**IN THE SUPREME COURT OF THE**

**DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

*In the matter of an Appeal under Section 5C of the High Court of the Provinces (Special Provisions) (Amendment Act) No. 54 of 2006 read with Article 128 of the Constitution of the Republic of Sri Lanka.*

**SC/ APPEAL/124/2014**

**SC/HCCA/LA/266/2012**

**SP/HCCA/GA/65/2003(F)**

**DC GALLE/462/RE**

Chandani Jayanthi Jayasundara.
Hapugala,
Wackwella.

**PLAINTIFF**

**Vs.**

Paliyapitiyage Chandradasa.
Thubha Pittaniya,
Hapugala,
Wackwella.

**DEFENDANT**

***AND THEN BETWEEN***

Chandani Jayanthi Jayasundara.
Hapugala,
Wackwella.

**PLAINTIFF-APPELLANT**

**Vs.**

Paliyapitiyage Chandradasa.
Thubha Pittaniya,
Hapugala,
Wackwella.

**DEFENDANT-RESPONDENT**

***AND NOW BETWEEN***

Paliyapitiyage Chandradasa (**Deceased**).
Thubha Pittaniya,
Hapugala,
Wackwella.

**DEFENDANT-RESPONDENT-APPELLANT**

1A. Palihapitiya Gamage Geethika Priyadarshani.

1B. Palihapitiya Gamage Darshana Pathum Kumara.

1C. Palihapitiya Gamage Yamuna Niroshani.

**SUBSTITUTED DEFENDANT-RESPONDENT-APPELLANTS**

**Vs.**

Chandani Jayanthi Jayasundara.
Hapugala,

Wackwella.

**PLAINTIFF-APPELLANT-RESPONDENT**

| | | |
|---|---|---|
| **BEFORE** | : | **P. PADMAN SURASENA, J.**<br>**ACHALA WENGAPPULI, J. &**<br>**MAHINDA SAMAYAWARDHENA, J.** |
| **COUNSEL** | : | W. Dayaratne, PC with Ms. R. Jayawardena for the 1A, 1B & 1C Substituted Defendant-Respondent-Appellants.<br><br>Manohara de Silva, PC with Hirosha Munasinghe, Harithriya Kumarage and Kaveesha Gamage for the Plaintiff-Appellant-Respondent. |
| **ARGUED & DECIDED ON** | : | 19-07-2024 |

**P. PADMAN SURASENA, J.**

Court heard the submissions of the learned President's Counsel for the Substituted Defendant-Respondent-Appellants and also the submissions of the learned President's Counsel for the Plaintiff-Appellant-Respondent and concluded the argument of this case.

The Plaintiff in this case, filing Plaint, sought to eject the Defendant from the premises more fully described in Schedule 01 of the Plaint on the basis that the Defendant had come to occupy the premises in suit to operate a Bakery upon payment of monthly rent to the Plaintiff's father. The Defendant through the Admission No. 3, has specifically admitted that the father of the Plaintiff is the owner of the premises in suit.

The trial proceeded on the above admission as well as on several other admissions and several issues. At the conclusion of the trial, the learned District Judge by his

Judgment dated 26-06-2003, had concluded that the Plaintiff had not proved her entitlement to the land described in the Plaint. The learned District Judge also had come to the conclusion that there was no lease in existence between the Plaintiff and the Defendant. It was on that basis that the learned District Judge had decided to dismiss the action of the Plaintiff.

Being aggrieved by the Judgment of the learned District Judge, the Plaintiff had appealed to the Provincial High Court of Civil Appeals. The Provincial High Court of Civil Appeals after considering the material adduced in the trial, had come to the conclusion that the evidence adduced by the Plaintiff has established to the satisfaction of Court, that she is entitled to succeed with the prayers in her Plaint. Thus, the Provincial High Court of Civil Appeals by its Judgement dated 29-05-2012, had proceeded to set aside the Judgment of the District Court and concluded that the Plaintiff is entitled to the relief as per prayers 'a', 'b', 'c', & 'e' of the prayers to the Plaint.

Being aggrieved by the Judgment pronounced by the Provincial High Court of Civil Appeals, the Defendant filed the Leave to Appeal Petition relevant to this Appeal. By its order dated 21-07-2014, this Court has granted Leave to Appeal in respect of four questions set out in paragraph 12 of the Amended Petition dated 08-06-2013. These questions of law are as follows:

(a) Have their Lordships of the Civil Appellate High Court seriously misdirected themselves when they held that the action filed by the Plaintiff is a *rei-vindicatio* action when it is very clear that the cause of action described in the Plaint with regard to the arrears of payment of lease rental by the Defendant which is clear from the issues No. 4 to 7 raised by her at the trail?

