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

Naomi Leela Elizabeth Perera,

No.17, Mendis Mawatha,

Moratuwa.

PLAINTIFF

SC Appeal 87/2017

SC.HC.CA.LA NO. 345/2016

WP/HCCA/COL/No. 327/2008(F)

D.C.Colombo Case No.18887/L

-Vs-

J.W.C. Hemamali Botheju Vithanage,

No.31, Kotuwegoda,

Rajagiriya.

DEFENDANT

AND

J.W.C. Hemamali Botheju Vithanage,

No.31, Kotuwegoda,

Rajagiriya.

DEFENDANT-APPELLANT

-Vs-

Naomi Leela Elizabeth Perera,

No.17, Mendis Mawatha,

Moratuwa.

PLAINTIFF-RESPONDENT

AND NOW

Naomi Leela Elizabeth Perera,

No.17, Mendis Mawatha,

Moratuwa.

PLAINTIFF-RESPONDENT-

PETITIONER-APPELLANT

-Vs-

J.W.C. Hemamali Botheju Vithanage,

No.31, Kotuwegoda,

Rajagiriya.

Presently of No. 95/39,

Donald Obeysekera Mawatha,

Rajagiriya Road, Rajagitiya.

DEFENDANT-APPELLANT-

RESPONDENT-RESPONDENT

Before: Sisira. J. de Abrew J
Kumudini Wickramasinghe J &
Janak de Silva J

Counsel: Palitha Kumarasinghe President's Counsel

With Asanka Ranasinghe for the Plaintiff-Respondent-

Petitioner-Appellant

Dr. Jayatissa de Costa President's Counsel with Wijerathne Hewage

for the Defendant-Appellant-Respondent-Respondent

Argued on : 15.2.2021

Decided on: 25.3.2021

Sisira. J. de Abrew J

The Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff- Appellant) filed case Number 18887/L in the District Court of Colombo against the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) seeking, inter alia, a declaration that he (the Plaintiff-Appellant) is the owner of the property described in the schedule to the plaint (hereinafter referred to as the property in question) and ejectment of the Defendant-Respondent and his agents from the said property and to keep the Plaintiff-Appellant in the vacant possession of the said property.

After trial the learned District Judge by his judgment dated 5.12.2008 granted relief claimed by the Plaintiff-Appellant in his plaint. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 6.6.2016, set aside the judgment of the learned District Judge dismissing the action of the Plaintiff-Appellant and declaring that the Defendant-Respondent is the owner of the property in question. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 2.5.2017, granted leave to appeal on questions of law set out in paragraph 18 of the Petition of Appeal dated 14.7.2016 which are set out below.

1. Did the Civil Appellate High Court err in law ignoring the effect of such Admission in holding that the Respondent has meant to be admitted was only the fact of execution of the Deed of Gift No.1161 dated 18th May 1990 by recording Admission No.1 when there is no such claim by the Respondent in evidence or any other pleading?

2. Did the Civil Appellate High Court err in holding that J.W.T.M.P. Vithanage nee Botheju (the mother of the Respondent) has acquired prescriptive right to the land by commencing the adverse possession from September 1977, in the circumstances of this case?

3. Did the Civil Appellate High Court err in entering a judgment in favour of the Respondent and allowing her appeal when there is no issue on prescription, when the Answer of the Respondent is on the basis that the

prescriptive possession commenced 30 years prior to the institution of this action and when there is no cogent evidence of prescriptive title to defeat the title of the Petitioner who became the owner by a Final Partition Decree?

4. Did the Civil Appellate High Court err in law holding that J.W.T.M.P. Vithanage nee Botheju (the mother of the Respondent) had a valid title to convey the Respondent by Deed of Gift No.1161 dated 18th May 1990 attested by N. Chelliah, Notary Public marked "V4"?

Since the Plaintiff-Appellant sought a declaration of title to the property in question, the burden of proof is on him to prove that he is the owner of the property. This view is supported by judicial decision in the case of D.A.Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 wherein this court held that in action rei vindication the plaintiff must prove and establish his title.

In the case of Dharmadasa Vs Jayasena [1997] 3 SLR 327 this court at page 330 held that in a rei vindicatio action the burden is clearly on the plaintiff to establish the title pleaded and relied on by him.

In the case of Pathiran Vs Jayasundera 58 NLR 169 wherein His Lordship Gratiaen J at page 172, held that 'in rei vindicatio action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.'

In Peiris Vs Savunahamy 54 NLR 207 it was held that 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 the case of De Silva Vs Goonetileke 32 NLR 217 Macldonell CJ at page 219 held that "there is abundant authority that a party claiming a declaration of title must have title himself."

In the case of Jamaldeen Abdul Lathiff Vs Abdul Majeed Mohamad [2010] 2 SLR 333 this court held that 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.

Considering the above legal literature, I hold that in a rei vindicatio action the plaintiff must establish that he is the owner of the property.

I will now consider whether the Plaintiff-Appellant has proved his title to the property in question. In DC Colombo case No.11215/P which was a partition case, the 20th Defendant Neemi Leela Elizabath Perera who is the Plaintiff-Appellant in this case was allocated Lot No 12 in Plan No.1524 A dated 20.11.1970 made by A.R.Dias Abeygunawardena Licensed Surveyor which is the Final Partition Plan in DC Colombo partition case No 11215/P. This is established by Final Decree in DC Colombo case No.11215/P marked as P23 in the trial in this case. This lot No 12 is the property described in the plaint. Therefore, the Plaintiff-Appellant has proved that she is the owner of the property in question. In an action for rei vindicatio, once the plaintiff established that he is the owner of the property in question, the burden shifts to the defendant to prove that his possession of the land is legal or he possesses the land on a legal basis. This view is supported by the judicial decision of the Privy Council in the case of Siyaneris Vs Jayasinghege Udenis Silva 52 NLR 289 wherein the Privy Council held that in an action for declaration of tile 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.

