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

In the matter of an Application for Appeal under and in terms of Section 54 of the Act No. 54 of 2006.

Kanapathi Veeraputhran,
No. 275/A,
Karfex Bazaar,
Dickoya.

Plaintiff

SC APPEAL 10/2015
SC HCCA LA : 386/2014
HCCA No. : CP/HCCA/KAN/107/2011 (FA)
D.C. Hatton Case No. DE/308

Vs.

Wimal Wickramarachchi,
Karfex Bazaar,
Dickoya.

Defendant

AND BETWEEN

Kanapathi Veeraputhran,
No. 257/A,
Karfex Bazaar,
Dickoya.

Plaintiff-Appellant

Vs.

Wimal Wickramarachchi,
Karfex Bazaar,
Dickoya.

Defendant- Respondent

AND NOW BETWEEN

V. Vinokanthan,
No. 257/A,
Karfex Bazaar,
Dickoya.

(Son of the deceased Plaintiff-Appellant)

Substituted-Plaintiff-Appellant-Appellant

Vs.

Wimal Wickramarachchi,
Karfex Bazaar,
Dickoya.

Defendant-Respondent-Respondent

Before : **S. Thurairaja, PC, J**
Janak De Silva, J
K. Priyantha Fernando, J

Counsel : K.V.S. Ganesharajan with Vithusha Loganathan for the Substituted-Plaintiff-Appellant-Appellant.

Amaranath Fernando with Thisura Hewawasam for the Defendant-Respondent-Respondent.

Argued on : 07.05.2024

Decided on : 09.07.2024

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Appellant-Appellant (hereinafter referred to as the plaintiff) filed action in the District Court of *Hatton* seeking a declaration that the plaintiff is entitled to possess the land as described in the 1st schedule to the plaint as a *bona fide* possessor, for the ejectment of the Defendant-Respondent-Respondent (hereinafter referred to as the defendant) and all those holding under the defendant from the land described in the 2nd Schedule to the amended plaint and for cost and further relief.

2. When the matter was taken up for trial, parties recorded their admissions, and issues were raised. Issues No. 1-10 were raised on behalf of the plaintiff, and issues No. 11-13 were raised on behalf of the defendant. After the trial concluded and judgment was reserved, the learned District Judge on his own has raised two new issues (issues No. 14 and 15). Thereafter, the learned District Judge by judgment dated 11.03.2011 (page 106 of the brief marked X1) dismissed the plaintiff's action.

3. Aggrieved by the judgment of the learned District Judge, the plaintiff preferred an appeal to the High Court of Civil Appeal of the Central Province holden in *Kandy*. Thereafter, the learned Judges of the High Court by judgment dated 01.07.2014 [X-3] dismissed the appeal of the plaintiff.

4. Being aggrieved by the judgment of the High Court, the plaintiff preferred an appeal to this Court. Leave was granted on the questions of law (a),(c),(d) and (h) as set out in paragraph 12 of the petition dated 11.08.2014. However, when the case was taken up for hearing on 07.05.2024, both Counsel submitted to Court that, they would be inclined to proceed on the questions of law (a),(c) and (h) in paragraph 12 of the petition dated 11.08.2014.

<u>Questions of law</u>

a) Did the learned High Court Judge err in law in not considering the fact that the issue nos 14 and 15 could not have raised at the end of the trial without giving any opportunity to the parties to address said issues as the said issues were important issues to the case.

c) Did the learned Judge of the High Court of Civil Appeal err in law in coming to the conclusion that the petitioner has failed to describe the land as per the provisions of the Civil Procedure Code on the basis that the extent of the land in dispute differ in the evidence of the plaintiff and the Commission report.

h) Did the learned Judge of the High Court of Civil Appeal err in law in considering the fact that the provisions of Section 4 of the Prescription Ordinance was not an issue before the District Court and parties were not invited to address the same.

5. At the argument of this appeal, the learned Counsel for the plaintiff submitted that, it was not necessary for the learned District Judge to frame two new issues. He further submitted that, issue No. 1-9 (at page 118 of X-1) would be mandatory to answer if the learned District Judge had not raised the issues No.

14 and 15. It is his position that, the substantial issue was as to possession and the learned District Judge has not gone into the merits of the case in order to decide the real issue. In his written submissions, the learned Counsel further urged that the learned District Judge has thereby not entered in to the Judgment in terms of section 184 of the Civil Procedure Code and the judgment should therefore be set aside.

6. The learned Counsel for the plaintiff submitted in his written submissions that, the learned District Judge in raising two fresh issues, has not provided the parties an opportunity to be heard regarding the same. In submitting that, the learned Counsel has relied on the case of ***Hameed V. Cassim [1996] 2 Sri.L.R. 30,*** where His Lordship *Ranarajah J* stated that, *"… the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."*

7. It was further submitted by the learned Counsel for the plaintiff that, the issues No. 11 and 12 which were issues on prescription has been answered in favour of the plaintiff. However, there has been no appeal preferred by the Defendant on that point. At this point, it is necessary to be pointed out that, simply due to the fact that the defendant's position is not proved, does not mean that the plaintiff's case is automatically proved.

8. It is noteworthy that, according to section 149 of the Civil Procedure Code, the Court may at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.

9. When considering the issue of forming additional issues by the learned District Judge after trial has been concluded, it is pertinent to consider the case of ***Seylan Bank Ltd V. Clement Charles and Others S.C. C.H.C. Appeal 39/06 S.C. Min. 01.08.2017.*** In *Seylan Bank(supra), Prasanna Jayawardena PC, J.* cited with approval, the case of ***Hameed V. Cassim*** *and stated that,*

"…Ranaraja J rejected that contention and held that, section 149 of the Civil Procedure Code gives the Court the discretion to frame additional issues at any time before passing a decree and that, accordingly, the District Court had the power to frame an additional issue even at the stage of judgment. However, Ranaraja J pointed out that, the discretion vested in the Court to frame additional issues at the stage of judgment should be exercised only where it is necessary to do so in the interests of justice, which is, primarily, to ensure that the correct decision was reached. Thus, Ranaraja J stated [at p.33] "Bertram C.J. in Silva v Obeysekara commenting on the discretion of a judge to allow issues after the commencement of the trial observed, `No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.' The provisions of section 149 considered along with the observation of Bertram C.J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case."

10. *Prasanna Jayawardena J.*, while agreeing with *Ranaraja J.* in ***Hameed V. Cassim*** takes this position further and states that,

"Further, since the framing of additional issues at the stage of judgment may result in the case being decided on issues regarding which the parties have not led evidence on or, perhaps, even contemplated, equity demands that, a trial judge who wishes to frame an additional issue at the stage of judgment, suspends the preparation of his judgment and give both parties notice of the additional issues which the Court has framed. If the additional issues are issues of law, the parties should be given an opportunity to make submissions. If the additional issues are issues of fact or issues of both fact and law, the parties should be given an opportunity to lead evidence

on 9 that issue and make submissions thereon. The preparation of the judgment may be resumed only after these steps are concluded. Ranaraja J expressed similar views in HAMEED vs. CASSIM [at p.33] when His Lordship stated, "….. the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."

…In this connection, it hardly needs to said that, a failure on the part of the trial judge to take these precautions will cause grave injustice. Further, a trial judge who fails to give the parties an opportunity to lead evidence on and be heard on additional issues raised in the judgment, will be ignoring the audi alteram partem rule."

11. However, *Jayawardena J.* explains that there may be limited instances in which a trial judge may vary from this approach.

"Finally, for the sake of completeness, it should also be mentioned that, there may be some limited instances in which, because the record makes it manifestly clear that the facts and law underpinning additional issues which are raised at the time of judgment, were at the forefront of the minds of both parties at the trial and that both parties were fully aware of the need to lead evidence and address the law on matters relating to those additional issues, a Court has the discretion to proceed to answer those additional issues without suspending the preparation of the judgment and giving the parties a further opportunity to be heard on those additional issues. This limited exception was referred to by Venkatarama Ayyar J in NAGUBAI AMMAL vs. B. SHAMA RAO, when the learned Judge, having outlined the general rule cited above, went on to mention, [at p.598], "But that rule has no application to a case where the parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce relating evidence thereto.". SUNDERSINGH vs. RAJARAM [AIR 1991 MP 59] and AGRAWALLA vs. BHARAT COKING COAL LIT [AIR 1989 SC 1530] are other decisions where this exception was referred to. However, this limited exception will apply only where it is indisputably clear from the

record that, both parties were fully aware that the questions raised in the additional issues framed in the judgment, were in issue at the trial but the parties have omitted to proceed to frame specific issues thereon. It is fitting to reiterate and emphasise that, the general rule is that parties must be given an opportunity to be heard on additional issues framed at the time of judgment."

12. The instant case falls within the ambit of the limited exceptional instance that is stipulated by *Jayawardena J.* in *Seylan Bank(supra),* as the record makes it manifestly clear that the two additional issues raised by the learned District Judge after the trial was concluded were in fact issues at the forefront of the minds of both the parties, as they were issues in relation to section 41 of the Civil Procedure Code in relation to the identification of the corpus. This is a material requirement to be established in a case of this nature. Further, it is clear that, in this case, both parties were fully aware of the need to lead evidence and address the law on matters relating to those additional issues.

13. Therefore, the learned District Judge in raising the two additional issues and answering them before giving the parties a further opportunity to be heard on the two additional issues, have not acted contrary to section 149 of the Civil Procedure Code.

14. The issue as to the corpus not being identified will be discussed later in this judgment.

15. The learned Counsel for the plaintiff submitted in his written submissions that, the learned District Judge has come to an erroneous finding that the subject matter of the action has not been described in terms of section 41 of the Civil Procedure Code. As according to the second schedule to the amended plaint, the plaintiff has described the subject matter of the action and has complied with section 41 of the Civil Procedure Code.

16. The learned Counsel for the defendant submitted that, there is an issue as to the boundaries and extent of the subject matter in question.

17. The learned Counsel for the defendant submitted that, according to prayer (b) of the original plaint dated 09.06.2003, the plaintiff seeks to have the defendant and those holding under him ejected from the land as described in the Schedule. The Schedule refers to Lot 1 of the Plan No. 1572 prepared by *Irandatissa Kotambage*, Licensed Surveyor. According to the said Plan, Lot 1 is 9.60 Perches in extent.

18. The learned Counsel for the defendant submitted further that, after the Commissioner's Plan and Report has been prepared, the amended plaint was filed so as to tally with the Commissioner's Plan. According to prayer (ආ) of the amended plaint dated 17.06.2005, the plaintiff seeks to have the defendant ejected from the land as described in Schedule 2 to the amended plaint. Schedule 2 to the amended plaint refers to lots 4 and 5 of the Commissioner's Plan No. 11118 prepared by the Commissioner on 21.03.2004. According to the Commissioner's Plan, Lots 4 and 5 are 3.43 Perches in extent.

19. It was the position of the learned Counsel for the defendant that Lot 1 as referred to in the schedule to the original plaint does not tally with Lots 4 and 5 of the Commissioner's Plan as referred to in the amended plaint. Therefore, it is his position that the boundaries and the extent of the subject matter from which the plaintiff seeks to eject the defendant are not properly identified.

20. When perusing the Commissioner's Report pertaining to the Plan No. 11118 (at page 149 of X-1), No. 6)(ආ) of the Report sets out that,

> "...මාගේ පිඹුර අංක : 11118 යේ කැබලි අංක :2 සහ 4 අයත් වන්නේ පැරණි පිඹුර අංක : 1572 යේ කැබලි අංක :1 ටය..."

21. Therefore, it is observed that, according to the above extract, Lot 1 in Plan No. 1572 is Lots 2 and 4 of the Commissioner's Plan. However, what has been prayed for in the amended plaint is to eject the defendant from Lots 4 and 5 of the Commissioner's Plan No. 11118 which is different to what was originally prayed for. Further, when comparing the extent, Lot 1 of Plan No. 1572 is

9.60 Perches in extent, whereas Lots 4 and 5 of Plan No. 1118 are 3.43 Perches in extent. Lots 2 and 4 of Plan No. 11118 which correspond to Lot 1 of Plan No. 1572 is 9.21 Perches in extent.

22. The importance of the identification of the corpus was discussed by *Marsoof, J.* in ***Latheef v. Mansoor [2010] 2 Sri LR 333 at 378.***

> *"The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision."*

17. The same is applicable to this action as well. In light of the above, it is my position that, the corpus has not properly been identified in this case by the plaintiff. Although the plaintiff claims that he has complied with section 41 of the Civil Procedure Code, it must be ensured that it is not simply any metes and bounds that the plaintiff must specify to comply with section 41 of Civil Procedure Code, but the metes and bounds of the specific subject matter in the action.

18. Thus, according to what has been discussed above, the questions of law set out in (a) and (c) of paragraph 12 of the petition are answered in the negative. The question of law (h) of paragraph 12

of the petition that have been raised need not be answered. The appeal is dismissed.

19. I affirm the judgments delivered by the learned District Judge and the learned Judges of the High Court.

Appeal is dismissed

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC, J

I agree

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA, J.

I agree

JUDGE OF THE SUPREME COURT