(b) Did their Lordships of the Civil Appellate High Court also fail to consider that when the Plaintiff demanded the payment of lease rental the question of title does not arise and in any event in the instant case there are clear and cogent evidence that the Defendant did not deny the Plaintiff's title and it was his

contention that the Plaintiff's father permitted him to continue the business of running the Bakery?

(c) Did their Lordships fail to consider that the Plaintiff did not institute this action on the basis of a co-owner nor did she raise an issue to that effect and further in her own pleadings that the Defendant was a Lessee. Therefore, she is not entitled to eject the Defendant as a co-owner as said right is given to a co-owner only if the Defendant is a trespasser?

(d) Did their Lordships of the Civil Appellate High Court unreasonably reject the clear finding of the Additional District Judge that the Plaintiff has failed to prove on balance of probability her contractual relationship to the Defendant as a Lessor of the said premises and also to prove the documents submitted by her in proof of payment of rental when the Defendant vehemently denied the said documents?

Having regard to the submissions made before us and the facts and circumstances of this case, we think it would suffice for us to consider and answer the question of law set out in paragraph 12(d) of the Amended Petition.

As has been set out before, the Defendant has admitted the title of the father of the Plaintiff. The father of the Plaintiff is Abraham Jayasundera. Admittedly, the Defendant does not claim title on any written document or deed. It is also admitted that the Defendant had come to occupy this premises with the licence of the father of the Plaintiff. This was the position taken up by the Defendant in his oral evidence before the trial Court as well. The said oral evidence of the Defendant could be reproduced in the following way:

උ: අලුත්වැඩියා කරගෙන යන්න කිව්වා.

ප්‍ර: තමා ඒ අනුව අලුත්වැඩියා කරගෙන හිටියා?

උ: එහෙමයි.

ප්‍ර: ඒ කාලයේ හැටියට මේක වටිනාකමක් තිබුනු දේපලක්?

උ: නැහැ.

ප්‍ර: ඒබ්‍රහම් ජයසුන්දර මොනවද කලේ?

උ: ඉඩකඩම් බලා ගත්තා. හපුගල සෑහෙන ඉඩකඩම් තිබුනා. මම දන්නා තරමින්.

ප්‍ර: තමා ඒ කාලයේ බලපත්‍රයක් ගත්තාද?

උ: නැහැ. මට කිව්වේ මේක කරගෙන යන්න පමණයි.

ප්‍ර: 70 ගනන්වල බලපත්‍ර ලිව්වාද?

උ: ලිව්වා තියෙන්නේ ඇති.

ප්‍ර: තමා මේ බේකරිය දිගටම කරගෙන ගියා?

උ: එහෙමයි. ගොඩනැගිල්ල අලුත් වැඩියා කරගෙන දිගටම කරගෙන ගියා.[1]

In the course of his evidence, at another place, the Defendant has even proceeded to admit that the license to carry on the business of the bakery which he was involved in, has been issued to the Plaintiff's father. This was followed by the subsequent renewal of the said license in the name of the mother of the Plaintiff after the death of the Plaintiff's father. The documentary evidence regarding this fact has also been produced by the Plaintiff through the receipts marked **P 1** – **P 63**.

The Defendant in his evidence before the trial Court, has also admitted that it was the Plaintiff who had paid the water bills, electricity bills and also rates to the Local Authority. At page 77 of the brief, the following excerpts from the evidence of the Defendant, shows that the Defendant has not been able to take up a specific position with regard to his status of possession of this property. These questions and answers are reproduced below:

ප්‍ර: අපි කියන්නෙ තමාගේ භාණ්ඩ නැහැ ජයසුන්දර මහත්තයාගේ බඩු තියෙන්නේ?

උ: නැහැ.

ප්‍ර: මෙම ස්ථානයේ තමා මුළුමනින්ම පදනම් විරහිතව පැමිණිලිකාරියගේ අයිතියට අභියෝග කරමින් ඉන්නවා කියලා අපි කියන්නෙ?

උ: පිළිතුරු නැත.

ප්‍ර: තමා ඒ බේකරියෙන් රුපියල් 10,000/- ක් විතර ලබා ගත්තා නේද මසකට?

උ: පිළිතුරු නැත.

[1] At page 64 of the Appeal Brief of the High Court of Civil Appeals Galle in case No. SP/HCCA/GA/65/2003(F).

ප්‍ර: දැන් ඒ සියලුම දේ මෙම නඩුවේ පැමිණිලිකරුවන්ට අහිමිවෙලා තිබෙනවා තමා බලහත්කාරයෙන් මේ දේපළ අල්ලාගෙන තිබෙන නිසා?

