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

In the matter of an appeal

Thajudeen Apukar

Phimbiya

Ratmale

Defendant-Appellant-Petitioner-Appellant

SC Appeal 129/2010

SC (HC) CALA 17/2010

HC Appeal (NWP/HCCA/KUR/80/2002(F)

DC Kuliyapitiya 12909/L

Vs

Viharadhipathy

Jankurawela Siriniwasa Thero

Bodhiyanganaramaya,

Pihimbiya

Plaintiff-Respondent-Respondent-Respondent

Before: Sisira J De Abrew J

Upaly Abeyratne J

Anil Gooneratne J

Counsel: Upali Jayamanne for the Defendant-Appellant-Petitioner-Appellant

Chula Bandara with Gayaththri Kodagoda for the

Plaintiff-Respondent-Respondent-Respondent

Written Submission

tendered on : 23.2.2012 by the Appellant

22.2.2012 by the Respondent

Argued on : 23.9.2016

Decided on : 23.11. 2016

Sisira J De Abrew J

The Plaintiff-Respondent-Respondent- Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) seeking a declaration, inter alia, that the land described in the schedule 'C' to the plaint is a land belonging to Pihimbiya Bodhiyanganarama Temple (hereinafter referred to as the temple) and to eject the Defendant-Appellant from the said land. The Plaintiff- Respondent is the Viharadhipathi of this temple. The learned District Judge by his judgment dated 30.10.2002, decided the case in favour the Plaintiff-Respondent. Being aggrieved by the said judgment, the Defendant-Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High Court) and the High Court by its judgment dated 9.12.2009, dismissed the appeal. Being aggrieved by the said judgment of the High Court, the Defendant-Appellant has appealed to this court. This court, by its order dated 11.10.2010, granted leave to appeal on the

questions of law set out in paragraph 9(a) and 9(b) of the petition of appeal which are set out as follows:

1. Has the Respondent (the Plaintiff-Respondent) proved title to Lot 71 in FVP 2086? If not as the Respondent (the Plaintiff-Respondent) failed to prove title to the land described in schedule C to the plaint, should the declaration sought by the Respondent (the Plaintiff- Respondent) from the District Court be refused?

2. In as much as the said action was a rei vindicatio action should the Respondent (the Plaintiff- Respondent) be granted a declaration of title only to Lot 70 in FVP 2086 and not to Lot 71 and should the judgment of the District Court be amended accordingly?

The land described in schedule 'C' of the plaint is an amalgamation of two lands described in schedule 'A' and 'B' of the plaint. Learned counsel appearing for the Defendant-Appellant submitted at the hearing of this appeal that he would not challenge the title of the Plaintiff-Respondent in respect of the land described in schedule 'A' of the plaint. He also admitted that this land is the land described as lot 70 in Final Village Plan (FVP) 2086. But he challenged the title of the land described in schedule 'B' of the plaint and submitted that the said land does not belong to the temple. The land described in schedule 'B' of the plaint is the Lot 71 in FVP 2086. The Plaintiff-Respondent takes up the position that the title of this land (Lot 71 in FVP 2086) was conveyed to the temple by a document dated 28.6.1917 marked P2 wherein Sooriyahetti Mudiyanselage Kiri Ethana, Mudalihamy, Podihamy, Dingiri Manike and Ran Manike had dedicated a land called Wilandagahamulahena to the temple and the Sangha. The Plaintiff Respondent

takes up the position that the said land described is in schedule ‘B’ of the plaint and that it is not Lot No.71 in the FVP No.2086. But the Defendant Appellant takes up the position that the land called Wilandagahamulahena is not Lot No. 71in FVP 2086 and it is Lot No.65. To prove this position he relies on document marked Z2 which is a Register of Settlement. I now advert to this contention. Although according to the document marked Z2 Wilandagahamulahena is Lot No.65, Navaratne the Surveyor who prepared plan No.4313 on a commission issued by court stated in evidence that Lot No.71 in FVP 2086 is the land called Wilandagahamulahena. He has also stated the same thing in his plan No.4313 which was marked as X at the trial. Therefore it is clear that the land called Wilandagahamulahena is Lot No.71 of FVP 2086. The document marked P2 refers to Wilandagahamulahena. When I consider the above facts, I hold that the land described in the document marked P2 is Lot No.71 of FVP 2086 and that it is the land described in schedule B of the plaint. Therefore it can be said that the title of the land described in P2 which is the land described in schedule ‘B’ of the plaint had been conveyed to the temple by the document marked P2.

It has to be considered here whether the title of the property described in the document marked P2 could be transferred to the temple and Sangha since it is not a document executed by a Notary Public and whether the document marked P2 contravenes Section 2 of the Prevention of Fraud Ordinance. A similar situation arose in the case of Randombe Dharmawansa Thero Vs Rupasinghe Mudiyanselage Ukku Banda 57 CLW 55 wherein Justice HNG Fernando (with whom Justice TS Fernando agreed) held thus:

"That a dedication once made is not rendered ineffective by the absence of a notarial document executed in accordance with the Prevention of Fraud Ordinance."

In Saranankara Unnanse Vs Indajothi Unnanse 20 NLR 385 at page 396 accepted the view that property becomes Sangika by virtue of the formal ceremony of dedication. In Dhammavisuddi Thero Vs Dhammadassi Thero 57 NLR 469 Supreme Court held that the property was Sangika although no notarial document was produced in proof of a transfer to the sangika or to a particular priest on behalf of the Sanga.

Applying the principles laid down in the above judicial decisions, I hold that when a person dedicates an immovable property to the Sangha or to a Buddhist Temple on behalf of Sanga, such a dedication does not become invalid by the absence of a notarial document. The Defendant-Appellant did not challenge the document marked P2.

For the above reasons, I hold that the title of the land described in the document marked P2 which is the land described in the schedule 'B' of the plaint had been conveyed to the temple by the five persons mentioned in P2 and that the owner of the land described in schedule 'A' and 'B' of the plaint is the temple.

In an action for rei-vindicatio the plaintiff must prove that he is the owner of the property. This view is supported by the following judicial decisions.

In De Silva Vs Gunatilake 32 NLR 217 at 219 Macdonell CJ held thus:

"There is abundant authority that, a party claiming a declaration of title

must have title himself. ... 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 Peiris Vs Savunahamy 54 NLR 207 Dias SPJ (with whom Justice Gratiaen agreed) held thus:

"Where in an action for declaration of title to land, the Defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium."

In Abeykoon Hamine Vs Appuhamy 52 NLR 49 Dias SPJ (with whom Jayatilake CJ agreed) observed thus:

"This being anion for rei vindicatio, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute."

In Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 Supreme Court held thus:

"In an action rei vindicatio the plaintiff must prove and establish his title. He 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 Defendant-Appellant admits that he is in possession of the land in dispute. The Plaintiff-Respondent in this case has proved that the property in dispute belongs to the temple and that the Defendant-Appellant is in possession of the property. Therefore the burden shifts to the Defendant-Appellant to prove that he is in possession of the land on a legal right.

The Defendant-Appellant in this case tries to take up the position that Pemananda Thero who is the owner of the property in question transferred this property to the father of the Defendant-Appellant on 9.10.1954 by deed No.2081 marked V1 and that he has become the owner of the property (vide paragraph 3 of his answer). Paragraph 3 of the answer clearly states that the name of the said land is 'Lindapitiyehena'. But the lands described in the schedule 'A 'and 'B' of the plaint are respectively 'Veherawatta and Wilandagahamulahena. This clearly demonstrates that the Defendant-Appellant is not the owner of the lands described in schedule 'A' and 'B' of the plaint which are respectively Lot No.70 and 71 in FVP 2086. It appears from the evidence led at the trial that the Defendant-Appellant is the owner of Lot No.73 in FVP 2086. It is interesting to note that what transpired in the cross-examination of the Defendant-Appellant. It was suggested to him during the cross-examination that he was in unlawful possession of the lands in suit. He did not deny this suggestion. The answer to this question was that he was living in the land given to him by his father. Failure to deny the above suggestion and the answer given to the question can be, in my view, considered as an implied admission that his possession in the land in suit (Lot No. 70 and 71 in FVP 2086) is unlawful. Courts cannot and should not recognize the claim of an unlawful occupier of a land in a rei vindicatio action. In my view, in a rei vindicatio action a person in unlawful possession of the land in suit has no right to challenge the title of the plaintiff. Therefore I hold that the Defendant-Appellant in this case has no right to challenge the title of the Plaintiff-Respondent.

From the above facts it is clear that the Defendant-Appellant claims prescription to the land called 'Lindapitiyehena' and not to the lands described

in schedules ‘A’ and ‘B’ of the plaint. When I consider all the above matters, I hold that the Defendant-Appellant is not the owner of the lands described in schedules ‘A’ and ‘B’ of the plaint; that he cannot claim prescription to the lands described in schedules ‘A’ and ‘B’ of the plaint; and that he is in possession of the said lands without any legal right.

The Defendant-Appellant has raised the following questions of law and leave to appeal was granted on the said questions.

1. Has the Plaintiff-Respondent proved title to Lot No.71 in FVP 2086? If not as the Plaintiff-Respondent failed to prove title to the land described in schedule to the plaint should the declaration sought by the Plaintiff-Respondent from the District Court be refused?

2. In as much as the said action was a rei vindication action should the Plaintiff- Respondent be granted a declaration of title only to Lot No.70 in FVP 2086 and not to Lot No.71 and should the judgment of the District Court be amended accordingly?

Having considered the aforementioned matters, I answer the above questions of law as follows.

1. The Plaintiff-Respondent has proved title to Lot No.70 and Lot. No71 in FVP 2086.

2. The Plaintiff-Respondent should be granted a declaration of title to Lot No.70 and Lot No.71 in FVP 2086.

For the above reasons, I affirm the judgment of the District Court and the judgment of the Civil Appellate High Court. I dismiss the appeal of the Defendant-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court

Upaly Abeyratne J

I agree.

Judge of the Supreme Court

Anil Gooneratne J

I agree.

Judge of the Supreme Court