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

Weerappulige Piyaseeli Fernando,
No. 37, Yagamwela, Dummalasooriya.
Plaintiff

SC APPEAL NO: SC/APPEAL/57/2016
SC LA NO: SC/HCCA/LA/461/2013
HCCA KURUNEGALA NO: NWP/HCCA/KUR/84/2007 (F)
DC KULIYAPITIYA NO: 11189/L

Vs.

1. Rathugamage Mary Agnes Fernando,
   'Reinland Estate', Yagamwela,
   Dummalasuriya (Deceased).

1A. Mihidukulasuriya Sudath Harison Pinto (also named as 1B1),

1B. Mihidukulasuriya Victor Pinto (Deceased),

1C. Mihidukulasuriya Sarath Asinas Pinto (also named as 1B2),
All of 'Reinland Estate', Yagamwela, Dummalasuriya.

2. Chithranganee Ratnamali Merlin De Soyza,
   No. 9, Fonseka Place, Colombo 05.
3. Anusha Chithra Mawli Geetal De Soyza,
   No. 4A, Keenakele Watta, Marawila.

4. Francis Dilini Anusha De Silva,
   No. 50, Ele Bank Road, Colombo 05.
5. Ranil De Soyza,
   No. 50, Ele Bank Road, Colombo 05.
6. Malani De Soyza, No. 50, Ele Bank Road, Colombo 05.
7. Siri Nanayakkara,
   No. 798, Galle Road, Molligoda, Wadduwa.

   Defendants

AND BETWEEN

Weerappulige Piyaseeli Fernando,
No. 37, Yagamwela, Dummalasooriya.
Plaintiff-Appellant

Vs.

1. Rathugamage Mary Agnes Fernando,
   'Reinland Estate', Yagamwela, Dummalasuriya (Deceased).

1A. Mihidukulasuriya Sudath Harison Pinto (also named as 1B1),

1B. Mihidukulasuriya Victor Pinto (Deceased),

1C. Mihidukulasuriya Sarath Asinas Pinto (also named as 1B2),
All of 'Reinland Estate', Yagamwela, Dummalasuriya.

2. Chithranganee Ratnamali Merlin De Soyza,
   No. 9, Fonseka Place, Colombo 05.
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   No. 50, Ele Bank Road, Colombo 05.
6. Malani De Soyza, No. 50, Ele Bank Road, Colombo 05.
7. Siri Nanayakkara,
   No. 798, Galle Road, Molligoda, Wadduwa.

   Defendant-Respondents

AND NOW BETWEEN

1A. Mihidukulasuriya Sudath Harison Pinto (also named as 1B1),
Reinland Estate, Yagamwela,
Dummalasuriya.

Defendant-Respondent-Appellant

1B. Mihidukulasuriya Victor Pinto (Deceased),

1C. Mihidukulasuriya Sarath Asinas Pinto (also named as 1B2) (Deceased),

1C(a). Samarakoon Mudiyanselage Wimalawathi,

1C(b). Sawinda Pranith Mihindukulasuriya,
Both of 'Reinland Estate', Yagamwela, Dummalasuriya.
1C(a), 1C(b) Substituted Defendant-Respondent-Appellants

Vs.

Weerappulige Piyaseeli Fernando,
No. 37, Yagamwela, Dummalasooriya.
Plaintiff-Appellant-Respondent

2. Chithranganee Ratnamali Merlin De Soyza,
   No. 9, Fonseka Place, Colombo 05.
3. Anusha Chithra Mawli Geetal De Soyza,
   No. 4A, Keenakele Watta, Marawila.
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7. Siri Nanayakkara,
   No. 798, Galle Road, Molligoda, Wadduwa.

   2-7 Defendant-Respondent-Respondents

Before: Jayantha Jayasuriya, P.C., C.J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Jacob Joseph for the 1A Defendant-Respondent-Appellant.
Dr. Sunil Coorey with Sudarshani Coorey for the Plaintiff-Appellant-Respondent.

