

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

C.A 750/1998(F)
D.C Colombo 5062/SPL

P. D. Keels Limited of
No. 130, Glennie Street,
Colombo 2.

PETITIONER

Vs.

J.W.Phillip Eardley Vernon Boteju
Of No. 183, Nawala Road,
Rajagiriya.

RESPONDENT

And

P. D. Keels Limited of
No. 130, Glennie Street,
Colombo 2.

PETITIONER-APPELLANT

Vs.

J.W.Phillip Eardley Vernon Boteju
Of No. 183, Nawala Road,
Rajagiriya.

RESPONDENT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Palitha Kumarasinghe P.C with Asanka Ranwala
For the Petitioner-Appellant

D.C. Mendis P.C. for the Defendant-Respondent-Respondent

ARGUED ON: 14.02.2012

DECIDED ON: 18.05.2012

GOONERATNE J.

This appeal concerns an order made by the learned District Judge of Colombo on or about 7.9.1998 discharging order nisi pertaining to registration of lis pendens in respect of an allotment of land marked lot (3) in plan bearing No. 220, in the Colombo Land Registry. It would be necessary to briefly state the relevant facts to ascertain the involvement of the Appellant and Respondent.

One Naomi Leela Elizabeth Perera became entitled to the above allotment of land (lot 3) and by another plan bearing No. 1592 of 20.3.1997 caused the said lot 3 to be subdivided into two lots namely 'A' & 'B'.

Further the above Naomi Leela Elizabeth Perera caused the said lot 'B' to be subdivided into 3 lots marked B1, B2 & B3 by plan 1593 of 23.8.1993. As such the said subdivided lots B1, B2 & B3 is a part of lot 3 in above plan bearing No. 220. The above named Naomi Leela Elizabeth Perera transferred lot B1, together with right of way over lots B2 & B3 to the Appellant by deed No. 678 of 3.9.1997. By October 1997 the Respondent filed a lis pendens in respect of the entire lot 3 in plan No. 220. Registration of the lis pendens as above is the dispute and the appellant's position is that it is unnecessary to register the lis pendens and the Respondent did not register the lis pendens for a period of 11 years until the Appellant purchased the property. (As pleaded in the Petition of Appeal). Appellant argue that Respondent filed a lis pendens mala fide with intention to cause loss and damage to the Appellant and also urge that under Section 33 of the Registration of Documents Ordinance the Appellant is entitled to move the District Court since registration of the lis pendens has become unnecessary.

Section 33 of the said reads thus:

- (1) Registration of a priority notice, seizure notice, seizure priority notice, caveat, or lis pendens may be cancelled at the request in writing of the person by whom or on whose behalf it was presented for registration.
- (2) A District Court may, on the application of any person interested in any property affected by registration of a priority notice, seizure notice, seizure priority notice, caveat, or lis pendens, if it is satisfied that the registration was or has become

unnecessary, order that the registration be cancelled. An application under this subsection may be made in a suit or summarily under Chapter XXIV of the Civil Procedure Code.

- (3) A cancellation under this section shall be registered by the Registrar in the prescribed manner.

There is reference made to two land cases, namely case Nos. 4955/ZL & 4956/ZL. Admittedly at the hearing of this appeal it transpired that Respondent was not a party in case No. 4955/ZL, in which lis pendens was registered. But it is not denied that Respondent was a party in case No. 4956/ZL. Case No. 4956/ZL was filed by the Public Trustee for ejectment of the Respondent from a land situated in Nawala. This land is connected to lot 3 in plan No. 220. (As stated by Appellant in the written submission filed in the District Court). The material placed before this court indicates that the Respondent had taken up the position in case No. 4956/ZL that the Respondent and his father was wrongly dispossessed by the Public Trustee from the said lot 3 in plan 220 on or about 3.7.1975. On that basis Respondent had by a claim in reconvention in respect of lot 3 prayed for damages on the footing that he was dispossessed by the Public Trustee. However after trial the Respondents claim in reconvention had been dismissed and judgment was entered in favour of the Public Trustee.

Judgment entered in favour of the Public Trustee on 24.4.1990. (vide judgment marked 'J3').

It was submitted by both counsel that the Respondent had appealed from the judgment (J3). Appellant further urge that:

- 5.10 The Respondent, purported to have appealed against the said Judgment. However, in the body of the Petition of Appeal, no allegation whatsoever in respect of the alleged errors committed by the Learned Judge in dismissing his claim in re-convention in respect of Lot No. 3 in Plan 220 has been pleaded. In other words, though an appeal has been lodged against the Judgment, the Respondent has not appealed particularly, against the dismissal of his claim in re-convention in respect of Lot No. 3 of Plan No.220.
- 5.11 No lis pendens has been registered in the said Case No. 4956/ZL, which was instituted on 10th May 1985 and dismissed on the 24th April 1990.
- 5.12. However, after Petitioner purchased the property on 3rd September 1997, the Respondent tendered the purported lis pendens to the Land Registry on 3rd October 1997.
- 5.13. By writing dated 26th November 1997 marked "L", the Petitioner called upon the Respondent to cancel the sad lis pendens and pointed out the case number given therein was erroneous.
- 5.14. The Respondent through his Attorney-at-law informed the Petitioner that he had taken steps to cancel the lis pendens filed with the case reference 4955/ZL and to tender a fresh lis pendens with case reference 4956/ZL. Up till the time the Petition was presented to Court, the lis pendens with Case reference No. 4955/ZL was registered in the Land Registry uncanceled and no new lis pendens with case reference 4956/ZL has been registered.

