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

CA 950/96F  
D.C. Monaragala 1039/L

W M R Seetha Kumarihamy,  
Ambanporuwa,  
Nannapurawa,  
Bibile

**Defendant-Appellant**  
**Vs**

T M Seelawathie,  
"Abhaya",  
Yalkumbura,  
Bibile

**Plaintiff-Respondent**

Before : A.W.A. SALAM, J.

Counsel : W Dayaratna PC with D Dayaratna for the  
Defendant-Appellant and P N Abeyratna for the Plaintiff-  
Respondent.

Argued on : 26.04.2012

**Decided on: 06.07.2012**

A W Abdus Salam, J

**T**his was a *rei vindicatio* action filed by the  
plaintiff seeking *inter alia* a declaration as to  
her ownership of the land and premises described in  
the schedule to the plaint and for ejection of the  
defendant therefrom.

As averred in the complaint the original owner of the land in dispute was one T.M. Appuhamy and on his demise his rights devolved on his wife and the two children. The two children had thereafter become the sole co-owners of the property upon the death of their mother. The two children namely T.M.Sudu Nilame and T.M Heen Kumarihamy had amicably partitioned the land between them and come to an agreement that had enabled T.M.Sudu Nilame to possess the land in dispute, to the exclusion of all others for a period of more than 40 years and the plaintiff claims the benefit of such possession on the part of her predecessors in title. T M Sudu Nilame who had allegedly become the owner of the subject matter purely by right of prescription has transferred his rights to his daughter, the plaintiff on deed No 28429 dated 14 September 1975 attested by H.D.R.Wijesingha, NP.

The plaintiff averred that from or about the year 1963, one T.M.Wijesundera a son of T.M. Sudu

Nilame, husband of the plaintiff and a brother of the plaintiff was placed in possession of the land in suit by T.M.Sudu Nilme, on the undertaking that the former would hand over possession of the property whenever the owner so requested. The plaintiff categorically pleaded that a few months prior to September 1975 (the month in which she became the owner of the property) the defendant forcibly entered the property acting in violation of her rights and that of her predecessor. The plaintiff further maintained the position that in the year 1983 she sent two letters of demand to the defendant requesting to handover the possession of the property but without success.

The defendant filed answer denying the main allegations in the plaint and maintained that the land in question belongs to the Paththini Devalaya. She further claimed that her husband had acquired a prescriptive title to it by reason of his having possessed the same for a such length of time sufficient to obtain a valid prescriptive title.

After trial the learned district judge entered judgement for the plaintiff as prayed for in the plaint. His findings were that the plaintiff had acquired a prescriptive title to the land and that the defendant is in occupation without any manner of title. In order to come to these conclusions, the trial judge relied heavily on documents marked P1 to P9, produced by the plaintiff.

At the trial T M Sudu Nilame gave evidence under section 178 of the CPC. He testified as to the manner of his possession of the subject matter and of the circumstances under which he transferred his rights in the land to the plaintiff. He denied that the land in question belonged to Paththini Devalaya and asserted that his ancestors were in possession of the subject matter for generations. The evidence of this witness was that his son (the deceased husband of the defendant) was a licensee and after his death the defendant commenced her possession without any manner of title. This evidence of T M Sudu Nilame is

contradictory to the position maintained by the plaintiff in her evidence. The evidence of Sudu Nilame is also contradictory to the pleadings on material particulars. The pleadings and the evidence of the plaintiff were that the possession was handed over to the husband of the defendant both by Sudu Nilame and herself. It is quite remarkable that the plaintiff in her evidence has emphatically stated that she never handed over the property in question to the husband of the defendant although she asserted in the plaint that it was handed over to him jointly by her and her father. The relevant paragraph (10) is reproduced below for easy reference.

එබැවින් ඉහත සඳහන් සුදු නිලමේගේ සහ මෙම නඩුවේ පැමිණිලිකාරියගේ අවසරය ඇතිව මෙම වී. එම්. විජේසුන්දර මෙම ඉඩම සහ ස්ථානය 1963 කාලයේ සිට පමණ භුක්ති විඳින ලදී. මෙම භුක්ති විඳීමට එම වී. එම්. විජේසුන්දරට ඉහත නම් සඳහන් සුදු නිලමේ සහ පැමිණිලිකරු අවසර

දුන්නේ ඔව්න්ට මෙම ස්ථානය සහ ඉඩම උවමනා  
වෙලාවක ආපසු දෙන පොරොන්දුව මතය.

As regards the commencement of possession and the mode of possession by the husband of the defendant and the continuation of possession by her after the death of her husband, the evidence of the plaintiff and her father is very much contradictory to each other. The learned district judge has failed to take into account those contradictions in assessing the credibility of the version put forward by the plaintiff.

The plaintiff also called her brother, an officer from the Primary Court of Wellawaya, a Licensed Surveyor, a witness from the office of the Government Agent and a colonization officer. For purpose of this judgement, details regarding the evidence of these witnesses are not dealt with, as this appeal could easily be disposed of without considering the effect of such evidence.

The defendant had given evidence before the learned district judge and called several witnesses to testify on her behalf. Some of the salient features of the evidence led through the witnesses of the defendant would be dealt at a different stage of this judgement.

The plaintiff has sought a declaration of title to two allotments of land described in the schedule to the plaint but she attempted to establish her title only in respect of one land, namely the land described under item 1 in the schedule. Hence, as regards paper title is concerned, it is only P1 that is relevant to the proof of the plaintiff's case.

The uncontroverted testimony led at the trial shows that the husband of the defendant was in possession of the subject matter of the action from the year 1963 and that he had converted the land in question covered with thick jungle into a Paddy.

The evidence regarding the possession of the subject matter as narrated by Sudu Nilame is quite interesting. He never stated that his son ever possessed the property either with his permission or that of her daughter. He maintained in his evidence, that it was after the death of his son Wijesundera, the defendant started possessing the land in suit. Even though the plaintiff had stated that her brother, namely the husband of the defendant was placed in possession by the father, the witness (father) never spoke of any permission being given to his son to possess the land or his son having ever possessed it. He was quite categorical that at the time of the death of his son, it was he (Sudu Nilame) who possessed the property and it was after the death of his son the defendant forcibly started possessing the subject matter. This evidence of Sudu Nilame is contradictory to the plaint and also the evidence of the plaintiff. The learned district judge has failed to consider this aspect of the matter when he evaluated the evidence



adduced on behalf of the plaintiff.

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As has been contended by the learned President's Counsel the fact that the husband of the defendant had improved the land is corroborated by the order of the learned district judge directing the payment of compensation to the defendant by the plaintiff.

The learned President's Counsel has submitted that the plaintiff has failed to prove the cause of action averred in the plaint. According to the plaint, the plaintiff has stated that the defendant forcibly entered her land on or about 14 September 1975. As stated in paragraph 14 of the plaint the notice to quit has been sent to the defendant demanding that the land be handed over on or before 31 October 1983. By reason of that notice the defendant becomes a trespasser actually from the date on on which he has been asked to hand over possession namely 1983. In the circumstances, the defendant becomes a trespasser or the cause of action had risen

to the plaintiff to sue the defendant from 31st of October 1983. However the issue raised is as to whether the defendant is in unlawful occupation of the land in question from the 14 September 1975.

It was admitted that the land which is under item No 2, in the schedule is in the possession of a third party and not occupied by the defendant. According to the evidence of Sudu Nilame the original owner of the subject matter was his father who died in 1915. Thereafter the land had devolved on his mother and sister. The evidence of the father of the plaintiff does not clearly indicate as to what happened to the share inherited by the daughter of the original owner. With all these infirmities the evaluation of the evidence by the learned district judge clearly indicates a serious injustice and misdirection in reaching the final decision.

It transpired in the evidence adduced by both parties that the subject matter is a portion of a larger land of

nearly 80 acres. Evidence of official witnesses has been led by the defendant on this aspect of the matter. The important consideration as to whether the land in question fell within the extent of 80 acres has not been sufficiently addressed to by the learned District Judge. If on the question of the identity of the corpus the Plaintiff fails to discharge her burden, invariably, she is not entitled to succeed in the action. Time and again, it has been emphasised that in an action for declaration of title the plaintiff should set out his title on the basis on which he claims a declaration of title and also prove that the title against the defendant in the action. It is trite law that the defendant in a *rei-vindicatio* action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the footing that the defendant's title is poor or that he has failed to establish his title. The basic rule is that the plaintiff must establish his claim should stand or fall depending on the outcome of his case alone. On this aspect, it is appropriate to refer to the case of

Wangiaratne Vs Juwanis Appuhamy 65 NLR page 67, where the Supreme Court re-endorsed the principle relating to the burden of proof in this type of actions. Here, it was re-echoed that the plaintiff in such a situation is not entitled to rely on the weak defence put forward by the defendant. In the impugned judgment the learned district judge has heavily relied on the weaknesses of the defendant's case and that has been influenced him to a great extent to decide the case in favour of the plaintiff. The learned district judge has also commented that the defendant had no proper knowledge as to the situation of the land in question and its metes and bounds. The documents relating to the Land Acquisition Act, relied upon by the plaintiff has no direct relevance to the plaintiff's case and the learned district judge should not have given that degree of weight to those documents, when he came to the conclusion that the plaintiff has established his title to the subject matter.

The President's Counsel has contended that a grave error of law and a misdirection had occurred as regards the standard of proof and therefore the finding that the plaintiff is the owner of the subject matter cannot be allowed to stand in law. Taking into consideration the fact that the plaintiff has not been able to establish with cogent evidence the identity of the corpus, the action should have failed due to a lack of proof of necessary ingredients.

Upon a consideration of the evidence led by both parties it is quite clear that no cogent evidence has been led by the plaintiff to obtain a declaration of title to the land in question. In the schedule to the plaint she has set out two lands in the course of the trial.

On the other hand, as the law casts no burden on the defendant to establish any material in a rei-vidicatio suit, the adverse inference drawn against the defendant by the learned district judge and reliance placed by him on the weakness of the defendant's

case are serious misdirections that had ended up in a miscarriage of Justice. For these reasons, the judgement appealed against is set aside and the learned District Judge is directed to enter decree dismissing the plaintiff's action.

There shall be no costs.

Judge of the Court of Appeal

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