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

In the matter of an application for Leave to Appeal from the Judgment of the Civil Appeal High Court of Ratnapura dated 19.01.2010.

Omatte Thilakaratne Mudiyanse
Ralahamillage Wilfred Bandara Kalawana
of Thilakaratne Walawwa, Kalawana.

Plaintiff

SC Application No. 78/2010
SC(HCCA) LA No. 44/2010
HCCA (Rat) case No. 165/07
DC Ratnapura Case No. 8612/L

Vs.

1. Sirisena Nawalage,
   Near the Post Office, Kalawana

2 O.T.M.R.U. Bandara Kalawana
  Dolehena, Kalawana

Defendants

AND BETWEEN

Omatte Thilakaratne Mudiyanse
Ralahamillage Wilfred Bandara Kalawana
of Thilakaratne Walawwa, Kalawana.

Plaintiff-Appellant

Vs.

1. Sirisena Nawalage, Near the Post Office, Kalawana

2. O.T.M.R.U. Bandara Kalawana
   Dolehena, Kalawana

Defendants-Respondents

AND NOW BETWEEN

1. Sirisena Nawalage, Near the Post Office, Kalawana

1st Defendant-Respondent-Petitioner

Vs.

1. Omatte Thilakaratne Mudiyanse Ralahamillage Wilfred Bandara Kalawana of Thilakaratne Walawwa, Kalawana.

Plaintiff-Appellant-Respondent

2. O.T.M.R.U. Bandara Kalawana Dolehena, Kalawana

2nd Defendants-Respondent-Respondent

BEFORE	:	HON. DR. BANADARANAYAKE, CJ. HON. EKANAYAKE, J. AND HON. PRIYASATH DEP, PC. J.
COUNSEL	:	Gamini Marapana PC with Navin Marapana and Nishanthi Mendis for the 1st Defendant – Respondent –Petitioner-Appellant. Chandana Prematthilake with Niluka Dissanayake for the Plaintiff - Appellant-Respondent – Respondent
ARGUED ON:	:	02nd August 2011.
WRITTEN SUBMISSIONS FILED ON	:	08th September 2011
DECIDED ON	**:**	31st July 2012

Justice Priyasath Dep PC

This is an appeal preferred against the judgment dated 19.01.2010 of the Provincial High Court of Sabaragamuwa holden at Ratnapura by which the judgment of the District Court of Ratnapura dismissing the Plaintiff's action in case No 8612/ L was set aside and the judgment was given in favour of the Plaintiff. The 1st Defendant preferred this appeal against the judgment of the High Court.

The Plaintiff Omatte Tilakaratne Mudiyanse Ralahamilage Wilfred Bandara Kalawana, instituted action in the District Court of Ratnapura bearing case No.8612/L on 23-2-1988 against Sirisena Nawalage the 1st Defendant and Omatte Tilkaratne Mudiyanse Ralahamilage Upatissa Bandara the 2nd Defendant (brother of the Plaintiff) praying for following reliefs:

a) to declare that he is the lawful owner of the land described in the scheduled to the plaint.
b) to evict the defendant and his agents, servants and employees and others from the said land
c) claiming damages in a sum of Rs. 15,000/- and monthly damages of Rs. 250/- from the date of filing of the action and to the date of the decree.
d) cost and further relief

The Plaintiff had annexed to the plaint a Pedigree and an Abstract of title. In the schedule to the plaint the Plaintiff had given a description of the land and its boundaries and the extent. The land in question is a part of the Kalawana Nindagama called Pattelle Henyaya alias Panvila Hena bounded on the North by Pattelle Athura , East by Gamsaba Road, South by a land cultivated by D.B. Kalawana (father of the Plaintiff) and on the West by Panwila Heendola and containing in extend Ten (10) acres.

According to the plaint and the Pedigree the chain of title starts from O.T.M.R. Tilakaratne Bandara Kalawana, a co-owner of Kalawana Nindagama who is the grandfather of the Plaintiff. The said Tilekarathne Bandara Kalawana gifted the land to his wife W.A.M.R. Lucy Delgoda Kalawana Kumarihamy by deed No 1601 dated 26 -01-1943.The said Lucy Delgoda Kalawana Kumarihamy by Deed No; 5569 dated 23-02-1948 transferred that property to O.T.M.R. Dingiri Banda Kalawana who is the father of the Plaintiff. The said Dingiri Banda Kalawana by deed No. 40289 dated 14.07.1970 gifted that property to her daughter O.T.M.R. Kalyanawathi, who is the sister of the Plaintiff. The said Kalyanawathi by Deed No. 652 dated 11.01.1988 transferred the property to the Plaintiff. These deeds were marked as P1-P4 and read in evidence at the trial.

