

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

C.A.No. 1014/97(F)

D.C.Tangalla No. 2020/L

**A. Jayawarnsinghe
Malpettawa, Ambalantota
and 10 others**

Substituted Plaintiffs

Ubeywarna Podisingho
Pokunuwatta, Rekawa

Defendant

AND NOW

1B Amaradasa Jayawarnasinghe
Malpettawa, Ambalantota

And 10 others

Substituted Plaintiff Appellants

Ubeywarne Podisingho
Pokunuwatta, Rekawa

Defendant Respondent

AND NOW

1B.Amaradasa Jayawarnasinghe
Malpettawa, Ambalantota

Petitioner

Vs

1B.Amaradasa Jayawarnasinghe
Malpettawa, Ambalantota

And 10 others

Substituted Plaintiff Appellants

Vs

Ubeywana Podisingho (Decd)
Pokunuwatta, Rekawa

Defendant Respondent

Ubeywana Leelawathie
Netolpitiya, Rekawa

Substituted Defendant Respondent

BEFPRE : Deepali Wijesundera J and
M. M. A. Gaffoor J

COUNSEL: Chandana Liyanpatabendi P.C with H. Ranasinghe for the
Plaintiff Appellant.

W. Premathilaka for the Defendant Respondent

ARGUED ON: 07.07.2015

DECIDED ON: 17.12.2015

Gaffoor J.,

This is an appeal preferred by the Substituted Plaintiff Appellants (hereinafter referred to as “the Plaintiffs”) against the Judgment delivered by the learned District Judge of Tangalla dated 11.11.1977.

The original Plaintiff filed an action seeking inter alia, a declaration of title to the land set out in the Plaint and eviction of the Defendant and all others holding under him.

The Defendant filed his answer stating that the land in dispute is situated within the land which is in possession of Defendant in extent of 1 ½ acres and a land referred to in the plaint is never in existence on the ground as a separate land.

The Defendant claimed prescriptive title to the land in his possession on that basis the Defendant moved to dismiss the Plaintiff's action and sought a declaration to the effect that he has obtained prescriptive title to the said land.

The facts germane to the case are briefly as follows :

The land called "Kongahawatta" consisting the land depicted in T.P. 283189 in extent of half an acre was belonged to one Selohamy who got title by purchasing and prescription. Later the aforesaid Selohamy transferred that land to one Piyoris Appu by virtue of Deed bearing No. 5436 attested on 25.4.1944. Aforesaid Piyoris Appu died intestate and his rights devolved on his wife and children. Subsequently aforesaid wife namely Sarlanchihamy transferred her half share to the original Plaintiff and William Singho by Deed bearing NO. 408 attested on 03.02,1982. Said William singho and other children who inherited shares upon the demise of their father Piyoris Appu transferred their rights to the original Plaintiff and thus she became the sole owner of a land in extent of half an acre. Thereafter the original Plaintiff and William Singho leased out the said land to one Piyasena in 1971 for a period of 10 years. It is the allegation of the original Plaintiff that the Defendant is in unlawful possession of the land..

The Defendant while denying the averments in the plaint took up the position that the land claimed by the Plaintiff is situated within a larger land in extent of one and half acres and no such land is in existence as a separate and distinct land. Moreover, the Defendants pleaded that one predecessor in title of the Plaintiff was the sister of the Defendant's father and his rights remains intact.

It is the stance of the Defendant that he came into possession of the land claimed by him in 1960 and prior to that his father was in the possession of the same. On that basis the Defendant claimed prescriptive title to the whole land including the land in dispute.

The trial commenced on 19 Issues raised at the beginning and one Jayawardena and Piyasena gave evidence in support of the Plaintiff's case. When the Plaintiff's case was closed the Defendant gave evidence and closed his case.

An examination of the impugned judgment reveals that the learned District Judge has found that the aforementioned Selohamy got title only to 10 perches and her rights passed to the original Plaintiff by virtue of title deeds marked P1 to P4.

It appears that the land claimed by the Plaintiff is one in extent of $\frac{1}{2}$ acre but it has not been properly identified by way of a commission issued from the court or otherwise.

Infact the learned trial Judge has clearly found that te original owner was entitled only to 10 perches though she transferred half an acre subsequently.

One of the sons of the original Plaintiff in his evidence in cross examination has stated as follows :

(Sinhala)

මා හිස දිනෙය සාක්ෂි දුන්නා නඩු කියක ඉඩම මම දන්නවා ඉඩම තිබෙනෙර රකව මෙම ඉඩම පුමාණය අක්කර බාගයයි අක්කර බාගයක සිනනක්කර ඩප්පුව තිබෙනෙන අනෙක් ටු අක්කර 1 බිම බදු ඉඩමක් එකට කිබෙනෙන වැටකින් වෙන් කරල නැහැ මා නඩු පවරා තිබෙනෙන අක්කර 1/2 කට,

In that sense it is amply clear that the Plaintiff has no certainty of the land claimed by the original Plaintiff and it is clear that no such land is in existence distinctly and separately.

In the case of Peeris vs Savunhamy – S.C.121-1951 – 64 NLR page 207 Dias S.P,J held:

“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;

For the purpose of identifying the land in dispute, statement of boundaries in title deeds between third parties are not admissible under Section 32 of the Evidence Ordinance.

A finding of fact may be reversed on appeal if the trial Judge has demonstrably misjudged the position.”

In a rei vindication action the burden rest on the Plaintiff to prove not only the title to the land in dispute but also identify the same.

In S.C. Appeal No. 105/10 the Supreme Court has given Leave to Appeal on the following questions of law :

- a) whether the Respondents has discharged the burden of establishing the identity of the land decried in the schedule to the Plaint in reference to the Plans referred to thereat;

- b) Did the Civil Appellate High Court and the District Court err in law by not taking into consideration the fact that the Plan FCP 63.160 was not referred to in the Permit (37-1) although it was in existence at the time of the issuance of the Permit (37-1)
- c) Did the Civil Appellate High Court and the District Court err in law by not taking into account that the boundaries and the extent described in the Permit (37-1) issued to the Respondent did not tally with the boundaries and the extent described in the plan (D 1) in order to properly identify the corpus;

Ratnayake J., held that :

- a) the title of a holder of a permit under the Land Development Ordinance is significant to maintain a vindicatory action against a trespasser :
- b) in a vindicatory action the burden of proof rests upon the Plaintiff to prove his title including identification of the boundaries;
- c) in a vindicatory action it is necessary to establish the corpus in a clear and unambiguous manner;

It is my opinion that in the present action the Plaintiff has failed to prove the land in suit and therefore his action should necessarily fail.

On the other hand the land claimed now appears to be a portion of a larger land which is in the possession of the Defendant from a considerable period.

In the circumstances I find no reason to interfere with the findings of the learned trial Judge.

For the aforesaid reasons I dismiss the appeal with costs and affirm the impugned judgment.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL