

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

Nambi Ralage
Rajakaruna,
Bogahawewa,
Medhawachchiya.

Plaintiff

C.A Case No. 254/96(F)

D.C. Anuradhapura case No. 14273/L

Vs

1. Ukkurala Bandage
Sirisena,
2. Ukkurala Bandage
Jayathilaka,
Both of them at
Aluth Halmillawa,
Bogahawewa,
Medhawachchiya.

Defendants

And Now Between
Nambi ralage
Rajakaruna,

Aluth Halmillawa,
Bogahawewa,
Medhawachchiya.

Plaintiff-Appellant

Vs

1. Ukkurala Bandage
Sirisena,
2. Ukkurala Bandage
Jayathilaka,
Both of them at Aluth
Halmillawa,
Bogahawewa,
Medhawachchiya.

Defendants-
Respondents

Before : **W.L.R.Siilva & A.W.A. Salam,J.**

Counsel : Mahanama de Silva for the Appellant
Priyantha Alagiyawanna for the Defendant Respondents

Written submissions filed on: 14.10.2011

Decided on : 10.08.2012

A.W.Abdus Salam,J.

The question involved in this appeal is whether an action for ejectment can be maintained without the plaintiff first seeking a declaration of title to the property of which the defendant is alleged to be in wrongful possession. The Plaintiff filed action against the defendant praying inter-alia for the ejectment of the defendant and damages. The plaintiff averred that the original owner of the subject matter of the action was one Punchirala Jayasinghe and he by deed No 8641 dated 5th September 1990 transferred it to the plaintiff.

The plaintiff specifically averred that he came into possession of the subject matter on 5th September 1990 and the defendants on 10th March 1991 entered the land without any authority and let the cattle graze on the land. The defendants in their answer countersued the plaintiff for a declaration of title on prescriptive possession and moved for a dismissal of the plaintiff's action.

The dispute proceeded to trial on several issues and the

following issues are noteworthy.

1. Was one Punchiralage Jayasinghe the original owner of the land described in the schedule to the plaint?
2. Did Punchiralage Jayasinghe by deed No 8641 dated 5th September 1990 transfer his rights to the plaintiff to enable the plaintiff to possess the land?
3. Did the defendants without any manner of title on or about 10th March 1991 enter the land and obstruct the plaintiff's possession?
4. As a result of the unlawful acts of the defendant, has the plaintiff suffered damages at the rate of Rs.500/- a month?

The issues suggested by the defendants include the following.

1. Is the subject matter of the action an ancestral land of the defendants?
2. Has Ukkuralage Banda, father of the defendants had improved the said land and possessed it for a period of more than 30 years?
3. Having possessed the property for 30 years have the defendants acquired a prescriptive title to the same?
4. Is the deed produced by the plaintiff bearing No 8641 a forgery?
5. If the above issues are answered in the affirmative should the plaint be dismissed?

At the trial both parties adduced evidence and the learned district judge by judgment dated 17 May 1996 dismissed the plaintiff's action, as he was of the opinion that the plaintiff has failed to establish the ingredients necessary to obtain relief in a possessory action. Further the learned district judge held that in any event the plaintiff has not established the identity of the corpus.

As regards the second finding, I need only to say that the question of the identity of the subject matter was never an issue raised in the case and even the pleadings of the defendants were on the basis that the subject matter of the action is not meant to be put in issue. Inasmuch as the plaintiff prayed for the ejection of the defendants, the defendants also prayed for a counter relief based prescriptive possession. This clearly shows that the parties were not at variance on the question of the identity of the corpus. In this background, the observation of the learned district judge as to the alleged failure to establish the identity of the subject matter is uncalled for.

