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

In the matter of an application for Leave to Appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

M.Y. Jezeema Beebi,
No. 166/8A, 166/8B,
Elvitigala Mawatha,
Colombo 05.

Plaintiff

SC Appeal No: 47/2015
SC/HCCA/LA No. 497/2014
WP/HCCA/COL/29/2009/F
DC Colombo No. 20654/L

Vs.

Gothanayagi,
No. 166/8,
Elvitigala Mawatha,
Colombo 05.

Defendant

AND THEN BETWEEN

M.Y. Jezeema Beebi,
No. 166/8A, 166/8B,
Elvitigala Mawatha,
Colombo 05.

Plaintiff-Appellant

Vs.

Gothanayagi,
No. 166/8,
Elvitigala Mawatha,
Colombo 05.

Defendant-Respondent

AND NOW BETWEEN

M.Y. Jezeema Beebi,
No. 166/8A, 166/8B,
Elvitigala Mawatha,
Colombo 05.

Plaintiff-Appellant-Petitioner

Vs.

Gothanayagi,
No. 166/8,
Elvitigala Mawatha,
Colombo 05.

Defendant-Respondent-Respondent

Before: **Justice P. Padman Surasena**

Justice A.L. Shiran Gooneratne

Justice Arjuna Obeyesekere

Counsel: Vishwa de Livera Tennekoon with Lilani Ganegama instructed by Nepataarachchi for the **Plaintiff-Appellant-Appellant.**

Heshan Thambimuttu with Prasanth Mahendran for the **Defendant-Respondent-Respondent.**

Argued on: 17/02/2023

Decided on: **22/09/2023**

A.L. Shiran Gooneratne J.

By Plaint dated 02/03/2005, the Plaintiff-Appellant-Appellant (hereinafter sometimes referred to as the "Plaintiff-Appellant") filed this Action No. D.C. Colombo 20654/L against the Defendant-Respondent-Respondent ("the Defendant-Respondent"), and sought a declaration that the Plaintiff-Appellant is entitled to Lot 1, 2, 3 and 4 bearing Assessment Nos. 166/8A and 166/8B, Elvitigala Mawatha, Colombo 5, depicted in Plan No. 2055 dated 07/10/2001, made by I.M.C. Fernando, Licensed Surveyor and a declaration that the Defendant-Respondent is not entitled to the said land.

In paragraph 1 of the said Plaint, the Plaintiff-Appellant states that her mother M.I.S.S. Beebi became entitled by Deed of Disposition No. 16007 dated 17/05/1995, attested by the Commissioner of Department of National Housing, to Lots 5 and 6 bearing Assessment Nos. 166/8A and 166/8B Elvitigala Mawatha depicted in Plan No. MF

46/76 dated 06/08/1976 made by I.M.C. Fernando Licensed Surveyor. The Plaintiff-Appellant claims entitlement to the said land by virtue of Deed of Gift No. 3 dated 01/01/1996 attested by P.D.R. Priyadharshani, Notary Public.

According to paragraphs 5 and 6 of the Plaint, on or about 1997, the Defendant-Respondent had forcibly entered the southern side of Lot 6 and the eastern side of Lot 5 depicted in the said Plan No. MF 46/76. The Plaintiff-Appellant claims that with the concurrence of both parties to this action, the said land was resurveyed and the boundaries were demarcated by the said Plan No. 2055 dated 07/10/2001, and further that Lots 5 and 6 depicted in Plan No. MF 46/76 were amalgamated, sub divided and depicted as Lots 2, 3 and 4 in Plan No. 2055. The Plaintiff-Appellant also claims Lots 2, 3 and 4 in the said Plan No. 2055, as land encroached by the Defendant-Respondent.

In Paragraphs 7 and 8 of the Plaint, the Plaintiff-Appellant states that, according to the said Plan No. 2055 dated 07/10/2001, the Defendant-Respondent has encroached zero decimal four two perches (0.42 perches) upon Lots 2, 3 and 4. The Plaintiff-Appellant relied on the said Plan No. 2055 to claim that, the Defendant-Respondent is using the encroached land unlawfully for construction purposes thereby causing mischief and irreparable loss to the Plaintiff-Appellant.

The Defendant-Respondent by amended answer dated 26/10/2005, denies any encroachment to the said land and states that she has acquired prescriptive title to Lot No. 4 in Plan No. MF 46/76 depicted as Lots Nos. 2, 3 and 4 in the resurveyed Plan No. 2055, for a period of over 30 years and prayed for a dismissal of the Plaint.

At the conclusion of the trial, the Additional District Judge by Judgment dated 16/01/2009, held *inter alia*, that the Defendant-Respondent has established uninterrupted possession of over 30 years to the said Lots Nos. 2, 3 and 4 in Plan No. 2055, and therefore acquired prescriptive title over the said land and accordingly, dismissed the action of the Plaintiff-Appellant.

Being aggrieved by the said Judgment, the Plaintiff-Appellant by Petition of Appeal dated 12/03/2009, appealed to the High Court of the Western Province exercising civil appellate jurisdiction holden in Colombo ("the Appellate Court"). The Appellate Court, after having also considered the question of the title by prescriptive possession acquired by the Defendant-Respondent to the relevant Lots, as in the District Court, by Judgment dated 22/08/2014, affirmed the said Judgment of the Additional District Judge dated 16/01/2009 and dismissed the appeal with costs.

The Plaintiff-Appellant, by Petition dated 03/10/2014 is before this Court, to set aside the said Judgment dated 22/08/2014, delivered by the Appellate Court.

By Order dated 04/03/2015, this Court granted leave to appeal on the following questions of law;

1. Has the Civil Appellate High Court erred in law in effectively failing to take into consideration the applicability of Section 15(2) of the Ceiling on Housing Property Law No. 1 of 1973 in this instance?

2. Has the Civil Appellate High Court misdirected itself in law by erroneously determining that the Respondent has established undisturbed, uninterrupted, and adverse possession, and therefore, has acquired prescriptive title to Lot No.'s 5B and 6B more fully depicted in Plan No. 424/2006 prepared by S. Rasappah, Licensed Surveyor having regard to Section 15(2) of the Ceiling on Housing Property Law No. 1 of 1973 and/or Section 15 of the Prescription Ordinance?

3. Has the Civil Appellate High Court erred in law by failing to determine that the Respondent had not acquired any prescriptive rights to Lot No.'s 2, 3 and 4 in Plan No. 2055, dated 7th October 2001, prepared by I.M.C. Fernando, Licensed Surveyor, subsequent to 17th May 1995 as envisaged in terms of Section 3 of the Prescription Ordinance?

In this action, the Plaintiff-Appellant claimed to be entitled to the land and premises marked Lots 5 and 6 depicted in Plan No. MF 46/76 dated 06/08/1976, made by I.M.C. Fernando, Licensed Surveyor, marked as 'P1'. The Plaintiff-Appellant further claimed that the said land was resurveyed by the same Licensed Surveyor, I.M.C. Fernando, and based on the said resurvey which amalgamated Lots 5 and 6 of Plan No. MF 46/76, the Plaintiff sought a declaration that she is entitled to Lots 1, 2, 3 and 4 in the resurveyed Plan No. 2055 dated 07/10/2001, 'P4' (marked subject to proof). Accordingly, the District Court was called upon to declare the rights of the Plaintiff-Appellant based on the Resurveyed Plan No. 2055.

The Plaintiff-Appellant contends that the Defendant-Respondent forcibly encroached upon the said Lots 5 and 6 in Plan No. MF 46/76, which were later depicted as Lots 1, 2, 3 and 4 in Plan No. 2055. The Plaintiff-Appellant alleges that the Defendant-Respondent is constructing a toilet in the encroached land and has caused damage to her land.

When this matter came up before the trial court, at the request of the Defendant-Respondent, the court appointed Surveyor S. Rasappah, who prepared Plan No. 424/2006 dated 18/08/2006, marked as 'X', and the Surveyor's Report marked as 'X1'. Both parties relied on the said Plan No. 424/2006 and the said Surveyor Report.

Surveyor Rasappah in his evidence stated that Plan 'X 'was prepared by superimposing Lot 4 (belonging to the Defendant-Respondent), and the said Lots 5 and 6 of Plan No. MF 46/76. Accordingly, the said Lot 4 is depicted as 4A and 4B, Lot 5 as 5A and 5B, and Lot 6 as 6A, 6B and 6C. Lot 4A is a building occupied by the Defendant-Respondent and Lot 4B is the right of way to the premises owned by the Defendant-Respondent. Lots 5A and 6A, consist of the building occupied by the Plaintiff-Appellant and Lot 5B is also made use of by the Defendant-Respondent as a right of way.

According to Surveyor Rasappah, Lot 6B is identified as the portion encroached by the Defendant-Respondent. He repeatedly stated to the trial court that he was not privy to the Resurveyed Plan No. 2055 marked 'P4', when preparing Plan 'X'.

According to the said survey report marked 'X1', the roadway depicted as Lot 5B, is used by the Defendant-Respondent without any disturbance or interruption by the Plaintiff-Appellant. The Surveyor has also observed that the permanent wall and the tin sheet wall separating Lots 6A and 6B, and the building constructed therein are over 20 years.