The Defendants filed the answer on 12th June 1989. They stated that the land in question belongs to Kalawana Nindagama. The original owner of the said land was O.T.M.R. Mudali Lokubandara Gamaarachchi. The said Gamaarachchi had ten children. Two of them died issueless and a daughter contracted a diga marriage and thereby forfeited her

right of inheritance. Therefore seven of his children including Tilakaratne Bandara Kalwana, grandfather of the Plaintiff became co-owners of the Nindagama. The Defendants had given details of predecessors in title to the land which is different to the pedigree given by the plaintiff. The 1st defendant purchased this land on 26th August 1988 after the institution of this action from several persons who are the co-owners namely, O.T.M.R. Somarathne Bandara, Anura Premalal Samarathunge, Hector Samarasinghe, B. I. Ranaweera; These transferors are either descendents of the original co-owners who inherited shares to the land or the persons who had subsequently purchased land from such persons. 1st Defendant states that he and his predecessors in title enjoyed undisturbed and peaceful possession for more than ten years. He states that without any objections from anyone he had cut drains and planted tea in the said land. He estimates the value of the improvements in a sum of rupees 10 lakhs. He prayed that the action of the Plaintiff be dismissed. In the alternative he had pleaded that in the event of the judgment is given in favour of the Plaintiff he is entitled to compensation for improvements in a sum of Rs. 10 lakhs and remain in possession until the compensation is paid.(Jus Retentionis)

The Plaintiff filed a replication denying the averments in the answer and further stated that the Defendant is not entitled to compensation as the improvements were made not in good faith and were made unlawfully and fraudulently.

At the trial the Plaintiff raised issues 1 – 6 and the Defendant raised issues 7-14. Subsequently, Plaintiff raised issues 15-16 based on his replication.

The Plaintiff gave evidence and also called one Jayaratne from the Rubber Control Department to state that his late father Dingiri Banda Kalawana obtained a permit to plant rubber. Plaintiff states that her sister after her marriage in 1970s went to reside in Matara and continued to reside in Matara. The land in question was looked after by his father Dingiri Banda.Kalwana. His father the said Dingiri Banda Kalawana died in 1984. After the death of his father there was no one to look after the land and his brother Upatissa Banda Kalawana the 2nd Defendant claimed part of the property. He had entered into a planting agreement with the 1st Defendant Sirisena Nawalage and permitted him to cultivate three acres of land. The 1st Defendant Sirisena Nawalage entered the land and started removing rubber trees and started planting tea. The Plaintiff then sent a Letter of Demand to the 1st Defendant not to cultivate beyond 3 acres of land as he and his sister co-owns the balance 7 acres. The said letter was marked by the Defendant as 1V1.It appears that at that time the plaintiff as well as his brother the 2nd defendant were not aware of the fact that their father had gifted the land to Sister Kalyanawathi Kumaihamy in 1970.

It is the evidence of the Plaintiff that in spite of the fact that his father having donated his land to his daughter Kalyanawathi, continued to possess the land until his death in 1984. The legal owner Kalyanawathi did not show any interest to this land and had permitted his father to possess the land. Thus it is evident that the dispute arose in 1985 after the death of Dingiri Banda Kalawana.

The Plaintiff by deed no 652 dated 11-1-1988 purchased the entire 10 acres from her sister Kalyanawathi. Thereafter he sent a letter 1V2 claiming that he is the lawful owner of 10 acres of land and requested the Defendant to vacate the land. As the defendant failed to vacate the land and hand over the peaceful possession, the Plaintiff instituted the present action.

The learned District Judge in his brief judgment dismissed the Plaintiff's action. He also answered issues No. 8 and 9 of the Defendant in the negative.

The Learned District Judge dealing with the cross claim of the Defendant held that the Defendant did not prove his title. The Defendant was not awarded compensation for the improvements. The learned District Judge further held that the land in question belongs to seven co-owners and Plaintiff's predecessors in title Tilekarathne Bandara Kalawana had only 1/7th share. Further he had referred to Letters of Demand sent by the Plaintiff to the Defendant and observed that those letters are contradictory of each other. (1V1 and 1V2) He had referred to the judgment in Muththusamy v Seneviratne 31 CLW 91 at page 91 and several other judgments dealing with legal principles applicable to rei vindicatio actions. He had correctly stated that in rei vindicatio actions the Plaintiff is required to establish his title and that there is no burden cast on the Defendant. The Learned District Judge dismissed the Plaintiffs action on the basis that the Plaintiff could not prove his title.

The Plaintiff appealed against this judgment of the District Judge to the High Court of Ratnapura exercising Civil Appellate jurisdiction. The parties filed written submissions and the Honorable High Court Judges in their judgment dated 19.01.2010 set aside the judgment of the District Court and allowed the appeal of the Plaintiff.

The main ground for the dismissal of the Plaintiff's action by the District Court was that the plaintiff's predecessors in title had only 1/7th portion of the land. This is on the basis that there were seven co-owners to this land. It is to be noted that Kalawana Nindagam consists of more than thousand acres. It was owned by seven co-owners including Tilakaratne Bandara.Kalawana, the grandfather of the Plaintiff. This was long prior to 1943 as evidenced by the documents filed in this case. Since then the original co-owners had died leaving behind number of heirs/successors, the exact number is not known. The Nindagm land was not partitioned. It was revealed in evidence that some of the lands forming part of the Kalawana Nindagama was acquired or vested with the State. Some of the lands were occupied by the villagers who prescribed to the land. Therefore it is unlikely that the original co-owners or their heirs continue to possess the entirety of the remainder of the Nindagam land as co-owners.The land which is the subject matter of this case consists only of 10 acres. It is the contention of the Plaintiff that the predecessor s in title of the plaintiff possess this land as a separate and distinct land prior to 1943 as evidenced by the Deed bearing Number 1601 dated 26-1-1943 marked P1.Since then this land was described with specific boundaries and extent.

The Honorable. Judges of the High Court in appeal held that the land in question was owned and possessed as distinct and separate land by predecessors in title of the Plaintiff. The Honorable Judges further held that ouster can be presumed even though the original owner is a co-owner of the aforesaid Kalawana Nindagama.

The Honorable High Court Judges referred to the case of Fernando vs. Fernando and others reported in Bar Association law Reports (2006 BLR 28). In this case Weerasuriya J having considered previous decisions of the Supreme Court stated that " It is a common occurrence that co-owners possess specific portions of land in lieu of their undivided extents in a larger corpus. This type of possession attributes to an express or classic division of family property among the heirs is sufficient to prove an ouster provided that division is regarded as binding by all the co-owners and not looked upon solely as an arrangement of convenience".

The Hon. High Court Judges having considered the Plaintiff's evidence and deeds P1 – P4 produced by the Plaintiff held that Plaintiff has sufficiently proved the title. The Defendant had taken up the position that by virtue of the deed No. 8348 executed in 1988 marked in evidence as V15 he became owner of the land and he and his predecessors in title had prescriptive title. This title deed was executed after the institution of this action. The High Court Judges as well as the District Judge correctly disregarded this deed. The Honorable Judges relied on Talagune v De Livera 1997 1SLR 253. In that case it was held that " under our code, there is no provisions which permit a Defendant to plead by way of the defense, matter arising subsequent to the institution of the action, The judgment must determine the rights of the parties on the date of the institution of the action".

The Civil Appellate High Court for the reasons set out in the judgment set aside the judgment of the District Court and entered judgment in favour of the Plaintiff but without damages.

Being aggrieved by the judgment of the High Court, 1st Defendant filed a leave to Appeal Application in the Supreme Court and obtained leave on following questions of law.

a) Had their Lordships' of the High Court of Ratnapura failed to give effect to the decision in De Silva v Gunathilake, 32 NLR 217, Muthusamy v Seneviratne, 31 CLW 91, Peris v Savunhamy, 54 NLR 207 and Wanigaratne v Juwanis Appuhamy, 65 NLR 167 and Harriet v Padmasiri 1996 1 SLR 358 ?

b) Had their Lordships' of the High Court erred in having failed to consider the Petitioner's right to compensation for the improvements done by him in view of the fact that the Learned District Judge has specifically stated that he has not considered the rights of the Petitioner in his Judgment?

c) Had their Lordships of the High Court erred in holding that the Petitioner ought to have filed an appeal against the failure of the Learned District Judge to

adjudicate upon his rights, when the Petitioner had clearly won the case in the District Court ?

First Question of Law

It is the contention of the learned President's Counsel for the Defendant that the Honorable High Court Judges disregarded the judgments of the Supreme Court regarding the burden of proof applicable to rei-vindicatio actions. In support of this argument he had cited several judgments. Including De Silva v Gunathileke 32 NLR 217, Wanigarathne vs. Juwanis Appuhamy 65 NLR 167, and Harriet v Padmasiri 1996 1 SLR 358

In De Silva vs. Gunatillake 32 NLR 217 at page 219 Macdonell CJ citing authorities on Roman Dutch Law referred to principles applicable to rei vindicatio action in the following manner. "

