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

S.C. Appeal No.05/2010
S.C. HC (CA) LA No. 282/2009
HCCA Ratnapura Case No.
SP/HCCA/RAT/452/2007(CA)
D.C. Embilipitiya Case No.3612/L

1. H.M. Oman Ekanayake
2. H.M. Ruman Ekanayake
3. H.M. Stephen Ekanayake
4. H.M. Sumana Ekanayake
5. H.M. Dharma Ekanayake

All at Malwatta, Godakawela.

Plaintiff-Respondent-Appellants

Vs.

W. Ratranhamy,
Malwatta,
Godakawela.

Defendant-Appellant-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
Chandra Ekanayake, J. &
S.I. Imam, J.

COUNSEL : Chathura Galhena for Plaintiff-Respondent-Appellants.

Thisath Wijayagunawardane with Prabhash Somasinghe for the Defendant-Appellant-Respondent.

ARGUED ON : 05.10.2010.

WRITTNE SUBMISSIONS

TENDERED ON : Plaintiff-Respondent-Appellants : 31.01.2011.

Defendant-Appellant-Respondent : 08.09.2010.

DECIDED ON : 06.02.2012.

Dr. Shirani A. Bandaranayake, CJ

This is an appeal from the judgment of the Civil Appellate High Court of the Sabaragamuwa Province holden at Ratnapura (hereinafter referred to as the High Court) dated 23-09-2009. By that judgment, learned Judges of the High Court had set aside the judgment of the District Court of Embilipitiya dated

24-01-2001 given in favour of the plaintiff-respondent-appellants (hereinafter referred to as the appellants) and allowed the appeal of the defendant-appellant-respondent (hereinafter referred to as the respondent). The appellants came before this Court by way of a leave to appeal application, on which leave to appeal was granted by this Court on the following questions:

1. Did the Civil Appellate High Court misdirected itself on the concept of accepting new evidence in an appeal?

2. Did the Civil Appellate High Court misdirected itself by considering the said Gazette Extraordinary No.1181/19 dated 25-04-2001 as valid?

3. Did the Civil Appellate High Court err in entering the judgment purely based on the Gazette Extraordinary No.1181/19 dated 25-04-2001?

The facts of this appeal, as submitted by the learned Counsel for the appellants, *albeit* brief, are as follows:

The appellants had instituted action in the District Court of Embilipitiya claiming *inter alia* a declaration of title regarding the land morefully described in the schedule to the plaint and to eject the respondent and those who are holding under them from the said portion of land. The respondent in his answer had taken the position that the appellants do not have title to the land described in the schedule and the said land is owned by one B.T.A.B. Maddegama. The said Maddegama had made an application in the District Court to intervene as a defendant claiming title to the land described in the schedule, which was allowed by the learned District Judge, wherein he had claimed prescriptive title.

The appellants had claimed that they had inherited the property in question from their father and had relied on a Statutory Determination marked ෆ්.2.

The District Court had decided in favour of the appellants by its judgment dated 24-01-2001.

Being dissatisfied by the decision of the learned District Judge, the respondents appealed to the Court of Appeal. With the establishment of the Provincial Appellate High Courts in 2007, the said appeal before the Court of Appeal was subsequently transferred to the Civil Appellate High Court of the Sabaragamuwa Province holden in Ratnapura.

While the appeal was pending, the Statutory Determination marked ෆ්.2 was cancelled by the Gazette Extraordinary No.1181/19 dated 25-04-2001 (X2).

Thereafter the respondent had filed an application before the Court of Appeal in the nature of *restitution in integrum* on the basis of the said Gazette Notification dated 25-04-2001.

The Court of Appeal had dismissed the said application as the matter was pending before the High Court.

The High Court delivered its judgment on 23-09-2009, setting aside the judgment of the learned District Judge as the Gazette Notification marked X2 had forfeited the title of the appellants.

Having stated the facts of this case, let me now turn to consider the appeal in terms of the questions on which leave to appeal was granted by this Court.

1. **Did the High Court misdirected itself on the concept of accepting new evidence in an appeal?**

Learned Counsel for the appellants submitted that the decision of the High Court to set aside the judgment of the District Court was based on the issuance of the Gazette Notification dated 25-04-2001. The appellants, as stated earlier, had relied on a Statutory Determination on which a declaration of title was given to the appellants' father under Section 19 of the Land Reform Law No.1 of 1972. By the Gazette Notification dated 25-04-2001, the said Statutory Determination had been cancelled and this had taken place three months after the judgment of the District Court was delivered.