Argued on : 17.10.2022

Written submissions:
by the 1A Defendant-Respondent-Appellant on 29.04.2016 and 02.01.2023
by the Plaintiff-Appellant-Respondent on 19.09.2016 and 29.11.2022

Decided on: 11.09.2023

Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Kuliyapitiya seeking a declaration of title to, ejectment of the defendant from, the two allotments of land described in the schedule to the plaint, and damages. The plaintiff relied on deed No. 3016 to claim title to the said allotments. The 1st defendant filed answer seeking dismissal of the plaintiff's action on the basis that the 1st defendant came into possession of the land upon making some advance payments to the vendors of deed No. 3016 well before the execution of this deed. After trial, the District Court dismissed the plaintiff's action accepting the defendant's version. On appeal, the High Court of Civil Appeal of Kurunegala set aside the judgment of the District Court and entered judgment for the plaintiff. Hence this appeal by the 1st defendant. This Court granted leave to appeal mainly on three questions of law:

(a) Did the High Court err in law in not considering that in a *rei vindicatio* action the burden is on the plaintiff to establish title pleaded and relied on by him and the defendant need not prove anything?

(b) Did the High Court err in law in not considering that the title deed of the plaintiff only conveys undivided 7/8 shares of the property and therefore the plaintiff failed to establish title as held in *Hariette v. Pathmasiri* [1996] 1 Sri LR 358?

(c) Did the High Court err in law in not considering that the plaintiff was a speculative buyer who knew the land was possessed by the defendant, possession having been given to the defendant by the same vendors?

Burden and standard of proof in a *rei vindicatio* action

At the commencement of the trial before the District Court admissions were recorded. The third and fourth admissions are that at one point of time the 2nd defendant was the owner of the land in suit and she (the 2nd defendant) executed the aforementioned deed of transfer No. 3016 in favour of the plaintiff. The 1st defendant has no paper title to the land. Learned counsel for the 1st defendant in his post-argument written submission admits this when he says "*The defendant had an actual exclusive possession of the land with the intention of becoming the owner*." In the plaint the plaintiff has taken up the position that the 1st defendant came into possession of the land on the leave and licence of the plaintiff's vendors. This has not been accepted by the District Judge. Despite the above admissions, the District Judge has held that by deed No. 3016 what has been transferred is only 7/8 shares but not the full title as claimed by the plaintiff. The plaintiff does not challenge this finding of the District Judge. Based on these findings, learned counsel for the 1st defendant argues that this being a *rei vindicatio* action, the plaintiff has

failed to prove title to the land as pleaded in the plaint and therefore the plaintiff's action must fail. I will deal with this in greater detail since the burden of proof and the standard of proof in *rei vindicatio* actions are overwhelmingly shrouded in misconceptions, misconstructions and misunderstandings.

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. (as he then was) 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 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'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 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. (as he then was) 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 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.

The distinction between an action for declaration of title and ejectment and a *rei vindicatio* action was also emphasised by Wigneswaran J. in *Luwis Singho and Others v. Ponnamperuma* [1996] 2 Sri LR 320 at 324:

> *Though due to procedural steps introduced by the Civil Procedure Code there may appear no real difference today in Sri Lanka between an action rei vindicatio and an action for declaration of title and ejectment it may not be correct to equate them as co-extensive in scope and content.*

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 cast on a plaintiff in a *rei vindicatio* action is not unduly 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.*

In *De Vos v. Adams and Others* [2016] ZAWCHC 202 decided on 06.12.2016, Davis J. stated:

> *Turning specifically to the rei vindicatio it is clear that there are three requirements which the owner must prove on a balance of*

> *probabilities, in order to succeed with the particular action. Firstly, the applicant must show his or her ownership in the property. In the case of immovable property it is sufficient as a result to show the 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. Thirdly, the defendant must be in possession or detention of the property at the time that the action is instituted.*

The requirement of proof of chain of title which is the norm in a partition action is not applicable in a *rei vindicatio* action. If there is no challenge to the title deed of the plaintiff on specific grounds, the plaintiff can prove his ownership to the property by producing his title deed. 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 was 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 "*sufficient evidence 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 onus 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; establishment of his own title, in the sense of establishing a title superior to that of the plaintiff; 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. (as he then was) 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.