උ: පිළිතුරු නැත.

ප්‍ර: තමාට මෙම ස්ථානයට කිසිම අයිතියක් නැහැ කියලා අපි කියන්නෙ?

උ: පිළිතුරු නැත.[2]

Having regard to the above evidence, we are satisfied that the Defendant has entered into this property with the leave and license of the father of the Plaintiff.

The learned President's Counsel for the Appellants also made submissions stating that the Plaintiff has not proved the fact that the Plaintiff is the full owner of the property. Although, the learned District Judge had proceeded on the basis that the Plaintiff had not been successful in proving her title to the whole property, we observe that the Provincial High Court of Civil Appeals had correctly chosen to go on the basis that it is possible even for a co-owner of a land to eject a person who is in unauthorized possession. In this regard we would like to cite here just two judgments which are as follows. In the case of Harriette v Pathmasiri,[3] this Court has held as follows:

> *"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 because the owner of an undivided share has an interest in every part and portion of the entire land."*

Citing the above case with approval, Sisira De Abrew J in the case of Nuwarapakshage Balasuriya v Nuwarapakshage Neelakanthi alias Baby,[4] stated the following:

> *"It is a commonsense principle that a co-owner has an interest in every part of the entire land. Thus, when a trespasser enjoys the fruits of the property the co-owner's rights are affected and he becomes entitled to eject the trespasser."*

[2] At page 77 of the Appeal Brief of the High Court of Civil Appeals Galle in case No. SP/HCCA/GA/65/2003(F).
[3] 1996 (1) SLR 358.
[4] SC Appeal 129/2013 SC Minutes on 30-06-2017.

We observe that even the learned District Judge has not refused the fact that Abraham Jayasundera is the father of the Plaintiff and therefore at its least, the Plaintiff is necessarily a co-owner as at least some share will devolve of father's property on the Plaintiff after the father's death in the absence of any other conveyance by the father. Although the Plaintiff had adduced evidence in the trial to prove that she is the owner of the whole property, in view of the afore-mentioned legal position that even a co-owner is entitled to eject a trespasser from the whole land, we do not think it necessary to go in to the question whether or not the Plaintiff is the owner of the whole property. Moreover, as has already been mentioned above, the Defendant does not claim any title to this property. Admittedly, the Defendant has never ever paid any rent either to the father of the Plaintiff or to the Plaintiff or to any other person. This is manifest by the evidence of the Defendant. The following excerpts taken from his evidence would establish that position.

ප්‍ර: තමන්ට කවුද මේ ගොඩනැගිල්ල භාර දුන්නේ?

උ: ඒබ්‍රහම් ජයසුන්දර.

ප්‍ර: ඒ භාර දුන්න කාලය මතකද?

උ: 1970 මට මතක හිතෙන හැටියට.

ප්‍ර: මෙම ගොඩනැගිල්ල අයිතිව තිබුණේ ඒබ්‍රහම් ජයසුන්දරට?

උ: එහෙමයි. දන්නා තරමින්.

ප්‍ර: ඒ බාරදුන්නට පස්සේ තමා ඒ ස්ථානයේ බේකරියක් පවත්වා ගෙන ගියා?

උ: එහෙමයි.

ප්‍ර: තමා ඒ ඒබ්‍රහම් ජයසුන්දරට බදු මුදල් වශයෙන් හෝ ගෙවල් කුලී වශයෙන් මුදලක් ගෙව්වාද?

උ: නැහැ කවදාවත් නැහැ.

ප්‍ර: ඒ තැනැත්තා තමාගෙන් ඉල්ලා හිටියද?

උ: නැහැ. කවදාවත් ඉල්ලා හිටියේ නැහැ.

ප්‍ර: මේ ගොඩනැගිල්ල මොන පදනමක් මතද තමාට දුන්නේ?

උ: අලුත්වැඩියා කරගෙන යන්න කිව්වා.

ප්‍ර: තමා ඒ අනුව අලුත් වැඩියා කරගෙන හිටියා?

උ: එහෙමයි.[5]

...

[5] At page 63-64 of the Appeal Brief of the High Court of Civil Appeals Galle in case No. SP/HCCA/GA/65/2003(F).

ප්‍ර: ඊට පස්සෙත් ඒබ්‍රහම් ජයසුන්දර මියගියාට පස්සේ තමා මේ බේකරිය පවත්වාගෙන ගියා?

උ: එහෙමයි.

ප්‍ර: ඉන්පසු කවුරු හරි මේකට බදු මුදල් හෝ කුලී ඉල්ලා හිටියද?