Learned Counsel for the respondent contended that in terms of Section 773 of the Civil Procedure Code, an Appellate Court is empowered to receive and admit new evidence in an appeal and therefore the High Court was not erroneous in considering the Gazette Notification which had come into effect on 25-04-2001.

Learned Counsel for the appellants relied on the decision in **Beatrice Dep v Lalani Meemaduwa** ([1997] 3 Sri L.R. 379) and contended that the High Court was wrong in taking into consideration the Gazette Notification of 25-04-2001, under and in terms of Section 773 of the Civil Procedure code.

Section 773 is contained in Chapter LXI of the Civil Procedure Code, which deals with the Hearing of the Appeals. Section 773, refers in particular to the power of Court to dismiss the appeal, affirm, vary or set aside the decree or direct new trials etc., and reads as follows:

> "Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree or order, according to law, or to pass such judgment , decree or order therein between and as regards the parties, or to give such direction to the Court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial."

It is important to note that the Court of Appeal, if it thinks fit, could receive and admit new evidence additional or supplementary to the evidence already taken in the Court of first instance.

This position was considered in **Ratwatte v Bandara et al** ((1966) 70 N.L.R. 231) where the Supreme Court following the decision of Denning L J in **Ladd v Marshall** ((1954) 3 All E.R. 745) had held that the reception of fresh evidence in a case at the stage of appeal may be justified, if the following three (3) conditions are fulfilled:

a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

b) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive;

c) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

A similar view had been expressed in **Rev. Kiralagama Sumanaratna Thero v Aluvihare** ([1985] 1 Sri L.R. 19) with regard to the evidence not been able to obtain with reasonable diligence at the trial. In **Beatrice Dep v Lalani Meemaduwa** (Supra) reference was made to the aforementioned three conditions.

It is therefore evident that in terms of Section 773 of the Civil Procedure Code, on the grounds enumerated in the decision in **Ladd v Marshall** (Supra) followed by **Ratwatte v Bandara** (Supra) and **Beatrice Dep v Lalani Meemaduwa** (Supra) an appeal Court could order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial.

As stated earlier the appellants had relied on the Statutory Determination dated 14-10-1988 (පැ.2) on their claim to the title of the property in question. Learned District Judge had also based his judgment on the said Statutory Determination in deciding in favour of the appellants. It is common ground that the said Statutory Determination was cancelled by Gazette No.1181/19 dated 25-04-2001. The said Gazette Notification was in the following terms:

"Land Reform Act, No.1 of 1972

Cancellation to the Statutory Determination No.4324 published under Section 19.

The above mentioned Statutory Determination pertaining to the Declaration under Unique No.Ra/106 of Mr. Hatan Achchi Mohottalage Mudiyanse of Malwatta, Godakawela published in respect of Statutory Determination No.4324 related to Unique No.Ra/106 of the Gazette Extraordinary No.527/13 of 14th October, 1988 is hereby cancelled."

It is therefore quite clear that the appellants had lost their title to the property in question by the issuance of the said Gazette Notification dated 25-04-2001 (X2).

When the District Court had decided the matter in favour of the appellants solely on the basis of the Statutory Determination of 1988, it was necessary for the High Court to have considered the changed circumstances by virtue of the second Gazette Notification of 25-04-2001, as by the latter the status quo of the appellants had got changed. It is not disputed that the said Gazette Notification was not available for the learned District Judge to have considered, as it had been issued four months after the delivery of the Judgment by the District Court. However, by the time the appeal was being considered by the learned Judge of the High Court, the said Statutory Determination was available and the High Court had correctly taken into consideration the said Gazette Notification as new evidence, in deciding the case in question.

The new evidence that had been taken into consideration by the Judges of the High Court is the Gazette Notification issued on 25-04-2001 (X2). It is common ground that the said Gazette Notification could not have been obtained with reasonable diligence for the use at the trial by the learned District Judge as it was issued 4 months after the delivery of the Judgment by the District Court. It is also of no doubt that the contents of said Gazette Notification has a clear impact on the final result of the decision and also it is the most credible piece of evidence in the case in question.

