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

In the matter of an Appeal in terms of Article 127(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 5(C) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006

SC Appeal No: 141/2012

SC. HCCA.LA No. 168/2011.

CP/HCCA/Kandy/125/2008(F).

D.C. Matale No. 5463/L

Abekoon Mudiyanselage Seelawathie Kumarihamy of
Yapa Niwasa, Millawana,
Matale.
Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of
Yapa Niwasa, Millawana,
Matale.

PLAINTIFF

-VS-

Galakumburegedara Wijerathna of
Madagama,
Millawana,
Matale.

DEFENDANT

AND BETWEEN

Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana,
Matale.

Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of

Yapa Niwasa, Millawana,
Matale.

PLAINTIFF -APPELLANT

-VS-

Galakumburegedara Wijerathna of Madagama,
Millawana,
Matale.

DEFENDANT -RESPONDENT

AND NOW BETWEEN

Abekoon Mudiyanselage Seelawathie Kumarihamy of Yapa Niwasa, Millawana,
Matale.

Through her Power of Attorney Holder Yapa Mudiyanselage Chandana Yapa Bandara of Yapa Niwasa, Millawana,
Matale.

PLAINTIFF -APPELLANT-

APPELLANT

-VS-

Galakumburegedara Wijerathna of

Madagama,

Millawana,

Matale.

DEFENDANT -RESPONDENT-

RESPONDENT

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ.**

S. THURAIRAJA, PC, J.

YASANTHA KODAGODA, PC, J.

COUNSEL : Rohan Sahabandu, PC with Nathasha Fernando for the Plaintiff-Appellant-Appellant.

Amarasiri Panditharatne with Thushani Machado and Laknath Pieris for the Defendant-Respondent-Respondent.

ARGUED ON: 09th March 2022.

WRITTEN SUBMISSIONS: Plaintiff- Appellant -Appellant on 2nd September 2019 and 30th March 2022.

Defendant- Respondent- Respondent on 22nd of July 2019 and 27th April 2022.

DECIDED ON: 29th February 2024

S. THURAIRAJA, PC, J.

The Background of the Case

The Plaintiff-Appellant-Appellant, Abekoon Mudiyanselage Seelawathie Kumarihamy, (hereinafter referred to as the 'Plaintiff' or 'Appellant', as appropriate) instituted action in the District Court of Matale by Plaint dated 30.06.2000 seeking to vindicate her title against the Defendant-Respondent-Respondent, Galakumburegedara Wijerathna (hereinafter referred to as the 'Defendant' or 'Respondent', as appropriate) to a land called "Alawatta" aliases "Alawattehena" and "Medalanda" (in extent of A1-R1-P16), described in the schedule to the Plaint, for the ejectment of the Defendant-Respondent-Respondent and for damages.

The Plaintiff-Appellant-Appellant stated by her Plaint that she became the owner of the disputed corpus by Deed of Transfer bearing No. 73 dated 25.06.1996 attested by C. S. Wijeyratne Notary Public and her husband Yapa Mudiyanselage Agrapala was the transferor.

In establishing this position, the Plaintiff-Appellant-Appellant traced her title and pleaded that the land originally belonged to the State. She stated that in terms of the *Land Settlement Ordinance,* it was settled to one Jayawardena on 25.10.1941 and that the said Jayawardena came into possession of the land described in the Schedule to the Plaint. The corpus was shown as Lot 918 in the Surveyor General's Final Village Plan (FVP) No. 72, showing an extent of A1-R1-P16. It was the position of the Plaintiff-Appellant-Appellant that the said Jayawardena possessed the land in question and by Deed No.12703 dated 18.01.1946, he transferred same to Loku Manike. Subsequently, Loku Manike had transferred the corpus to the Plaintiff's Husband, Agrapala, by Deed No.1030 dated 24.7.1974. The Plaintiff-Appellant-Appellant stated that the said Agrapala then sold it to the Plaintiff-Appellant-Appellant by Deed of Transfer No.73 dated 25.7.1996 as stated above.

It was the position of the Plaintiff-Appellant-Appellant that she was in possession of the land in question and the Defendant-Respondent-Respondent had come to occupy the land as a servant of her Husband. She states that after she became the owner of the land, the Defendant-Respondent-Respondent continued to be in possession of the land as a servant of the Plaintiff-Appellant-Appellant. She mentions that following the termination of the services of the Defendant-Respondent-Respondent, he has been living in the land with the leave and license of the Plaintiff-Appellant-Appellant.