There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindicatio* plaintiff must have ownership actually vested in him". (1 *Nathan p*. 362, *s*.593) "The right to possess may be taken to include the *ius vindicandi* which Grotius (2, 3, and 1) puts in the forefront of his definition of ownership." (*Lee's Introduction to Roman-Dutch Law, p.* 111 *note, ed* 1915). "This action arises from the right of dominium. By it we claim specific recovery of property belonging to us but possessed by someone else" (*Pereira, p.* 300, *ed.*1913, quoting *Voet* 6, 1, 3). 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 Wanigarathne vs. Juwanis Appuhamy 65 NLR 167 Herath J stated that "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 favor merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title"

In the case of Dharmadasa v Jayasena 1997 3 SLR 327(SC) G.P.S. de Silva CJ at page 330 quoted with approval the aforementioned statement of Macdonall CJ in De Silva vs. Gunathileke 32 NLR 217 and the statement of Herath J in Wanigarathne vs. Juwanis Appuhamy 65 NLR 167

It is settled law that in rei vidicatio actions the plaintiff must prove his title. In establishing his title the plaintiff cannot rely on the weakness of the defendant's title. In this appeal we have to consider whether the plaintiff established his title or not.

In order to prove his title the Plaintiff produced four deeds marked P1-P4. These deeds indicate that since 1943 the land in question was identified with specific boundaries. The extent of the land is 10 acres. The identity of the land was not in issue. It was established that the plaintiff and his predecessors in title had title to the .land in question and had established the right of dominium over the land and had possession of the land in question until the death of his father Dingiri Banda Kalawana in 1984. It is to be noted that disturbance to the land commenced after the death of Dingiri Banda Kalawana and due to the conduct of the Defendant. It is only the Plaintiff who objected to the conduct of the Defendant. If the land in question belong to and possessed by some others as alleged by the defendant, the question that will arise is why such owners kept silent when the 1st defendant took over the possession of the land and started removing rubber trees and commenced planting tea while completely changing ecology of the land. Therefore it is abundantly clear that until his death, the father of the plaintiff did possess and use the land and he had undisturbed and uninterrupted possession.

Therefore it was established that the Plaintiff's predecessors in title had the ownership and the possession of the land. Therefore the Plaintiff had proved his title to the land.
It is incorrect to state that the honorable High Court Judges failed to give effect to Supreme Court Judgments pertaining to rei vindicatio actions.

Second Question of Law

The Learned District Judge dismissed the plaintiff's case but did not order compensation for improvements to the 1st Defendant. Due to the dismissal of the Plaintiff's action in the District Court, the Defendant was not ejected and he remained in possession. Therefore, question of compensation did not arise. The Honorable High Court Judges set aside the judgment of the District Court and held in favour of the Plaintiff and declared that the Plaintiff is the owner of the land and ordered the ejectment of the Defendant. There was no order for compensation for improvements carried out by the Defendant.

As the Honorable High Court Judges did not consider the question of compensation for improvements it is appropriate at this stage to consider whether the 1st defendant is entitled to compensation or not. The 1st Defendant, the appellant entered the land in question after entering into a planting agreement with the 2nd Defendant who is the brother of the Plaintiff. This agreement was in respect of 3 acres of land. Thereafter, he unlawfully occupied the balance 7 acres of land. Since then he was in possession of the land. As he was not a bona fide possessor he is not entitled to any compensation. He had been in occupation of the land unlawfully for more than two decades and he would have reaped the benefit of the improvements carried out by him at his own risk. Therefore, I hold that the Defendant is not entitled to any compensation for the improvements.

Third Question of Law

Third question of law is 'Did the Hon. Judges of the High Court err in law when they held that the Petitioner ought to have appealed when the learned District Judge failed to adjudicate upon his rights specially regarding awarding of compensation for improvements?' The Defendant in his answer prayed for the dismissal of the Plaintiff's action and in the alternative, in the event of judgment given in favour of the Plaintiff to award compensation for improvement and until such time compensation is paid to remain in possession. (Jus Retentionis).In view of the dismissal of the Plaintiff's action in the District Court there was no need to adjudicate on Defendant's rights as he was not ejected and he continued to possess the land. Therefore, there was no necessity for the Defendant to appeal against the judgment of the District Court. Therefore the finding of the High Court on this point is erroneous. However it did not affect the judgment of the High Court.

For the reasons stated in this judgment, I affirm the judgment of the High Court setting aside the judgment of the District Court which dismissed the case of the Plaintiff.

Appeal dismissed. I order the 1st Defendant to pay Rs. 50,000/- to the Plaintiff as costs of this appeal and the Plaintiff is entitled to the costs of the appeal to the High Court and also costs in the District Court

Judge of the Supreme Court

Dr. Shirani A. Bandaranayake, CJ.

I agree.

Chief Justice.

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court