

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

CA 1147/96
DC AMPARA 256/E

WEERABADDANAGE PREMDASA,
"MUNASINGHA STORES", KANDY
ROAD,
AMPARA
PLAINTIFF-APPELLANT

UDENI GUNAWARDENA,
"DISNA STORES", AMPARA
DEFENDANT-RESPONDENT

BEFORE: A W A SALAM, J
COUNSEL: MANOHARA DE SILVA PC WITH HIROSHA
MUNASINGHA FOR THE PLAINTIFF-APPELLANT AND D
M NILUKA SANJANI DISSANAYAKA FOR THE
DEFENDANT-RESPONDENT.
ARGUED ON: 17.11.2011.
WRITTEN SUBMISSIONS TENDERED ON: 28.02.2012
AND 09.03.2012
DECIDED ON : 15.05.2012.

A W ABDUS SALĀM, J

This is an appeal from the judgement of the learned district judge dated 9.12.1996, dismissing the action, filed by the plaintiff-appellant for a declaration of title to the subject matter of the action and ejection of the defendant-respondent. The facts briefly are that the plaintiff-appellant filed action against the

defendant-respondent seeking *inter alia* a declaration of title as the lawful permit holder of the land in suit. This being an action for declaration of title, the burden is on the plaintiff-appellant to prove the title to the land in suit. The learned district judge dismissed his action on the ground that he has failed to prove the permit (P1) issued to him, at the most is valid only up to 31st December 1993 and therefore the permit in question was not valid as at the date when the judgement was delivered.

The Learned President's Counsel submitted that the plaintiff was in possession of a valid permit when he filed action and the learned district judge was in error by dismissing the action on the basis that the plaintiff had failed to retain his title throughout the case. The learned president's counsel has further adverted to the evidence of Seneviratna from the divisional secretary's office, to the effect that the acceptance of the rent from the defendant-appellant has been stopped from 1993, subsequent to the filing of the present action.

It is of importance to note that at the commencement of the trial several admissions were recorded. The admissions include the identity of the corpus, the fact that the corpus belongs to the State, a person by the name of Munasingha was the original permit holder and the said Munasingha handed over the subject

matter of the action to the defendant. In the course of the trial, it was admitted that the plaintiff-appellant was granted an annual permit in respect of the subject matter of the action as is evident from P1. The evidence led at the trial indicated that the plaintiff-appellant has paid the annual rent payable on the permit, in order to renew the same on an annual basis up to 31st of December 1993. In the light of this evidence, it is clear that the plaintiff-appellant had a valid permit to the subject matter of the action, as at 19.5.1993 being the date on which the action was instituted.

As is borne out in the evidence led at the trial, there was no difficulty to conclude that the plaintiff-appellant had a permit from the State to possess the land which is the subject matter of the action up to 31.12.1993. However, the learned district judge at the time of delivering the judgement raised two more issues without notice to the parties and answered them against the plaintiff-appellant and came to the conclusion that the plaintiff-appellant did not retain the title to the subject matter throughout the case.

One of the main matters that needs to be considered in this judgement is the propriety of the learned district judge having framed two issues in the course of delivering the judgement. No doubt in terms of section 149 of the Civil Procedure Code the court is vested with the

discretion to frame issues at any time before passing decree. However, such discretion has to be exercised in the interest of Justice and to ensure the right decision in the case. Above all, when the judge exercises such discretion, he should make up his mind as to whether it is necessary to hear the parties on the new issues so framed, to enable the parties lead fresh evidence touching upon the new issues, in order to assist court to come to a decision on those issues. If the issues so framed by the learned judge when reading of the judgement are purely questions of law then it may not be necessary for the parties to be given the opportunity of being heard or adducing evidence on those issues. On the other hand if the issues raised by the learned judge in the course of delivering the judgment are not purely questions of law but either questions of fact or questions of mixed fact and law then the parties should be given an opportunity of meeting those issues.

The two issues framed by the learned district judge in reading of the judgement are as follows.

22. Has the plaintiff been able to retain his title until the pronouncement of judgement?

23. If not, can the plaintiff have and maintain the action?

The question as to whether the plaintiff had title until the pronouncement of the judgement was

never the contemplation of either party or the learned district judge in the course of the trial. According to the learned district judge the plaintiff's paid the annual rent up to 31st of December 1993. By reason of the decision taken by the Divisional Secretary not to act to money during the progress of the case, it may well be that the plaintiff was not able to make the payments. However in such a situation which is a total impossibility on the part of the plaintiff, the annual rent is an impediment to retain the title has not been considered by the learned district judge nor have the parties been afforded the opportunity of meeting that question either by way of submissions or evidence.

In my opinion, the learned district judge should have allowed the parties to make submissions and/or adduce evidence before he answered the two issues raised after the conclusion of the case. In the circumstances, I am of the view that the impugned judgement cannot be allowed to stand and therefore set aside. Accordingly, the judgement is set aside and the case is sent back for a fresh trial.

There shall be no costs.

Judge of the Court of Appeal

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