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

1. Ruwan Pathiranage Seetin (Deceased)

**Defendant-Appellant**

1A. Hewa Gamage Gimarahami,

1B. Ruwan Pathiranage Geetha Malanee,

1C. Ruwan Pathiranage Wijepala Ruwan,

All of Walawe-watte, Ma-madala.

**Substituted 1st Defendant-Appellants**

2. Ruwan Pathiranage Dharmasena
Walawe-watte, Ma-madala.

**2nd Defendant-Appellant**

**Case No. C.A. 1289/99(F)**

**D.C. Hambanthota Case No. 1114/L**

**Vs.**

Ruwan Pathiranage David (Deceased)

Walawe-watte, Ma-madala

**Plaintiff**

1. Ruwan Pathiranage Lalith Kumara,

Walawe-watte, Ambalanthota.

2. Ruwan Pathiranage Sriyani,
Beragama, Ambalanthota

**Substituted Plaintiffs-Respondents**

**Before:** Janak De Silva J.

**Counsel:**

H. Withanachchi for Substituted 1A to 1C Defendant-Appellants and 2nd Defendant-Appellant

Sudharshini Cooray for Substituted Plaintiff-Respondents

**Written Submissions tendered on:**

Substituted 1A to 1C Defendant-Appellants and 2nd Defendant-Appellant on 01.03.2019

Substituted Plaintiff-Respondents on 28.02.2019 and 18.03.2019

**Argued on:** 05.03.2019

**Decided on:** 21.06.2019

**Janak De Silva J.**

This is an appeal against the judgment of the learned District Judge of Hambanthota dated 06.12.1999.

The Plaintiff instituted the above styled action seeking the eviction of the Defendants from the land is dispute. The position of the Plaintiff was that his father Ruwan Pathiranage Siyadoris was issued a permit (P1) under the Land Development Ordinance (Ordinance) to the land in dispute and that his father had nominated him as the successor. It was further claimed that upon the death of his father on 12.09.1964 he became the lawful permit holder to the land in dispute. The Plaintiff sought the eviction of the Defendants from the said land as they were in unlawful possession.

The Defendants in reply claimed that the 1st Defendant was the eldest son of Siyadoris and that after the death of Siyadoris, he and the Plaintiff amicably divided the land in dispute from 1980 with the Plaintiff cultivating two acres on the eastern side and the 1st Defendant cultivating one acre on the western side. It was further claimed that the Plaintiff failed to succeed within one year of the death of Siyadoris. The 1st Defendant counter claimed for a declaration that he is entitled to possess one acre on the western side of the land in dispute.

The learned District Judge entered judgment as prayed for in the plaint and hence this appeal.

The learned counsel for the Appellants urged the following grounds in appeal:

(1) The Plaintiff could not have maintained the action as he had not prayed for a declaration of title.
(2) The learned District Judge erred in disregarding permits marked D1 and D2 which shows that two permits under the Ordinance had been issued to the Substituted Plaintiff (Lalith Kumara), the son of the original Plaintiff, and 1st and 2nd Defendants.

***Failure to seek a Declaration of Title***

At the argument the learned counsel for the Appellants submitted that the Plaintiff cannot maintain this action as he has not prayed for a declaration of title. The learned counsel for the Respondents submitted that this is not an objection taken up in the District Court and as such the Appellant should not be allowed to raise it in appeal for the first time.

A pure question of law which is not mixed with questions of fact can be taken up for the first time in appeal [*Thalagala v. Gangodawila Co-operative Stores Society Limited* (48 N.L.R. 472), *Jayawickrema v. Silva* (76 N.L.R. 427)]. I hold that the question raised is a pure question of law and should be considered by Court.

The learned counsel for the Appellants submitted that this being a *rei vindicatio* action there must a prayer for a declaration of title. This submission is misconceived in law as Gratiaen J. held in *Pathirana v. Jayasundara* (58 N.L.R. 169 at 173):

> "A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam)."