උ: මෑත කාලයක ඒ වගේ ප්‍රශ්නයක් ඇති වුනා. ඊට පස්සේ අධිකරණයට ආවා.[6]

...

ප්‍ර: මේ වනතුරු තමා කිසිම තැනැත්තෙකුට මේ ස්ථානය වෙනුවෙන් කිසිම මුදලක් ගෙවා තිබෙනවාද?

උ: නැහැ.[7]

...

ප්‍ර: තමා දන්නවා මහත්තයාගේ මරණයෙන් පස්සේ ඒ මහත්තයාගේ නෝනා ලයිට් ගත්තා 1984?

උ: එහෙමයි. ඒ ගොල්ලෝ ගත්තේ. අරගෙන මම පාවිච්චි කරා.

ප්‍ර: තමන්ගේ නෑකමක් තිබෙනවාද?

උ: හිතවත්කමක් තිබෙනවා.

ප්‍ර: නෝනා ලයිට් අරගෙන දුන්නා නේද?

උ: එහෙමයි.

ප්‍ර: ලයිට් බිල ගෙව්වේ ඒගොල්ලෝ නේද?

උ: මම ගෙව්වේ නැහැ.

ප්‍ර: ජයසුන්දර මහත්තයාගේ ඉඩම බේකරිය එයාගේ බලපත්‍ර ගත්තේ එයා, ලයිට් බිල් ගෙව්වේ ඒ ගොල්ලෝ?

උ: එහෙමයි.[8]

As has been stated above, the father of the Plaintiff is Abraham Jayasundera. Admittedly, the Defendant does not claim title on any written document or deed. It is also admitted that the Defendant had come to occupy this premises with the licence of the father of the Plaintiff.

[6] At page 64 of the Appeal Brief of the High Court of Civil Appeals Galle in case No. SP/HCCA/GA/65/2003(F).
[7] At page 65 of the Appeal Brief of the High Court of Civil Appeals Galle in case No. SP/HCCA/GA/65/2003(F).
[8] At pages 72 -73 of the Appeal Brief of the High Court of Civil Appeals Galle in case No. SP/HCCA/GA/65/2003(F).

Although the Provincial High Court of Civil Appeals has considered whether the Defendant has succeeded in establishing a prescriptive title to this property, we observe that the Defendant has neither claimed such prescriptive title to this property in his answer nor raised any issue in that regard. We also observe that the learned District Judge has also not discussed the aspect of prescriptive title in his Judgment. Thus, it appears that the question whether the Defendant has succeeded in establishing a prescriptive title to this property, has only popped up in the appeal before the Provincial High Court of Civil Appeals, at the instance of the Defendant. This is something unacceptable. Explanation 2 to Section 150 of the Civil Procedure Code is a clear bar for a party to advance a case that is materially different from that advanced in the original Court. It reads as follows:

Explanation 2, Section 150 Civil Procedure Code

> *The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's* pleadings.

This provision has been interpreted by Chief Justice G. P. S. de Silva in the case of Candappa nee Bastian v Ponnambalampillai.[9] The relevant excerpt from the above Judgement is reproduced below.

> *"Thus it is seen that the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to section 150 of the Civil Procedure Code. It reads thus: "The case enunciated must reasonably accord with the party's pleading, i.e. plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on*

[9] [1993] 1 SLR 184 at 189.

*record, and which his opponent is prepared to meet ....." A fortiori, a party cannot be permitted to present in appeal a case different from the case presented before the trial Court except in accordance with the principles laid down by the House of Lords in The Tasmania [(1890) 15 App. Cases 233] and followed by Dias, J. in Setha v. Weerakoon [49 NLR 225 at 228, 229]."*

In the instant case, despite the afore-stated legal bar for the Defence to agitate a claim on prescription, consideration of the available evidence, particularly the evidence adduced by the Defendant, satisfies us that the Defendant has not succeeded in establishing a prescriptive title to this property.

After going through the Judgment of the Provincial High Court of Civil Appeals, we observe that the learned Judges of the Provincial High Court of Civil Appeals have considered the above factors and given adequate reasons as to why they had decided to set aside the Judgment of the District Court and grant relief as per prayers 'a', 'b', 'c' and 'e' of the prayers of the Plaint. Therefore, we answer the question of law set out in paragraph 12(d) in the negative.

Accordingly, we decide to dismiss this Appeal without costs.

Appeal is dismissed without costs.

**JUDGE OF THE SUPREME COURT**

**ACHALA WENGAPPULI, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**MAHINDA SAMAYAWARDHENA, J**

I agree.

**JUDGE OF THE SUPREME COURT**

PR/-