Documents J1, J2 & J3 (judgment in 4956/ZL) gives sufficient details and the role played by the Defendant in that case who is the present

Respondent. The learned District Judge has made some forceful observations regarding the Respondent. This court would not be in a position to comment on same, but judgment J3 would certainly assist this court to arrive at a conclusion as regards the registration of lis pendens.

Let me also consider the order of the Original Court. The learned District Judge states that the objections of the Respondent is to the effect that the transferor namely Naomi Leela Elizabeth Perera has no right or title to the land in dispute and that by case No. 18164/L which had been filed by Respondent's sister was an action filed to invalidate deed No. 678 executed in favour of the Appellant, which is pending in the District Court. I must at this point state that either of the counsel appearing in this appeal did not make any specific reference to Case No. 18164/4 or informed this court of the outcome of the said case. Trial Judge also considered the position that the lis pendens was registered in Case No. 4955/ZL where Respondent was not a party and the Respondent's position that the lis pendance was to be registered in fact for Case No. 4956/ZL where Respondent is a party. This mistake was admitted by counsel who appeared before me. There is an appeal pending from the judgment (J3) delivered in D.C Colombo Case No. 4956/ZL.

The trial Judge is of the view that since the appeal in Case No. 4956/ZL, and D.C Colombo 18164/L are still pending the Respondent is entitled to register the lis pendens. Trial Judge also hold that the Respondent is not entitled to register a lis pendens as regards case No.4955/ZL

This court is unable to agree with the views expressed by the learned District Judge. It appears that the learned District Judge has not considered the provisions contained in Section 33 of the Registration of Documents Ordinance. Trial Judge has to give his mind as to whether registration of the lis pendens becomes unnecessary in the circumstances of this case. The lis pendens registered in case No. 4955/ZL cannot be permitted to be maintained as the Respondent is not a party in that suit. In any event mistake is admitted by parties. Nor is the Respondent a party in Case No. 18164/L (document 'අ'). No lis pendens in Case No. 4956/ZL, in fact has been registered. I agree with the submission of learned Counsel for Appellant that what is pending in the Court of Appeal is the 'Appeal' and not the action. 'Lis pendens' means (Latin) A pending action – Oxford Dictionary of Law 6th Ed. Edited by Elizabeth A. Martin & Jonathan law. In Cooray Vs. Perera 17 NLR 460....

Per Wood Renton C.J. and De Samiayo A.J. (Perera J. dissentiente) – Where in an action an order of abatement is entered under section 402 of the Civil Procedure Code and the same is subsequently set aside, the action cannot be regarded as having been *lis pendens* during the period between the passing of the order and its being set aside.

Per Pereira J. – If during the period referred to above the action is not to be regarded as *lis pendens*, the aim and object of the provision of the section allowing an order of abatement to be set aside would be defeated.

The doctrine of *lis pendens* is one common to both English Law and Roman Dutch Law. Effect of it appears to be that an alienation made by a party to the suit *pendent lite* in favour of a person who has notice of the suit is in operation against rights sought to be enforced in the suit by the opposite party. Per Shaw A.C.J 3 CWR at 163. In the case in hand *lis pendens* applied 7 years after judgment was delivered (J3) and Respondent claim in reconvention rejected. No action was pending. Appeal from judgment J3 cannot be construed to be an action. There was no pending action.

Appellate Court in appeal has the power to substitute its decision on matters in issue; Court would decide whether the decision under appeal was ‘right’ or ‘wrong’ Appellate powers are condensed in Section 773 of the Civil Procedure Code and Constitutional Provisions.

Action as described in Section 6 of the Civil Procedure Code reads thus:

Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.

I would refer to the following cases as regards 'actions'.

Action is not an apt – term to describe insolvency proceedings, the procedure in regard to which is regulated by “Insolvency Ordinance No 7 of 1853... The Civil Procedure has nothing to do whatsoever with insolvency matters.

Wither J. In re Abdul Aziz 1 N.L.R 196....

Damages cannot be claimed or awarded in a partition case.
Samarasinghe Vs. Balahamy 5 NLR 379...

It has been approved by Basnayake J. In
Kiribanda Vs. Weerappa Chettiyar 50 N.L.R. 490....

An application made to appoint a guardian ad litem in a partition suit and to add as a defendant falls within the meaning of the action defined in section 6 of the civil procedure code.

Raman Chetty Vs. Abdul Razak 7 N.L.R 345

Parents have right to file action against school master to issue school leaving certificate of their child. There was an implied contract between the parties

Amaris Vs. Amarasinghe 21 N.L.R 176

Roman Dutch Law recognizes two classes of action. Rea (in rem) and personal (in personam) In the case of Court held an application made to a court in the course of and incidental to, an action is itself considered an action.

Subramaniam Chetty Vs. Soysa 25 N.L.R. 344

It was held by majority of the Supreme Court that an application for a writ of certiorari does not fall within the ambit of the expression of “civil suit or action”

Silverline Bus Co, Ltd. Vs. Kandy Omni Bus Co. Ltd 58 N.L.R 193

In the circumstances of this case the District Court should have ordered and have the registration cancelled, as it has become unnecessary. The Respondent does not seem to have an actual vested interest in the property in dispute. Appellant is a bona fide purchaser who has purchased the property for valuable consideration. There is also an apparent lapse of time of about 7 years which the Respondent has not been able to explain in either court. Therefore this court would set aside the order of the learned District Judge dated 7.9.1998 (prayer ‘a’) Appeal allowed with costs in term of sub paragraphs a, b & c of the Petition of appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL