

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

Mohomad Mohideen Mohomad  
Shakeer Mohideen,  
No. 57,  
Kandy Road,  
Thihariya.  
Plaintiff

**SC APPEAL NO: SC/APPEAL/116/2013**  
**SC LA NO: SC/HCCA/LA/346/2010**  
**HCCA GAMPANA NO: WP/HCCA/30/2003 (F)**  
**DC GAMPANA NO: 36607/L**

Vs.

Warnakulasuriya Mahawaduge  
Emalin Peiris,  
No. 593,  
Havelock Road,  
Pamankada,  
Colombo 05.  
Defendant

AND BETWEEN

Warnakulasuriya Mahawaduge  
Emalin Peiris, (Deceased)  
No. 593, Havelock Road,  
Pamankada,  
Colombo 05.  
Defendant-Appellant

Wannakuwatta Mitiwaduge Agnes  
Sirimawathie,  
No. 593, Havelock Road,  
Pamankada, Colombo 05.  
Substituted Defendant-Appellant

Vs.

Mohomad Mohideen Mohomad  
Shakeer Mohideen,  
No. 57, Kandy Road, Thihariya.  
Plaintiff-Respondent

AND NOW BETWEEN

Wannakuwatta Mitiwaduge Agnes  
Sirimawathie,  
No. 593, Havelock Road,  
Pamankada,  
Colombo 05.  
Substituted Defendant-Appellant-  
Appellant

Vs.

Mohomad Mohideen Mohomad  
Shakeer Mohideen, (Deceased)  
No. 57,  
Kandy Road,  
Thihariya.

Plaintiff-Respondent-Respondent

1. Sithy Fareeda,
2. Fathima Fareesha,
3. Mohamed Rukshan,
4. Mohamed Mizran,

All of,  
No. 66/17/2,  
Ali Jinnah Maatha,  
Thihariya.

Substituted Plaintiff-Respondent-  
Respondents

Before: P. Padman Surasena, J.  
Achala Wengappuli, J.  
Mahinda Samayawardhena, J.

Counsel: Rasika Dissanayake with Sandun Senadhipathi for the  
Substituted Defendant-Appellant-Appellant.

Ikram Mohamed, P.C., with Lal Matarage and Vinura  
Jayawardene for the Substituted Plaintiff-Respondent-  
Respondents.

Argued on: 21.10.2021

Written submissions:

by the Substituted Defendant-Appellant-Appellant on  
06.11.2013.

by the Substituted Plaintiff-Respondent-Respondents  
on 09.12.2013.

Further written submissions:

by the Substituted Defendant-Appellant-Appellant on  
25.10.2021.

by the Substituted Plaintiff-Respondent-Respondents  
on 25.10.2021.

Decided on: 26.11.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant therefrom and damages. The defendant filed answer seeking dismissal of the action. After trial the District Court entered judgment for the plaintiff. On appeal, the High Court affirmed it. This appeal is from the judgment of the High Court. This court granted leave to appeal on the following two questions of law:

*(a) Did the District Court err in entering judgment despite the plaintiff failing to discharge the burden that his title deeds relate to the land occupied by the defendant?*

*(b) Did the High Court fail to appreciate that the District Court entered judgment for the plaintiff notwithstanding the plaintiff failed to identify the corpus?*

In essence, leave to appeal was granted on the question whether the land in suit has been properly identified.

The identification of the land is of paramount importance for the plaintiff to succeed in a *rei vindicatio* action. The examination of title does not arise until the land which the plaintiff claims title to is properly identified. The burden is on the plaintiff, not on the defendant, to identify the land in suit.

In this case, the defendant who is in possession of the land known as “Millagahawatta” did not contest the plaintiff’s title deeds. Throughout the action her position was that the plaintiff’s title deeds relate to a different land, not to the land which she is in possession of. The defendant clearly stated in her answer that she purchased lots 1, 2, 3 and 5 in plan No. 1067/1967 of 25.04.1967 by deed No. 34 of 25.11.1970 and she is in possession of that land. Admittedly that land is different from the land the plaintiff claims title to and seeks the ejectment of the defendant from. The defendant attached a copy of her title deed (D1) and a copy of the plan (D2) to the answer, and the originals were produced at the trial. Her transferor’s title deed (P19) also identifies the land according to the said old plan. The land the defendant claims title to as described in these deeds is as follows:

*All that divided and defined parcel of land called Millagahawatta comprising of Lots 1, 2, 3 and 5 (excluding Lot 4) depicted in Plan No. 1067/1967 dated 25<sup>th</sup> April 1967 made by H.L. Croos Da Brera, Licensed Surveyor situated at Thihariya in the Meda Pattu of Siyane Korale in the District of Colombo (now Gampaha) Western Province and bounded on the North the land of P.L. Mumeena Umma and Lot 4 shown on the said Plan No.1067/1967 on the East by the P.W.D. Road from*

*Warapalana to Thihariya on the South by land of A.T. Razeem and others and on the West by land of C.L. Abdul Samad, land of A.L. Segu Mohamed and others and land of U.L. Abdul Rahiman containing in extent one Acre Three Roods Two Perches (A1. R3. P2) according to the said Plan No. 1067/1967.*

It is clear from the above description that “Millagahawatta” is a larger land and the defendant claims a divided and defined portion of that larger land.

The plaintiff purchased his land, a portion of “Millagahawatta”, about 22 years after the defendant had purchased her land. The land described in the schedule to the plaint as described in the plaintiff’s title deed No. 6952 of 06.09.1992 (P8) is as follows:

*Southern portion of Millagahawatta situated at Thihariya in the Meda Pattu of Siyane Korale in the District of Gampaha of the Western Province bounded on the North by a portion of the same land belonging to Ali Lebbe Pakir Lebbe, on the East by cart road to Thihariya, on the South by Dangaha Ovita belonging to Ali Thambi Lebbe Ama Lebbe, on the West although it says Ovita belonging to Ahamadu Lebbe Ali Lebbe and others, in fact, the land belonging to Ali Thambi Machcham Ahamadu Lebbe Machcham in extent 1A 3R 0P.*

It is clear from the above description also that “Millagahawatta” is a larger land and the plaintiff claims a portion (“southern portion”) of the larger land (1 acre and 2 roods), and that portion is bounded on the north by a portion of the larger land.

There is no plan prepared to identify this portion of land at or before the execution of the plaintiff’s deed or after the institution of this

action despite the defendant having raised the issue of identification of the land at the earliest possible opportunity.

The plaintiff marked the title deeds of his predecessors in title. According to the schedule to the first deed No. 16855 marked P2, “Millagahawatta” comprises more than 10 acres.

The transferor of the plaintiff’s deed No. 6952 (P8), Riyal, became entitled to the land by deed of gift No. 2934 (P7) from his father, Shariiff. Shariiff became entitled to the land by deed No. 23381 (P6). It is to be noted that although Shariiff gifted the entire southern portion of “Millagahawatta” within those boundaries in extent of 1 acre and 2 roods by P7, according to deed P6 Shariiff had got only an undivided 2/3 share of that portion.

Learned President’s counsel for the plaintiff quoting *Balasooriya v. Neelakanthi [2017] BLR 202* and *Punchiappuhamy v. Dingiribanda [2016] BLR 40* contends that if a plaintiff claims the entire land but establishes title to a portion of the land, he is entitled to have the trespasser ejected from the entire land. In these two cases there was no question of identification of the land whereas in the instant case the issue is the identification of the plaintiff’s land on the ground. Hence those two cases are inapplicable here.

The plaintiff admits that the plaintiff’s land is registered at the Land Registry in one folio (page 384 of the brief) and the defendant’s land is registered in a different folio (page 473).

During the course of the argument, learned President’s Counsel for the plaintiff stated that the question of identification of the land can be addressed at the execution of the decree and the fiscal can obtain the assistance of a surveyor to identify the land and hand over possession to the plaintiff. I am afraid I cannot agree. In the

execution of the decree the fiscal cannot purport to identify the land in order to eject the defendant from it when the defendant has contested the case of the plaintiff on the premise that she is not in possession of the land described in the schedule to the plaint. Under such circumstances, in the first place, there is no executable decree. (*David v. Gnanawathie* [2000] 2 Sri LR 352, *Gunasekera v. Punchimerike* [2002] 2 Sri LR 43)

The District Judge entered judgment for the plaintiff on the basis that the land claimed by the plaintiff is different from the land claimed by the defendant. If the solution is so straightforward, the District Judge could have entered judgment for the plaintiff with consent soon after the defendant filed the answer because the defendant categorically stated in her answer that the land claimed by the plaintiff is different from the land claimed by the defendant: in fact, that is her defence against ejection from the land and rightly so.

The High Court affirmed the judgment of the District Court on the grounds that (a) the defendant has not been in possession of “the land in suit”; (b) the plaintiff has established title to the land described in the schedule to the plaint; and (c) “the defendant has failed to identify the land he claims and prove his title to the same.”

The High Court states the defendant has not been in possession of the land in suit. What is “the land in suit”? Has it been identified on the ground? This is the pivotal issue before court. The defendant need not prove that she is not in possession of the land described in the schedule to the plaint. The onus lies on the plaintiff to prove his case. As I stated previously, the defendant at the first opportunity tendered a copy of her plan and stated that she is not in possession of the land the plaintiff claims title to. Then the burden is on the

plaintiff who filed the action to eject the defendant from the land to take out a commission to prepare a plan to depict the land he claims and to superimpose the defendant's plan thereon. This has not been done.

If the plaintiff fails to identify the land he claims dominium over, his action must fail. In the instant case the defendant has a strong case: she has title deeds, a plan and she is in possession of the land. She is presumed to have title to the land she is in possession of, and it was for the plaintiff to rebut that presumption which he has failed to do. (*Peeris v. Savunhamy* (1951) 54 NLR 207)

Marsoof, J. in *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 378 stated:

*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.*

I answer the questions of law on which leave to appeal was granted in the affirmative and set aside the judgments of the District Court and the High Court and allow the appeal. The plaintiff's action shall stand dismissed. The defendant is entitled to costs in all three courts.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court