Clearly it is not incumbent on a plaintiff to seek a declaration of title in a *rei vindicatio* action. It will be sufficient if the plaint contains a prayer to evict the trespasser or unauthorized occupier from the land in dispute provided that he pleads the title in the body of the plaint which entitles him to maintain the action.

In this case, the plaintiff has pleaded that he is a permit holder under the Ordinance. In *Palisena v. Perera* (56 N.L.R. 407) it was held that a permit-holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser.

Indeed, if the Plaintiff had sought a declaration of title to the land in dispute, I would have held he is not entitled to do so for the reasons morefully set out earlier in *Jayatissa v. Bandara* [C.A. 891/97; C.A.M. 29.06.2018] where I held that a permit holder under the Ordinance is not entitled to obtain a declaration that he is the owner of the land given to him in terms of a permit issued under the Ordinance.

Before leaving this issue and in view of the many instances where the issue has come up before this Court, I wish to state that a permit holder under the Ordinance has the following remedies in order to evict a trespasser or unauthorized occupier from the state land given under the permit:

(1) An action for a declaration that he is a permit holder under the Ordinance and eviction of the trespasser or unauthorized occupier on the strength of such declaration [*Attanayake v. Aladin* (1997) 3 Sri.L.R. 386].
(2) An action where the only relief is to evict the trespasser or unauthorized occupier from the land in dispute on the strength of his title pleaded in the body of the plaint [*Palisena v. Perera* (56 N.L.R. 407), per Gratiaen J. in *Pathirana v. Jayasundara* (58 N.L.R. 169 at 173)].
(3) A possessory action in terms of section 4 of the Prescription Ordinance [*Edirisuriya v. Edirisuriya* (78 N.L.R. 388)].
(4) An action for a declaration that he is the **owner within the meaning of the Ordinance** and for eviction of the trespasser or unauthorized occupier on the strength of that declaration [Amendment to section 2 of the Ordinance made by section 2 of Act No. 27 of 1981].

***Permits marked D1 and D2***

The case of the Plaintiff was based upon the permit marked P1. One T.N. Pushpa Kumari, Field Advisor, Divisional Secretariat, Ambalanthota testified on 17.01. 1994 [Appeal Brief pages 90-96] and stated that the permit P1 was originally granted in the name of Siyadoris who had nominated the Plaintiff as his successor and that it was duly done [Appeal Brief pages 90-1]. This evidence establishes that as at the date of the institution of the action the Plaintiff had a valid permit issued under the Ordinance to the land in dispute.

Although the Defendants raised an issue on whether the Plaintiff had failed to succeed to the land within one year of the death of Siyadoris they have failed to prove it and in any event the evidence shows that the Plaintiff did in fact succeed as required by the law. Furthermore, issue nos. 15 and 16 raised by the Defendants on 23.02.1999 after leading evidence of T.N. Pushpa Kumari, Field Advisor, Divisional Secretariat, Ambalanthota cuts across this position as it is claimed that D1 and D2 was issued after Lalith Kumara, son of the Plaintiff and now Substituted Plaintiff-Respondent surrendered his rights to the Divisional Secretary [Proceedings of 23.02.1999, page 3].

There is a general principle that the rights of the parties must be determined as at the date of institution of proceedings or action. [*Ponnamma v. Arumugam* (8 N.L.R. 223 at 226), *Silva v. Nona Hamine* (10 N.L.R. 44), *Ponnamma v. Weerasuriya* (11 N.L.R. 217), *Silva v. Fernando et al* (15 N.L.R. 499), *Jamal Mohideen & Co. v. Meera Saibo et al* (22 N.L.R. 268 at 272), *Shariff et al v. Marikkar et al* (27 N.L.R. 349), *Eminona v. Mohideen* (32 N.L.R. 145), *De Silva et al v. Goonetileke et al* (32 N.L.R. 217), *De Silva v. Edirisuriya* (41 N.L.R. 457), *Lenorahamy v. Abraham* (43 N.L.R. 68), *Kader Mohideen & Co. Ltd., v. Gany* ( 60 N.L.R. 16), *Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another* (1983) 2 Sri. L. R. 267), *Talagune v. De Livera* (1997) 1 Sri. L. R. 253, *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others* (1998) 1 Sri. L. R. 235, *Lalwani v. Indian Overseas Bank* (1998) 3 Sri. L. R. 197, *Jayaratna v. Jayaratne and another* (2002) 3 Sri. L. R. 331, *Sithy Makeena and others v. Kuraisha and others* (2006) 2 Sri. L. R. 341].