The pivotal question for determination in this appeal is whether the learned district judge is justified in identifying the nature of the action instituted by the plaintiff as a possessory action and that the plaintiff's action should fail for want of proof of ingredients necessary to obtain relief in such a case. Basically, on a perusal of the pleadings, particularly the plaint, it is hardly possible to conclude that the action filed by the plaintiff is for possessory relief. The plaintiff clearly pleads a chain of title on

which he places reliance for his case. So much so when giving evidence the plaintiff produced a deed which is not pleaded in the plaint but without any objections from the defendants. Besides, the plaint does not allege dispossession of the plaintiff from the subject matter of the action. On a close scrutiny of the plaint it is seen that the plaintiff has complained of disturbance caused by the defendants to his possession by the defendant having let the cattle to graze at the pasture on the land in question and not dispossession. This clearly shows that the action of the plaintiff is not one founded on possessory remedies. Even the answer filed by the defendants is on the basis that the plaintiff is not the owner of the subject matter of the action and that the deed by which the plaintiff has purchased rights is a forgery. Above all the defendants have set up a claim on prescriptive possession seeking the relief that they be declared entitled to the land on that account.

It is trite law that once the issues are framed the pleadings recede to the background. In this case, the issues raised by the parties and accepted by the trial judge are indicative that the parties have never proceeded to trial on the basis that the action filed by the plaintiff is one that can be characterized as a possessory action. The issues framed by the plaintiff are based on title and the unlawful possession of the defendants. The main issues suggested by the defendants centres round the question as to whether the defendants are entitled to the corpus by right of prescription which is a recognized mode of acquisition of title. Therefore, it would be correct to observe that both the plaint and the issues of the plaintiff contemplated

on a regular action to eject the defendants from the subject matter in terms of Section 217 (c) or (e) of the Civil Procedure Code. For ready reference section 217 of the Civil Procedure Code (without the inapplicable parts) are copied below.

217. A decree or order of court may command the person against whom it operates-

(C) to yield up possession of immovable property;

(E) to do any act not falling under any one of the foregoing heads ;

(F) not to do a specified act, or to abstain from specified conduct or behaviour, or it may, without affording any substantive relief or remedy-

(G) to declare a right or status

The question that arises here is whether it is permissible for a plaintiff in a regular action to obtain an order of ejectment of the defendant who is in unlawful possession of his property without seeking a declaration of title to the same. In the case of T.B. Jayasinghe Vs Kiriwanegedara Tikiribanda 1988 2 The Colombo Appellate Law Reports, Page 24, it was held that Section 35 of the Civil Procedure Code contemplates two types of actions namely the recovery of immovable property and declaration of title to properties. By this judgement, the court clearly held that the action for recovery of immovable property is quite distinct and different from an action for declaration of title. In this respect, the judgement in the case of Gordon Fraser & Co Ltd Vs Jean Marie Losis and Martin Wenzel 1984 Sri Lanka Law

Report, Volume 2, page 86, is of much assistance to resolve the dispute at hand. In that case, this court clearly held that a plaintiff can seek an injunction to restrain the defendants from committing an act, the commission or continuance of which would produce injury to the plaintiff, as a substantive relief. A decree granting such substantive relief is permissible in terms of section 217(F) of the Civil Procedure Code without a prayer for declaratory relief.

that a plaintiff is entitled in terms of section 217 (F) of the Civil Procedure Code without a prayer for declaratory relief to obtain substantive relief an injunction to restrain the defendants from committing an act the commission or continuants of which would produce injury to the plaintiff as a substantive relief.

It is quite interesting to note the manner in which the trial judge has answered issue No. 1. Issue No. 01 is whether one Punchirala Jayasinghe was the owner of the land in question. This, the learned district judge has answered as being "probable". This means that in the opinion of the trial judge the plaintiff is the owner of the corpus on a balance of probability. The next issue is whether the said Punchirala had transferred his rights to the plaintiff by deed No 8641. This, the learned district judge has answered as being not clear to him as to whether Punchirala has transferred his rights to Jayasinghe or not. In the circumstances, it appears that the learned district judge was in a state of confusion with regard to his duty to answer the issues raised on the evidence led at the trial and that he has misapprehended the plaintiff's action to be one of

possessory actions.

In the circumstances, as the findings of the learned district judge had resulted in a miscarriage of justice, the impugned judgement cannot be allowed to stand. For the foregoing reasons, I am of the opinion that the judgement must be reversed and the case remitted to the district judge for re-trial in due course.

The appellant is not entitled to his costs.

A W A Salam, J

JUDGE OF THE COURT OF APPEAL

W L R Silva, J

I agree

JUDGE OF THE COURT OF APPEAL

LA/-