It has to be noted here that the mother of the Defendant-Respondent Jayawardena Welathanthrige Thelma Manel Phylis Vithanage was the 18th defendant in the said partition case No.11215/P and no share was allocated to her in the partition case. This is clear when the Final Decree in DC Colombo case No.11215/P marked as P23 is examined. The date of the decree of the said partition case is 14.9.1977. The Defendant-Respondent in her answer [paragraph 8(a)] filed in the District Court takes up the position that her mother was in possession of the property in question for a period of thirty years prior to this action being filed. The action in this case was filed on 12.5.2000. If the paragraph 8(a) of the answer of the Defendant-Respondent is true, then her mother had been in possession of the property in question from 1970 onwards. The date of the decree of the said partition case is 14.9.1977. But the mother of the Defendant-Respondent was allocated no share in the partition case. This establishes that prescription claimed by the mother of the Defendant-Respondent had not been proved and is a false claim. The Defendant-Respondent in her answer claims prescription on the basis of her mother's claim for prescription. Since the Defendant-Respondent's mother's claim for prescription had not been proved and is a false claim, her (Defendant-Respondent) claim for prescription has not been established. For the above reasons, I hold that the Defendant-Respondent has not established prescription to the property in question. The learned Judges of the Civil Appellate High Court have concluded that the mother of the Defendant-Respondent had acquired title to the property in question by prescription. I have earlier pointed out that the claim of the Defendant-Respondent for prescription on the basis of her mother's claim for prescription had not been established. For the above reasons, I hold that the conclusion of the learned Judgers of the Civil Appellate High Court is wrong. On this ground alone the judgment of the Civil Appellate High Court should be set aside.

The mother of the Defendant-Respondent, by Deed No.1161 dated 18.5.1990 marked V4 attested by Nagarajah Chelliah had transferred several allotments of land inclusive of Lot 11 and 12 of Plan No. 1524A dated 20.11.1970 made by A.R.Dias Abeygunawardena Licensed Surveyor which is the Final Partition Plan in DC Colombo partition case No 11215/P to the Defendant-Respondent. The learned Judges of the Civil Appellate High Court in their judgment dated 6.6.2016 concluded that the mother of the Defendant-Respondent had a valid title (on the basis of prescription) to convey the property to the Defendant-Respondent. I have earlier pointed out that the claim of the Defendant-Respondent for prescription on the basis of her mother's claim for prescription had not been established. Further I have pointed out earlier that the Defendant-Respondent's mother's claim for prescription had not been proved and is a false claim. The learned Judges of the Civil Appellate High Court by the said judgment declared that the Defendant-Respondent was the owner of the property in question. But the learned Judges of the Civil Appellate High Court have failed to appreciate the fact that mother of the Defendant-Respondent was not given any share in the said partition case where she was the 18th Defendant although she (the mother of the Defendant-Respondent) claimed prescription to the property in question.

When I consider all the above matters, I hold that the mother of the Defendant-Respondent did not have any title to the property in question to convey the property in question to her daughter who is the Defendant-Respondent.

There was no issue raised in the present case with regard to the prescription. But the learned Judges of the Civil Appellate High Court decided the case in favour of the Defendant-Respondent on the basis of prescription. Can a court of law decide to give title of property in suit on the basis of prescription without an issue being

raised on prescription? At this juncture I would like to consider the following judicial decisions. In the case of Haniffa Vs Nallamma [1998] 1 SLR 73 at page 77 His Lordship GPS de Silva CJ held as follows.

"What is relevant for present purposes and what needs to be stressed is that once issues are framed, the case which the court has to hear and determine become crystallized in the issues. It is the duty of the court "to record the issues on which the right decision of the case appears to the court to depend" (section 146 (2) of the Civil Procedure Code). Since the case is not tried on the pleadings, once issues are raised and accepted by the court the pleadings recede to the background. The Court of Appeal was in error in harking back to the pleadings and focusing on the "validity" and the "legality" of the pleadings."

If a party in action fails to raise an issue on prescription at the trial, his failure shows that he does not depend on prescription. In such a situation it is not correct for the court to give title of the property in suit on the basis of prescription. It has to be noted here that the Defendant-Respondent did not raise an issue in this case on prescription. But The learned Judges of the Civil Appellate High Court have concluded that the mother of the Defendant-Respondent had acquired title to the property in question by prescription. I have earlier pointed out that the claim of the Defendant-Respondent for prescription had not been established. In my view, court cannot decide to give title of the property in suit on the basis of prescription without an issue on prescription.

The Defendant-Respondent at page 286 of the brief admitted in evidence that she even did not know the boundaries of the land in question. When it was suggested to the Defendant-Respondent that she has no any title to the land in question, she said that she did not know about it (page 287 of the brief). The above evidence

shows that her claim for prescription to the property in question could not be accepted.

For the aforementioned reasons, I hold that the learned Judges of the Civil Appellate High Court were wrong when they decided the case in favour the Defendant-Respondent. I hold that the learned District Judge was correct when he decided the case in favour of the Plaintiff-Appellant.

For the above reasons, I set aside the judgment of the Civil Appellate High Court dated 6.6.2016 and affirm the judgment of the learned District Judge dated 5.12.2008.

In view of the conclusion reached above, I answer the 2nd,3rd and 4th questions of law in the affirmative. The 1st question of law does not arise for consideration.

The Plaintiff-Appellant is entitled to costs in all three courts.

Appeal allowed.

Judge of the Supreme Court.

Kumudini Wickramasinghe J

I agree.

Judge of the Supreme Court.

Janak de Silva J

I agree.

Judge of the Supreme Court.