However, it is not an immutable principle and courts have recognized certain exceptions to the general rule.

In *Sabapathipillai et al v. Vaithialingam* (40 N.L.R. 107) it was held that a trustee whose term of office expired during the pendency of an action brought by him, is not entitled to continue the action. Similar approach was taken in *Appusinno v. Balasuriya* (16 N.L.R. 385) by Ennis J. when he held that the Buddhist Temporalities Ordinance gave no power to appoint a provisional trustee when the office became vacant by expiration of time, that the plaintiff had no status to continue the action the moment he ceased to be trustee and that the principle that a case must be decided as at the time of the institution of the suit cannot be applied to this case.

In *Thangavadivel v. Inthiravathy* (53 N.L.R. 369) where proceedings by way of summary procedure under section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance were instituted by a wife against her husband for the return of certain jewelry, but while the inquiry was proceeding, a decree absolute was entered in a divorce case dissolving the marriage between the spouses, it was held that the plaintiff, having ceased to be the wife of the defendant during the pendency of the inquiry, lost her status to continue the proceedings and the general rule that the claims of the litigants are to be ascertained as at the commencement of the action would not be applicable in such a case. In *Mariam Nurban Hussain Teyabally v. Hon. R. Premadasa and two others* [S.C. No. 69/92, S.C.M. 05.11.1993] G.P.S. De Silva C.J. held (at page 5) that the general principle of law that the right of parties are determined as at the date of action has no application in the statutory context. In *Master Drivers (Pvt) Ltd. v. Karunaratne and others* [CA (PHC) APN 140/2012, C.A.M. 09.08.2018] I held that when entering judgment in a foreign currency the rupee value at the exchange rate prevailing at the date of payment together with legal interest should also be entered therein.

But I am of the view that none of the exceptions to the general rule applies in this case and that the learned District Judge correctly did not take into consideration the effect of permits marked D1 and D2.

In any event, there are several inconsistencies in the evidence of the said T.N. Pushpa Kumari, Field Advisor, Divisional Secretariat, Ambalanthota when she was recalled in 1999 to give evidence on permits D1 and D2. First, she testifies that the land in dispute comprises of 3 acres of which 1 ½ acres is high land and 3 acres is paddy land [Proceedings of 23.02.1999, page 2] and that 1 ½ acres of high land was given to Lalith Kumara [Proceedings of 23.02.1999, pages 2 and 3]. It was stated later that Lalith Kumara gave back 1 ½ acres of high land to the State and then the permit given to Lalith Kumara was cancelled and three new permits issued to Lalith Kumara and 1st and 2nd Defendants [Proceedings of 23.02.1999, page 3].

Furthermore, it was accepted by T.N. Pushpa Kumari, Field Advisor, Divisional Secretariat, Ambalanthota when she testified for the first time that Siyadoris had nominated the Plaintiff as his successor. Then upon the death of the Plaintiff, in the absence of a nominated successor the title to the land in dispute must in terms of section 72 of the Ordinance devolve as prescribed in Rule I of the Third Schedule. The permits D1 and D2 appears to have been issued contrary to the said provisions.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Hambanthota dated 06.12.1999.

Appeal is dismissed with costs.

Judge of the Court of Appeal