The right to possession is an essential attribute of ownership. The owner of the land has the right to exclude others from its use.

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 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 commences and endures through adverse possession, not lawful possession. When the Court declares that title by prescription is established, it transforms illegality into legality. 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 title by prescription is an illegality made legal due to the other party not taking action.*" This was quoted with approval by Chithrasiri J. in *Sumanawathie v. Sirisena* (CA/830/98(F), CA Minutes of 10.03.2014) and Salam J. in *Fathima Naseera v. Mohamed Haris* (CA/818/96(F), CA Minutes of 11.07.2012).

Defendant's evidence 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 standard 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 in 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 making a determination in this regard, the Court is entitled to consider evidence of all parties, including the evidence of the defendant. 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.*" should not be misconstrued to imply that the Court is precluded from taking the defendant's evidence into consideration in arriving at the final conclusion in a *rei vindicatio* action.

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 a 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, by way of the 3rd admission recorded at the trial, the 1st defendant admitted that the 2nd defendant transferred the land to the plaintiff by deed No. 3016 marked at the trial as P3. The title of the plaintiff in the land was never challenged by the defendant; nor did the defendant ever make a claim for title to the land. The defendant is in unlawful occupation as he has manifestly failed to prove any legal basis for his occupation of the land of which the plaintiff is the paper title holder.

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.*

This Court took the same view in *Ashar v. Kareem* (SC/APPEAL/171/2019, SC Minutes of 22.05.2023).

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 the expectation of 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 in an action *in rem*. The owner suffers the consequences if it is an action *in personam*.

Maasdorp (op. cit., 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 it 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 *rei vindicatio* 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 greater includes the less

It may be recalled that in *Preethi Anura v. William Silva (supra)* Chief Justice Dep stated that a plaintiff in a *rei vindicatio* action need not establish the title in the property "*with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case*." In a *rei vindicatio* action the plaintiff need not strictly adhere to the exact manner in which he has pleaded title 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 that are duly listed to fortify his case, the Court need not mechanically dismiss the plaintiff's action or disallow the plaintiff to mark those deeds 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 partition case such stringent procedure is not adopted. This does not mean that the 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.

Stemming from the misconception that the plaintiff in a *rei vindicatio* action shall strictly prove title exactly as pleaded in the plaint, a popular argument mounted is that, if the plaintiff in a *rei vindicatio* action had come to Court seeking a declaration of title to the entire land and ejectment of a trespasser from the whole or part of the land, but later if the Court decides that the plaintiff is only a co-owner who is entitled to undivided rights of the land, the Court shall dismiss the action since the plaintiff came before the Court as the sole owner of the land.

If the plaintiff in a *rei vindicatio* action seeks a declaration of title to the entire land, but at the end of the trial, 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 action *in toto*. It is a recognised principle that when a plaintiff has asked for a greater relief than he is actually entitled to, it should not prevent him from getting the lesser relief which he is 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, *Ibralebbe 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.

The finding that the plaintiff is entitled to a portion of the land means he is a co-owner of the land. It is 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. This the plaintiff can do by way of a *rei vindicatio* action.

In *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.*

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 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).

Learned counsel for the defendant submits that since the plaintiff filed this action *rei vindicatio* seeking a declaration of title to the lands described in the schedules to the plaint and ejectment of the defendant therefrom as the sole owner of the lands, but as conceded later, the plaintiff is only entitled to 7/8 shares of each land, the plaintiff's action must fail. Learned counsel says that this view was taken by the Supreme Court in the case of *Hariette v. Pathmasiri (supra).* I am not inclined to agree with this submission. As I have already explained, the plaintiff can be granted the lesser relief. In any event, as I will explain below, the Supreme Court in *Hariette's* case did not take such a view.