The Plaintiff-Appellant-Appellant states that the Defendant-Respondent-Respondent, on or about 14.01.2000, had disputed the rights of the Plaintiff-Appellant-Appellant and thereafter the matter had been referred to the Magistrate Court and the said case bearing No. 3331 was pending at the time of the filing of the Plaint. It is the position of the Plaintiff-Appellant-Appellant that she sent a notice dated 24.04.2000 through her Attorney-at-Law informing the Defendant-Respondent-Respondent that she had terminated the leave and license given to him and requesting him to vacate the premises on or before 31.05.2000 and hand over vacant possession of the land to the Plaintiff-Appellant-Appellant.

It was the position of the Plaintiff-Appellant-Appellant that, in spite of the said notice, the Defendant-Respondent-Respondent continued to be in possession of the land and that due to the notice, the said possession is illegal from 01.06.2000. In the circumstances, the Plaintiff-Appellant-Appellant sought a declaration that she is the owner of the land in dispute and to eject the Defendant-Respondent-Respondent and his agents therefrom. The Plaintiff-Appellant-Appellant further sought damages of Rs.3000/- per month from 01.06.2000 until the possession of the land is handed over. In addition to the above, the Plaintiff-Appellant-Appellant further claimed prescriptive rights to the land.

The Defendant-Respondent-Respondent thereafter tendered his answer denying the averments in the Plaint stating *inter alia* that the Plaintiff-Appellant-Appellant and her predecessor in title have never been in possession of the land, while the Defendant-

Respondent-Respondent has acquired prescriptive rights by being in possession of the land for more than 35 years. Further, the Defendant-Respondent-Respondent stated that he was never a servant of the Plaintiff-Appellant-Appellant and/or her predecessor in title and that he is not living in the land with leave and license of the Plaintiff-Appellant-Appellant.

In the circumstances, it was the position of the Defendant-Respondent-Respondent that no cause of action has accrued to the Plaintiff-Appellant-Appellant. The Defendant-Respondent-Respondent sought dismissal of the Plaint and sought a commission to prepare a Plan to show the area of land possessed by him and further, in his claim in reconvention, sought a declaration that he has acquired prescriptive rights to the land in dispute. The Defendant-Respondent-Respondent further claimed the improvements he has made to the land worth Rs. 500,000/-.

After the trial, the learned Judge of the District Court dismissed the action of the Plaintiff-Appellant-Appellant subject to cost. The learned District Judge further held that the Defendant-Respondent-Respondent was a licensee of the Plaintiff-Appellant-Appellant and entered the judgment accordingly dismissing the Defendant-Respondent-Respondent's claim in reconvention.

Thus, the Plaintiff-Appellant-Appellant had preferred an appeal to the Provincial High Court of the Central Province (Civil Appeals) holden in Kandy. The learned High Court Judges delivered the judgment on 21.04.2011 dismissing the action based on the non-identification of the land.

Being aggrieved by the judgment of the High Court, the Plaintiff-Appellant-Appellant has filed a Petition dated 30.05.2011 before this Court, and leave was granted on 03.08.2012 on the following questions of law referred to in paragraph 16 of the Petition as follows:

16. *I. Was the identification of the corpus an issue in the present case?*

II. In any event is there sufficient evidence adduced to identify the corpus?

III. *Did the High Court and the District Court err in law in not appreciating that the burden of proof that was shifted to the defendant was not discharged by him?*

IV. *In the circumstances are the judgments of the learned District Judge and the High Court according to law and according to the evidence adduced in the case?*

Analysis

Issue No. 6, 7 and 8 raised before the District Court of Matale specifically dealt with the question of license and termination of license and the same were answered affirmatively, in favour of the Plaintiff. In effect, the learned Judge in his judgment holds that the Defendant is a licensee by answering issue No. 6 as pleaded by the Plaintiff. Said Issue No. 6 is as follows,

6. චිත්තිකරු මෙම පැමිණිලිකාරියගේ සහ ඇයගේ පූර්වගාමීන්ගේ සේවකයෙකු වශයෙන් මෙම පැමිණිල්ලේ උපලේඛණ ගත දේපලේ පදිංචිව සිටියේද?

[6. Was the defendant residing in the property described in the schedule to the plaint as a servant of the plaintiff and her predecessors?]

[An approximate translation added]

Further, Issues No. 10 and 14 of the District Court were specifically in relation to prescription as follows:

10. චිත්තිකරුට මෙම නඩුවේ විෂය වස්තු වන දේපල සම්බන්ධයෙන් කිසිඳු නීත්‍යානුකූල අයිතියක් නොමැතිද?

[10. Does the defendant have no legal right to the property which is the subject matter of this suit?]

....

14. නඩුවට විෂය වූ දේපල විත්තිකරු හා ඔහුගේ පූර්වගාමීන් විසින් පුරා 10 වසරකට අධික කාලයක් අබාණ්ඩව, නිරවුල්ව, අන් අයගේ අයිතිවාසිකම් වලට ප්‍රතිකූලව බුක්ති විඳ තිබේද?

[14. Have the defendant and his predecessors enjoyed possession of the property that is the subject matter of the case for more than 10 years prior in an uninterrupted, undisturbed manner, contrary to the rights of others over the land?]

[An approximate translation added]

In answering the aforementioned Issues No. 10 and 14, it was held that Defendant had not shown his prescriptive rights to the land in question.

I must note that despite a claim based on prescriptive rights being raised as enumerated above in the lower courts, it is unnecessary to decide whether the learned District Judge has duly evaluated the evidence on the question of prescription as the issue of prescription has not been raised as a substantive question of law before this Court when this matter was considered for granting of leave. Therefore, I do not wish to go into this question in depth, nor do I wish to disturb the findings of the lower courts.

Having decided the issues as to the prescriptive rights of the Defendant, the learned Judge nevertheless **dismissed the Plaintiff's action on the sole basis that the Plaintiff did not identify the land.**

At the very outset, it was submitted that Defendant-Respondent-Respondent sought the position that the instant matter is a *rei-vindicatio* action and that Plaintiff has not proved the essential requisites in a *rei-vindicatio* action. It was submitted that both the District Court and Provincial High Court of the Central Province have held that the identity of the corpus has been not established and it must be dismissed.

When this matter was argued before this Court, the Court inquired as to whether this is a *rei vindicatio* action or an action based on a licensee. Counsel for the Plaintiff-

Appellant-Appellant submitted that the Plaintiff comes to Court on the basis that the Defendant is her licensee who has acted in violation of her rights as the Defendant has not vacated and given vacant possession when the said license was terminated.

Moreover, as per paragraphs 9, 10, 11, 12, 14, 15, 16 and 17 of the Plaint, the Plaintiff stated that the Defendant worked on the land as a lessee and that he looked after the property while residing in the building constructed on the said land by her family. The Plaintiff by producing P16, P17 and P18 (payment receipts of money for plucking coconuts), submitted that the Defendant had worked for her family for a long time. The documents were produced to show the relationship that the Defendant had in 1981, 1982 and 1983 with one Agrapala who became the owner in 1974. It was submitted that the said Agrapala is the predecessor in title of the Plaintiff and the Plaintiff became entitled to the land in 1996 by virtue of the Deed marked P15.

The Defendant did not lodge a cross-appeal at the High Court on the issue of Prescription and license which were held against him by the learned District Judge; nor has he raised a question of law before this Court on the issue of Prescription. Furthermore, at the trial, the Plaintiff's title deeds were marked and accepted without challenge and it was proven that the Plaintiff has sufficient title over the land in question.

As such, no question with regard to prescription arises in the instant Appeal before this court as I have already noted and the findings of the learned District Judge as to the prescriptive title of the Defendant need not be disturbed at this stage.

The questions of law set out in this case directly relate to the dismissal of the Plaintiff's action by the learned District Judge, which as I noted previously, was done on the sole basis that the Plaintiff did not identify the land.

It is indeed true that in a *rei vindicatio* action, a Plaintiff is saddled with the burden of identifying the property as well as proving his/her entitlement thereto. As it was held in ***Wanigaratne v. Juwanis Appuhamy*** **(1962) 65 NLR 167**,

> "*it is trite law that Plaintiff should set out his title on the basis on which he claims a declaration of title to the land. The burden rests on the Plaintiff to prove that title*".

Further, in ***Jamaldeen Abdul Latheef and v. Abdul Majeed Mohamed Mansoor and Another*** **(2010) 2 SLR 333** it was held as follows;

> *"It is trite law that the identity of the property with respect to which a vindicatory action is instituted is a fundamental to the success of the action as the proof of the ownership (dominion) of the owner (dominus). Where the property sought to be vindicated consists of a land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method."*

As enumerated above, to succeed in a *rei vindicatio* action, the owner must prove on a balance of probabilities, not only his or her ownership in the property but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment. This exact position has been stressed in ***Jamaldeen Abdul Latheef and v. Abdul Majeed Mohamed Mansoor and Another*** (supra) as follows;

> *"In a rei vindicatio action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated, the action ought to be dismissed without more."*
>
> *"An important feature of the action rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title. To succeed in an action rei vindicatio, the owner must prove on a balance of probabilities, not only*

his or her ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment."