The Plaintiff-Appellant contends that the Defendant-Respondent has encroached upon Lot 5B, which is presently used as a roadway and the encroachment upon Lot 6B. It is in evidence that Lots 6A and 6B are separated by a permanent wall and a tin sheet fence which extends up to the disputed toilet used by the Defendant-Respondent.

The Plaintiff-Appellant did not call into question Surveyor Rasappah's assertion based on experience, that the said wall was in place for over 20 years nor placed any evidence to the contrary. The Plaintiff-Appellant also did not question the surveyor on the alleged encroachment to Lot 6B, which is used as a roadway by the Defendant-Respondent.

The Plaintiff-Appellant in her evidence admitted that the said wall demarcated the boundaries of the land owned by the respective parties and that the said wall was constructed by the Defendant-Respondent. Answering a question posed by Court, the Plaintiff-Appellant stated that she cannot remember the period when the tin sheet wall was constructed, however, at a later stage stated that the wall was constructed after 1995. The Plaintiff-Appellant did not place any further evidence to substantiate the said claim nor put in issue the encroachment to Lot No. 6B, used as a roadway by the Defendant-Respondent.

The Defendant-Respondent's position in brief is that she resides in the said premises since 1971 and the said wall existed prior to 1983 as a timber plank wall and thereafter, the present wall was constructed around 1984. Whilst admitting that Lots 5 and 6 in

Plan marked 'P1' belong to the Plaintiff-Appellant, the Defendant-Respondent completely disassociated herself with any knowledge of the existence of Plan No. 2055 or to the veracity of the boundaries depicted therein. Before parting with her cross examination, the learned Counsel for the Plaintiff-Appellant suggested to the Defendant-Respondent that Lots 5 and 6 (clearly in reference to Plan No. MF 46/76) belong to the Plaintiff-Appellant, to which the Defendant-Respondent answered in the affirmative. An issue raised by the Defendant-Respondent to establish uninterrupted possession of the toilet situated in the northern part of Lot 4 in Plan No. 46/76 shown as Lots 2, 3 and 4 of Plan No. 2055, for over 30 years, was decided in favor of the Defendant-Respondent.

The dispute between the parties to this action clearly arise from the boundaries to the land and premises depicted in Plan No. 2055. The Defendant-Respondent did not dispute the boundaries of the land and premises marked Lots 5 and 6 depicted in Plan No. MF 46/76 and accordingly, the trial court held that the Plaintiff-Appellant was entitled to Lots 5 and 6 in the said Plan No. MF 46/76.

As stated earlier, the Plaintiff-Appellant relied on Plan No. 2055 made by I.M.C. Fernando, Licensed Surveyor marked 'P4', for relief as prayed for. Surveyor I.M.C. Fernando was deceased at the time this case came up for trial and a survey report in respect of the said Plan No. 2055 is also not part of the record.

In the said Judgment dated 16/01/2009 in case No. D.C. Colombo 20654/L, the learned Additional District Judge *inter alia* held,

1) that the said Plan No. 2055 remains a document that has not been duly proved by the Plaintiff-Appellant,
2) that the land occupied by the Defendant is enclosed by a permanent wall and Tin roofing sheets for a period of over 20 years,
3) that no forced entry to the Plaintiff's land by the Defendant has been revealed in evidence.

The Court held that the Plaintiff-Appellant's claim that the Defendant-Respondent has encroached Lot 6 was not proved and accordingly, dismissed the action of the Plaintiff-Appellant.

As stated earlier, in its Judgment dated 22/08/2014, the Appellate Court *inter alia*, considered the undisturbed and uninterrupted possession of the Defendant-Respondent of the relevant Lots Based on Plan No. 424/2006 made by Rasappah Licensed Surveyor, the Appellate Court *inter alia*, held that the subdivided lot 5B is presently used by the Defendant-Respondent as a right of way and the subdivided lot 6B remains a part of the Defendant-Respondent's land attached to Lot No. 4.

The Appellate Court further held that;

"The very important factor reveals from the Surveyor's Report is that the said subdivided Lots 6A and 6B are partitioned and separated by the said permanent wall and the galvanized sheet fence and the said fence and wall runs up to the place where the defendant's latrine is situated. In terms of said plan and report the subdivided lots 5B and 6B are within the possession of the defendant" and declared that *"the defendant has prescribed to the sole possession of subdivided lots marked 4A, 4B, 5B and 6B in the said plan marked X".*

With regard to Plan No 2055, the Appellate Court, whilst commenting that it remains a document that has not been duly proved, stated that *"Plan Bearing No. 2055 does not show a latrine and a kitchen alleged to have been built by the Defendant in the Plaintiff's land".*

The Appellate Court, affirmed the Judgment of the learned trial Judge and dismissed the appeal with costs.