In *Meera Lebbe Cassy Lebbe Marker v. Kalawilage Baba* (1885) 7 SCC 97, Dias J. held:

> *If the plaintiffs can establish their rights even to less than what they claim, they may have a judgment for that reduced share. Though a plaintiff cannot recover more than he claims, there is nothing to prevent him recovering less.*

Gunawardana J. in the case of *Allis v. Seneviratne* [1989] 2 Sri LR 335 at 337 observed:

> *The fact that the appellant has asked for a larger relief than he is entitled to, should not in my view prevent him from getting the lesser relief which he is entitled to.*

In *Chandrasiri Fernando v. Titus Wickramanayake* [2012] BLR 344 Gooneratne J. at 346 quoted this with approval.

In the Supreme Court case of *Punchiappuhamy v. Dingiribanda (supra)* the plaintiffs filed action seeking a declaration of title to the whole land and ejectment of the defendant therefrom. The District Court granted both reliefs. On appeal, the High Court reversed the judgment of the

District Court. Whilst dismissing the appeal on ejectment, Wanasundara J. remarked: "*I am of the view that the Judges of the Civil Appellate High Court should have granted a declaration of title only to 11/24th share of the co-owned land of Belinchagahamula Hena to the Plaintiffs instead of dismissing the action altogether. I hold that the Appellants are only entitled to that relief and no more. Since it was not proved that the Defendant was a trespasser, he cannot be ejected by the Plaintiffs*."

Applicability of *Hariette v. Pathmasiri*

In actions *rei vindicatio*, 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 in my view is a misinterpretation of the judgment. In *Hariette's* case the Supreme Court held at pages 362-363 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 had not been proved, 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. (as she then was) 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 *Hariette'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]*

Learned counsel for the defendant contends that the High Court was wrong when it stated that *Hariette v. Pathmasiri* has no application to the instant case. I cannot agree.

The *ratio decidendi* in one case cannot be mechanically applied to decide another case unless facts are similar. A principle of law laid down in a decision must be understood in the light of facts and circumstances of that particular case.

There are two schedules in the plaint of the instant action. However, unlike in *Hariette's* case (and *Attanayake's* case), in the instant case, the plaintiff sought declaration of title and ejectment from both lands which are two separate allotments – lot 6 in plan No. 467 in the first schedule and lot 7 in the same plan in the second schedule. Hence the High Court was correct in holding that *Hariette's* case has no direct applicability to resolve the instant case.

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 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 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.

Vendor's duty to put the purchaser in possession

It is admitted that the owner transferred the property to the plaintiff by deed No. 3016. The defendant does not have a deed of transfer in his name. However, it is the position of the defendant that the owner placed the defendant in possession prior to the execution of the said deed in favour of the plaintiff. Hence learned counsel for the defendant argues that the immediate cause of action accrued to the plaintiff is to seek a refund of the purchase money and damages from the vendor. Learned counsel for the defendant in his written submissions cites two authorities in support – *Babaihamy v. Danchihamy* (1913) 16 NLR 245 and *Don Seneris Appuhamy v. Guneris* 1 Balasingham Reports 8.

The real dispute in those two cases was between the vendee and the vendor, not between the vendee and a third party in possession.