However, if the subject matter is admitted, no further proof of the identity of the corpus is required, for no party is burdened with adducing further proof of a fact admitted. Similarly, where a Defendant does not object to the subject matter as identified by the Plaintiff and proceeds on the Plaintiff's identification, that would be tantamount to an admission as to the identification of the subject matter.

The identification of the land was not in dispute at the original trial. The Defendant in paras 10 and 11 of the answer identified the land where he claimed that he acquired prescriptive title to "මෙම නඩුවට අදාළ දේපල *[the property subject to this action]*". It is apparent that the Defendant had no difficulty in identifying the land nor did he have any objections to the Plaintiff's identification of the property. How can one claim title to that which had not been identified? If the land was not identified by the Plaintiff, the Defendant could not have claimed prescriptive title thereto.

Furthermore, if there were any questions as to the identification of the land, the Defendant could have raised Issues to that effect. *Per contra,* the Defendant's 14th Issue is "නඩුවට විෂය වූ දේපල විත්තිකරු හා ඔහුගේ පූර්වගාමීන් විසින් පුරා 10 වසරකට අධික කාලයක් අඛණ්ඩව, නිරවුල්ව ආණ්ඩ අයගේ අයිතිවාසිකම් වලට ප්‍රතිකූලව භුක්ති විඳ තිබෙද?" If there was a problem as to the identification of the land, the Defendant would not have raised such an issue.

In testimonial evidence, too, the Defendant did not question the identification of land. In evidence-in-chief itself, at page 193 of the brief, he said that the case has been filed "නඩුවට අදාළ දේපලින් මාව ඉවත් කිරීමට". The evidence of the Defendant's wife was also to like effect. At no point did they question the identification of the land.

In light of the foregoing, it is clear that the identification of the corpus was not an issue in the instant case. Therefore, I answer the first question of law in the negative. Answering the first question of law negatively, I find that the second question of law—which questions whether, in any event, there is sufficient evidence adduced to identify the corpus—has no bearing on the case for the identification of land was not disputed at the District Court. For this reason, I see no need to answer the second question of law.

The third question of law raised by the Appellant was "Did the High Court and the District Court err in law in not appreciating that the burden of proof that was shifted to the defendant was not discharged by him?"

The question of law on its own is too ambiguous and does not sufficiently indicate the onus it is in reference to. However, it appears from the Petition dated 30.05.2011 of the Appellant that it is with reference to the onus on the Defendant of proving superior title once the paper title is proved by the Plaintiff.

It is perplexing why the Plaintiff-Appellant-Appellant raised this question of law, seeing as the learned District Judge has held in favour of the Plaintiff, having considered the Defendant's claim of prescriptive title from pages 20-24 of the Judgment dated 12.03.2008 (pages 298-302 of the brief). The Judgment of the High Court does not disturb this finding as the Defendant had not filed a cross appeal regarding the same. Therefore, the third question of law is answered in the negative. However, this need not disturb the outcome of the instant appeal.

Finally, the fourth question of law, i.e., whether, in the circumstances, the judgments of the learned District Judge and the High Court are according to law and according to the evidence adduced in the case, have to be answered negatively in light of the answer to the first question of law.

Conclusion of the Court

I am of the view that the learned trial Judge had correctly come to the conclusion when he concluded that the Plaintiff-Appellant-Appellant had established the contractual relationship between Plaintiff and Defendant in rejecting the Defendant's claim on prescriptive title. However, the learned Judge has committed a serious error in dismissing the Plaintiff's action on the basis that he failed to identify the land when the identification of the land was not in question. The learned Judge of the High Court, too, has failed to duly appraise this element.

Hence, I am of the view that the judgment entered in the High Court of Civil Appeal dismissing the appeal of the Plaintiff-Appellant-Appellant is incorrect in law and in fact. In these circumstances, I find merit in this application and accordingly allow this Appeal.

I direct the learned District Court Judge to enter the judgment for the Plaintiff as prayed for in paras (a) and (b) of the prayer to the plaint.

The Plaintiff is entitled to costs.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ.

I agree

CHIEF JUSTICE

YASANTHA KODAGODA, PC, J.

I agree

JUDGE OF THE SUPREME COURT