judgment of the High Court of Civil Appeal.

This Court granted leave to appeal on the question whether the High Court of Civil Appeal erred in law in coming to the conclusion that the Plaintiffs proved title to the land despite Deed Nos. 36988 and 38247 as pleaded in the plaint not being tendered in evidence. The contention of learned counsel for the Defendants is that the Plaintiffs failed to prove the chain of title.

In paragraph 3 of the amended plaint, the Plaintiffs state that the original owner, namely William Singho, sold the land in suit, which is in extent of ½ an acre, to the deceased husband of the 1st Plaintiff who was also the father of the 2nd and 3rd Plaintiffs, namely Karunadasa, by Deed No. 7236. This Deed was marked P1 in evidence without any objection.

In paragraphs 4 and 5, the Plaintiffs further state that by Deed No. 36988, Karunadasa alienated the land to a person by the name of Weerasinghe on a conditional transfer, and Weerasinghe in turn retransferred the land to Karunadasa by Deed No. 38247 in fulfilment of the condition set out in the former Deed.

The Defendants, in paragraph 3 of the amended answer, accept that Karunadasa purchased the ½ acre mentioned above, but their position is that it is a portion of a larger land in extent of 4 acres, and the balance 3 ½ acres excluding the said ½ acre had been gifted to the original Defendant Jayasena by Deed No.1903. By the same paragraph, the Defendants further take up the position that they have possessed this ½ acre since 1950 with the leave and license of Karunadasa, together with the balance portion of the larger land as one entity, and acquired prescriptive title to it. Karunadasa and Jayasena are siblings.

Although the Defendants admit in their amended answer that Karunadasa purchased the disputed ½ acre, which is the subject matter of this action, in the District Court they never took up the position in their answer or by way of the issues or in evidence or written submissions that the Plaintiffs do not have paper title to the said ½ acre or that Karunadasa subsequently lost his paper title. Instead, the Defendants made a claim in reconvention to that ½ acre by way of prescriptive title.

It is well settled law that in a *rei vindicatio* action the burden is on the Plaintiff to prove title to the land in suit irrespective of weaknesses in the Defendant's case. H.N.G. Fernando J. (later C.J.) in *Pathirana v. Jayasundara (1955) 58 NLR 169 at 171* required "strict proof of the Plaintiff's title". But this shall not be understood that a Plaintiff in a *rei vindicatio* action shall prove his title beyond reasonable doubt such as in a criminal prosecution, or on a high degree of proof as in a partition action. The standard of proof of title is on a balance of probabilities as in any other civil suit. The stringent proof of chain of title, which is the norm in a partition action to prove the pedigree, is not required in a *rei vindicatio* action.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition, 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.*

Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", International Property Investment Journal, Vol 2, pp. 217-246 at p. 244:

> *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.*

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, stresses 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.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera [1986] 2 Sri LR 121* 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 *Banda v. Soyza [1998] 1 Sri LR 255* — a *rei vindicatio* action proper — the Supreme Court took the view that in order for the Plaintiff to succeed in a *rei vindicatio* action he shall prove "superior title" to that of the Defendant.

In *Banda*'s case the Plaintiff sought a declaration of title to the land in suit, the ejectment of the Defendants and damages. After trial, Judgment was entered in favour of the Plaintiff. 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 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 "sufficient evidence led on behalf of the Plaintiff to prove the title and the identity of the lots in dispute." The Supreme Court particularly relied upon a Lease Bond executed in 1906, which was not considered by the Court of Appeal, to decide that the Plaintiff was the owner of the land. G.P.S. de Silva C.J., at page 259, laid down the criterion 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.*

In *Preethi Anura v. William Silva (SC Appeal No. SC/LA/116/2014, Minutes of the Supreme Court on 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 to 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 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 executor conveyance by which the Plaintiff claimed title to the land. 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. 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? In *Miller v. Minister of Pensions [1947] 2 All ER 372*, Lord Denning declared:

> *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.*

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.

The Court shall not protect rank trespassers and promote unlawful occupation to the detriment of the legitimate rights of lawful landowners by setting an excessively higher standard of proof in a *rei vindicatio* action than what is expected in an ordinary civil suit.

Bearing in mind the burden of proof cast upon the Plaintiff in a *rei vindicatio* action, if the Plaintiff in such a case has "sufficient title" or "superior 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.

For completeness, let me add the following.

There is a difference between a *rei vindicatio* action proper and a declaration of title action in terms of the burden of proof of title, notwithstanding that a declaration of title and ejectment of the Defendant is the common relief sought in both actions.

In *Pathirana v. Jayasundara (supra)* at page 173 Gratiaen J. explained this in the following manner:

> *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.*

In simple terms, in an action filed by the Plaintiff seeking a declaration of title to and the ejectment of the Defendant from the land in suit, if the Plaintiff can prove that the Defendant came into possession as a licensee or lessee under him which

was later terminated, the Defendant cannot defeat the action of the Plaintiff on the ground that the Plaintiff is not the owner of the land. In such a situation, the Plaintiff can automatically obtain a declaration of title through the operation of the rule of estoppel contained in section 116 of the Evidence Ordinance:

> *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 of licensee of 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.*

In fact, a licensor, lessor or landlord need not necessarily be the owner of the property to grant leave and licence, lease or rent out the property. A person may let immovable property to another without having any right or title to it or without any authority from the true owner. Such a lease is valid between the landlord and the tenant, but the true owner is not bound by it. (Professor George Wille, *Landlord and Tenant in South Africa*, 4th Edition, page 20; Dr. H.W. Tambiah, *Landlord and Tenant in Ceylon*, page 48; *Imbuldeniya v. De Silva [1987] 1 Sri LR 367 at 372, 380*)

In the unique facts and circumstances of the instant case, failure to tender Deed Nos. 36988 and 38247 is not fatal and the Plaintiffs' action need not be dismissed on this ground. When the totality of the evidence led in this case is considered, I am satisfied that the Plaintiffs have proved title to the property on

the balance of probabilities and the Defendants' counter claim to the same on prescriptive title is bound to fail.

I answer the issue on which leave was granted in the negative.

The appeal is accordingly dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court