In *Appuhamy v. Appuhamy* (1880) 3 SCC 61 the Full Bench of the Supreme Court presided over by Cayley C.J. held:

> *The execution and delivery of a conveyance of land, the property of the vendor, if in conformity with the Ordinance of frauds, transferred the title to the land to the purchaser, although no corporeal delivery*

> *or actual possession of the land had followed. And that by virtue merely of the title so created, the purchaser might maintain an action seeking for a declaration of title against a third party in possession without title or under a weaker title.*

In *Punchi Hamy v. Arnolis* (1883) 3 SCC 61 the Full Bench of the Supreme Court presided over by Burnside C.J. held:

> *A purchaser of land who has a conveyance from his vendor, but has never had any possession, may maintain an action to eject from the land a third party claiming title adversely to the vendor.*

This position has been followed in *Latheef v. Mansoor (supra)* wherein Marsoof J. held at 352:

> *The action from which this appeal arises is not one falling within these special categories, as admittedly, the Respondents had absolutely no contractual nexus with the Appellants, nor had they at any time enjoyed possession of the land in question. Of course, this is not a circumstance that would deprive the Respondents to this appeal from the right to maintain a vindicatory action, as it is trite law in this country since the decisions of the Supreme Court in Punchi Hamy v. Arnolis (1883) 5 SCC 160 and Allis Appu v. Edris Hamy (1894) 3 SCR 87 that <u>even an owner with no more than bare paper title (nuda proprietas) who has never enjoyed possession could lawfully vindicate his property subject to any lawful defence such as prescription.</u>*

In *Andris v. Siman* (1889) 9 SCC 7 it was observed that, in an action *rei vindicatio*, if the plaintiff seeks ejectment of the defendant on paper title, "*title lies in deed only, and possession is not necessary to perfect it*". Burnside C.J. held "*if the plaintiff having failed to prove possession and ouster, had relied on his paper title only to entitle him to possession, then*

the question to be determined would have been whether the plaintiff had succeeded in establishing a good paper title to the land as against the defendants, whose actual possession was sufficient until the plaintiff had proved good title."

The Full Bench of the Supreme Court presided over by Hutchinson C.J. in *Ratwatte v. Dullewe* (1907) 10 NLR 304 held "*Where the question is between a purchaser and a third party, the delivery of the deed of transfer is sufficient to entitle the purchaser to maintain an action, as owner, against such third party.*" Middleton J. stated at page 309:

> *It seems to be good and settled law (Appuhamy v. Appuhamy (1880) 3 SCC 61 following Don Andris v. Illangakoon (1857) 2 Lor. 49) that the execution and delivery of conveyance of land in conformity with the Statute of Frauds confers the dominium on the purchaser, and so gives him title to maintain an action against a third party in possession without or under a weaker title.*
>
> *I have no doubt therefore that if the plaintiff [purchaser] here and accepted the conveyance tendered by the defendant [vendor], he might maintain his action against Dullewe [third party] for declaration of title, and might have called upon his vendor to warrant and defend the title conferred.*

As held in *Luwis Singho and Others v. Ponnamperuma (supra)* by Wigneswaran J. at 324-325:

> *But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that;*
>
> *(i) the Plaintiff is the owner of the land in question i.e. he has the dominium* ***and****,*

(ii) *that the land is in the possession of the Defendant (Voet 6:1:34)*

Thus even if an owner never had possession of a land in question it would not be a bar to a vindicatory action.

It is true that it is the duty of the vendor to deliver possession of the property to the vendee at the time of the sale, and warrant and defend the title when a third party challenges the title of the vendee. However, merely because the vendor does not deliver possession of the property to the vendee at the time of the sale, the sale does not become ineffective or unenforceable against third parties, nor does the vendee become a speculative buyer. The vendee can either sue the vendor seeking rescission of the sale and a refund of the purchase price together with damages or sue the trespassers for a declaration of title and ejectment, and defend his title with the assistance of the vendor.

Conclusion

I answer the questions of law upon which leave to appeal was granted in the negative. I affirm the judgment of the High Court of Civil Appeal and dismiss the appeal with costs.

Judge of the Supreme Court

Jayantha Jayasuriya, P.C., C.J.
I agree.

Chief Justice

A.H.M.D. Nawaz, J.
I agree.

Judge of the Supreme Court