It is therefore quite clear that, the applicability of the said Gazette Notification of 25-04-2001 (X2) would clearly come within the provisions of Section 773 of the Civil Procedure Code and therefore there had not been any misdirection by the learned Judges of the High Court in accepting new evidence in that appeal.

2. Did the High Court misdirected itself by considering the Gazette Extraordinary No.1181/19 dated 25th April 2001 as valid?

Learned Counsel for the appellants strenuously contended that the Gazette Notification dated 25-04-2001, had come into being after the Judgment of the District Court was pronounced and therefore it was not correct for the learned Judges of the High Court to have considered the said Statutory Determination.

It is not in dispute, as stated earlier, that the District Court had decided the matter solely on the basis of the Statutory Determination dated 14-10-1988 (වැ.4). The said Statutory Determination was in the following terms:

"ව්‍යවස්ථාපිත නිශ්චය අංකය : 4324

විශේෂ්‍ය අංකය : ර 106

1972 අංක 1 දරණ ඉඩම් ප්‍රතිසංස්කරණ පනතේ 19 වැනි වගන්තිය යටතේ ව්‍යවස්ථාපිත නිශ්චය

ගොඩකවෙල මල්වත්තේ පදිංචි, හටන්ආච්චි මොහොට්ටාලගේ මුදියන්සේ මහතා විසින් පනතේ 18 වැනි වගන්තිය යටතේ ව්‍යවස්ථාපිත ප්‍රකාශනයක් කරන ලදින්, පනතේ 19 වැනි වගන්තිය යටතේ ඉඩම් ප්‍රතිසංස්කරණ කොමිෂන් සභාව වෙත පැවරී ඇති බලතල අනුව, එම කොමිෂන් සභාව විසින් ව්‍යවස්ථාපිත බදු ගැනුම්කරුට අයිතිව තිබූ කෘෂිකාර්මික ඉඩම් වලින් ඔහුට නබා ගැනීමට ඉඩදිය යුතු කොටස නිශ්චය කරමින් ව්‍යවස්ථාපිත නිශ්චයක් කරන ලදී. එසේ ව්‍යවස්ථාපිත බදු ගැනුම්කරුට නබා ගැනීමට ඉඩ දෙන ලද කෘෂිකාර්මික ඉඩම් කොටස් මෙහි උපලේඛනයෙහි දැක්වේ."

The contention of the appellants was that the said Statutory Determination was given to their father and that they had inherited the said property in question from him. Excepting for the above, the appellants had not shown any other source of title in their favour.

It is settled law that in a vindicatory action the burden of establishing title devolves on the plaintiff. As stated quite clearly by Macdonell, C.J., in **De Silva v Goonatillake** ((1931) 32 N.L.R. 217) that,

> "There is abundant authority that a party claiming a declaration of title must have title himself . . . . 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."

This position had been clearly endorsed in later decisions. For example in **Muthusamy v Seneviratne** ((1946) 31 C.L.W.91), Soertsz, S.P.J. had observed that,

> ". . . . it is a serious misdirection in that it overlooks the elementary rule that in an action for declaration of title, it is for the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title to it."

The only exception to this general principle referred to earlier, is the position where the plaintiff had earlier enjoyed peaceful possession of the property in question and had alleged that he had been ousted by the defendant. In such circumstances the plaintiff has in his favour a presumption of title, which is rebuttable. This position was considered by Burnside, C.J., in **Mudalihamy v Appuhamy** ((1891) 1 C.L.R. 67) where it was stated that,

> "Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep it against all the world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and plaintiff might have contended himself with proving his *de facto* possession at the time of the ouster."

It is to be noted that the appellants had not taken any steps at any stage to challenge the validity of the Gazette Notification dated 25-04-2001 (X2). The

contention of the appellants was that they became aware of the said Gazette Notification only in 2002, but assuming that the said position is correct, it must be taken into consideration that even after 2002, the appellants had not taken any steps to challenge that Gazette Notification.

Considering the aforesaid it is quite evident that the Gazette Notification dated 25-04-2001 stood unchallenged when the appeal was considered by the High Court.

In such circumstances it is apparent that the High Court had not misdirected itself by considering the said Gazette Notification as valid.

3. Did the High Court err in entering the judgment purely based on the Gazette Extraordinary No.1181/19 dated 25th April 2001 as valid?

As stated earlier, the appellants had placed their title solely on the basis of the Statutory Determination published in the Gazette dated 14-10-1988 (වැ.4). However, soon after the judgment was delivered by the District Court and well before the appeal was considered by the High Court the said Determination was cancelled by the Gazette Notification dated 25-04-2001 (X2).

It is therefore quite clear that although the appellants had title to the land in question on the basis of the aforementioned Statutory Determination, that such title had ceased to exist by 25-04-2001, in terms of the second Gazette Notification marked X2.

The question as to the necessity for a plaintiff to have the title not only at the time the *rei vindicatio* action is instituted, but also to retain it throughout the pendency of the action was considered, quite clearly by *Voet.* The underlying principle for the need to sustain the title to the property in question is stated by *Voet* (*Voet* – 6.1.4, Voet's Title on Vindications and Interdicta by Casie Chitty), in the following terms:

> "But again, if he who brought this action was the *dominus* at the time of the institution of the suit, but *lite pendente* has lost the *dominum*, reason dictates that the defendant should be absolved . . . both because the suit has then fallen into that case, from which an action could not have a beginning, and in which it could not continue . . . and because the interest of the plaintiff in the subject of the suit has ceased to exist, . . . and in short because that (right of *dominum*) has been removed and become extinct, which was the only foundation of this real action."

The said statement by Voet was considered by the Supreme Court in **Silva v Jayawardena** ((1942) 43 N.L.R. 551) on the basis of a *rei vindicatio* action, where Keuneman, J, had observed that the action contemplated by Voet was the action *rei vindicatio* and had stated thus:

> "It is clear that the action contemplated by *Voet* was the action *rei vindicatio* and I think it follows that all rights in *rem* against the property are lost, when the *dominum* has been transferred pending the action to another person."

The necessity for the party claiming a declaration of title to have title himself was considered in detail by Macdonell, CJ in **De Silva v Goonatillake** (Supra). In that, an action *rei vindicatio* had been instituted in respect of property which had vested for non-payment of taxes in the Municipal Council, by virtue of a vesting certificate issued in terms of Section 146 of Ordinance No.6 of 1916. In considering the said issue, it was held that the plaintiff could not maintain the action, even though the Municipal Council, on being added as party, expressed its willingness to transfer the property to the party declared entitled thereto by Court. In deciding the matter in issue. Macdonell, CJ, had stated that,

> "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 actively vested in him." (Nathen, P.362, S.593) "The right to possess may be taken to include the *ius vindicandi* which Grotius (2,3,1) puts in the forefront of his definition of ownership . . . . The 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"** (emphasis added).

Similar views had been expressed by our Courts in several other cases.

In **Eliashamy v Punchi Banda** ((1911) 14 N.L.R. 113) during the pendency of an action for declaration of title, ejectment and damages consequent to the

trespass and the wrongful removal of plumbago from the land in dispute, the plaintiff had sold the land in dispute to a third party. It was held that the plaintiff was not precluded from maintaining his claim for damages although he could not get a decree for declaration of title and ejectment. Similarly in **Fernanodo v Appuhamy** ((1921) 23 N.L.R. 476), the plaintiff had purchased a land subject to a lease in favour of the defendant and then had sold it to one Luvina. The defendant had not delivered the possession of the property and therefore the plaintiff had instituted action for declaration of title , ejectment and damages. Ennis ACJ, and De Sampayo J, had held that after the sale of the land to Luvina, plaintiff could not maintain the action for declaration of title, although he could maintain the action for ejectment and damages.

It is therefore evident that in a vindicatory action it is necessary for the title to be present with the plaintiff not only at the beginning of the action, but until the conclusion of the case. Therefore the High Court was not in error when they entered the judgment based on the Gazette Extraordinary dated 25-04-2001 as valid.

For the reasons aforesaid the questions on which leave to appeal was granted are answered as follows:

1. The High Court did not misdirect itself on the concept of accepting new evidence in an appeal.

2. The High Court did not misdirect itself by considering the said Gazette Extraordinary No.1181/19 dated 25-04-2001 as valid.

3. The High Court did not err in entering the judgment purely based on the Gazette Extraordinary No.1181/19 dated 25-04-2001.

The judgment of the High Court dated 23-09-2009 is therefore affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

Chief Justice

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court