In this regard, it is observed that-

a) the Plaintiff-Appellant filed this action seeking a declaration that the Plaintiff-Appellant is entitled to Lots 1, 2, 3 and 4 depicted in Plan No. 2055 and a further declaration that the Defendant-Respondent is not entitled to the said land;
b) Plan No. 2055, dated 07/10/2001 was made by I. M. C. Fernando, the same surveyor who made the Original Plan No M.F. 46/76 dated 06/08/1976;
c) as commented upon earlier in this Judgment, the Commission Plan No. 424/2006, made at the request of the Defendant-Respondent, established that the Defendant-Respondent had encroached on to the Plaintiff-Appellant's land;
d) both courts below were of the view that the Defendant-Respondent had encroached on the Plaintiff-Appellant's land based on the said Commission Plan No. 424/2006, however, they decided that the Defendant-Respondent was entitled to prescriptive title to the encroached land, even though any relief was not claimed by the Defendant-Respondent to that effect;
e) In his evidence before the trial court, Surveyor Rasappah clearly stated that he was unaware of the existence of the said Plan No. 2055 and did not consider the said plan when making Plan No. 424/2006;
f) Surveyor Rasappah made use of the Original Plan No. M.F. 46/76 to prepare the said Plan No. 424/2006 and not Plan No. 2055 dated 07/10/2001, on which the Plaintiff-Appellant based her claim for relief;
g) The purported encroachment by the Defendant-Respondent on the Plaintiff-Appellant's land, as reflected in the Commission Plan No. 424/2006, is based on the Original Plan No. M.F. 46/76, dated 06/08/1976, with no reference to Plan No. 2055, which the Plaintiff-Appellant relied upon;
h) Even though the Appellate Court decided on the prescriptive rights of the Defendant-Respondent, and in her favour; the Defendant-Respondent did not pray for any relief, other than the dismissal of the said action.

The Plaintiff-Appellant's relief as prayed for in the Plaint dated 02/03/2005, is based on Plan No. 2055. The Defendant-Respondent consistently disputed and rejected Plan

No. 2055 on the basis that the said plan was not duly read in evidence and that a survey report thereon is not available.

Although the Plaintiff-Appellant's relief, was based on Plan No. 2055, the Plaintiff-Appellant failed to follow due procedure according to law to establish the death of the surveyor or to call a competent witness to read the said Plan in evidence. Plan No. 2055 was never shown to the Court appointed surveyor when he visited the land and there is no reference made to the said Plan in the Commission Plan/ Report tendered in evidence. Both the trial court and the Appellate Court has referred to the said Plan No. 2055 as a document which was not duly proved.

The Plaintiff-Appellant did not place any material before this Court to negate the said stand that Plan No. 2055 was not duly proved as contended by the Counsel for the Defendant-Respondent and upheld by the courts below.

The Plaintiff-Appellant came before the trial court seeking a declaration that she is entitled to Lots 1, 2, 3 and 4 depicted in Plan No. 2055, dated 07/10/2001. Accordingly, the trial court was called upon to decide on the Plaintiff-Appellant's rights based on Plan No. 2055.

In the aforesaid circumstances, this Court is of the view that Plan No. 2055 was not adequately proved to determine the rights of the Plaintiff-Appellant.

In discussing the duties and obligations of the Plaintiff-Appellant and the Defendant-Respondent respectively, in an action for declaration of title to land, (as in this instance), reference may be made to the following cases decided by our Appellate Courts.

a) ***Menikgama Arachchige Don Ananda Vs. Kollupitiye Mahinda Sangarakkitha Thero, Viharadhipathi and Trustee, Kelaniya Raja Maha Vihara, Kelaniya- CA 908/96 F, CA minutes dated 23/04/2012***

In the course of the Judgment in this case, the Court of Appeal,

I. stated that the Plaintiff sought to vindicate his title to the subject matter of the action, to wit, the land described in schedule 2 of the Plaint, which had been pleaded by the Plaintiff was as a portion of the land more fully set out in schedule 1, and that, *"From the issues suggested by the Plaintiff, it is quite clear that the Plaintiff has not made any attempt to identify the land described in schedule 2 of the Plaint as a portion of the larger land described in schedule 1".* The Court went on to state that *"It is common knowledge that without establishing title to the larger land described in schedule 1 of the Plaint, the Plaintiff cannot succeed in establishing his title to the land described in schedule 2 of the Plaint. It is of paramount importance in an action of this nature, to identify and establish the identity of the subject matter and the title by adducing clear evidence to obtain a declaration of title and ejectment of the Defendant;"*

II. stated that *"It is trite law that the burden in a rei vindicatio action is on the plaintiff to prove ownership to the subject matter of the action. More so when the defendant is in possession of the corpus;"*

III. referred to the case of ***Dharmadasa Vs. Jayasena (1997) 3 SLR 327***, which is mentioned in, b) below;

IV. stated that the Plaintiff failed to prove that the subject matter of the action was vested in him, and that *"he had given no evidence whatsoever to prove it;"*

and allowed the appeal of the Defendant-Appellant and set aside the Judgment of the District Judge in favour of the Plaintiff-Respondent.

b) ***Dharmadasa Vs. Jayasena (Supra)*** which states in the headnote that-

"The Plaintiff sued the Defendant for a declaration of title and ejectment. The Plaintiff based his claim on a Grant from the Urban Council, Anuradhapura.

Held: in a rei vindicatio action the burden is on the Plaintiff to establish the title pleaded and relied on by him. The Defendant need not prove anything. The Grant relied on by the Plaintiff was invalid. Hence the Plaintiff has failed to establish his title."

In the course of the Judgment in this case, the Supreme Court stated that *"The Authorities unite in holding that the Plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie"*. per Macdonell C.J., at page 219, in ***De Silva Vs. Goonetilleke (1931) 32 NLR 217***. The principle was lucidly stated by Herat J. in ***Wanigaratne Vs. Juwanis Appuhamy (1964) 65 NLR 167*** in the following terms *"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. This, the plaintiff has failed to do, and his action must therefore fail."*

c) *Terrence Clinton Percival Thirunayake Vs. M George Anthony Fernando (SC Appeal No.18B of 2009) SC minutes dated 07/03/2014*

The Plaintiff instituted a rei vindicatio action in 1994, in the District Court of Kurunegala, *inter alia*, seeking a declaration of title that the Plaintiff is the owner of the land described in the second schedule to the Plaint and for an order ejecting the Defendant and his agents occupying a portion of the land. The District Judge gave Judgment, in 2001, in favour of the Plaintiff, against which the Defendant appealed to the Civil Appellate High Court.

The Civil Appellate High Court allowed the appeal and dismissed the Judgment of the District Judge on the basis that the land in dispute has not been precisely identified and the land described in the schedule to the Plaint is different in that the land is a larger land; against which order of the Civil Appellate High Court the Plaintiff filed an appeal to the Supreme Court.

In the course of the Judgment in this appeal, the Supreme Court –

I. citing the decision in ***Peiris Vs. Sinnathamby, 54 NLR 207***, stated that *"…. in a rei vindicatio action claiming a declaration of title and ejectment it is a paramount duty on the part of the petitioner (appellant in this case) to establish correct boundaries in order to identify the Corpus."* Referring to the evidence produced by the Appellant the Court stated further, *"Therefore, it is obviously clear that the Appellant has failed to produce evidence to identify the land in dispute"* and that *"this being an action rei vindicatio there is a greater and heavy burden on the part of the Appellant to prove not only that he has a dominion to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title"* and

II. agreeing with the submissions of the Counsel for the Respondent, concluded that *"……. the land in dispute has not been precisely and definitely described in the schedule to the Plaint in terms of the Law…."* dismissed the Appeal, affirming the Judgment of the Civil Appellate High Court.

In view of the above and from what has been stated earlier in this Judgment, it is clear that the Plaintiff-Appellant has failed to fulfill the obligations and duties and duly discharge the burden of proof, which is required of a Plaintiff in a rei vindicatio action, which have been described above, particularly, in regard to the establishment of the identity of the property in respect of which declarations are sought in such a rei vindicatio action and the due establishment of the title of the Plaintiff thereto.

The Defendant-Respondent has also made extensive submissions in this regard, in the written submissions dated 03/07/2015 and 17/03/2023 filed in this Court, that the reliefs sought by the Plaintiff-Appellant are untenable in Law, with which I agree.

In the circumstances, this Court is of the view that, in deciding on this Appeal, the three questions on which leave to appeal to this Court have been granted and which have

been quoted earlier in this Judgment need not be considered and, with respect, I answer such three questions accordingly.

For these reasons, the Judgment dated 16/01/2009 of the Additional District Judge and the Judgment dated 22/08/2014 of the Appellate Court are hereby affirmed and this Appeal is dismissed. No order for Costs.

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

Arjuna Obeyesekere, J

I agree

Judge of the Supreme Court