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

T. N. Chrishanthi Peiris
No. 54, 4th Lane
Rajagiriya.

PLAINTIFF

C.A 816/1999 (F)
D.C No. 5685/ZI

Vs.

1. S. Matilda Fernando
   No. 20/5, 4th Lane,
   Rajagiriya.

2. C. A. Rathnapala
   No. 20/5, 4th Lane,
   Rajagiriya.

3. L. R. Padman de Silva
   No. 16/7, Maligawa Road,
   Etul Kotte, Kotte.

DEFENDANTS

AND NOW

S. Matilda Fernando
No. 20/5, 4th Lane,
Rajagiriya.

1ST DEFENDANT-APPELLANT

Vs.

T. N. Chrishanthi Peiris
No. 54, 4th Lane
Rajagiriya.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL R. Suwandaratne with S. Tennakoon
for Plaintiff-Respondent

W. Rajapaksa P.C., with N. Kumarage
for Defendant-Appellant

ARGUED ON: 25.11.2011

DECIDED ON: 16.02.2012

GOONERATNE J.

This was an action filed by the Plaintiff-Respondent in the District Court of Colombo for a declaration of title and ejectment of the 1st Defendant-Appellant and 2nd & 3rd Defendant-Respondents from the premises described in the 4th schedule to the plaint. Judgment was entered by

the learned Additional District Judge, Colombo in favour of the Plaintiff-Respondent on 13.8.1999. By the same judgment the learned trial Judge also dismissed the claim in reconvention of the 1st Defendant-Appellant who by her amended answer, sought a declaration of title in her favour and also a declaration that deed No. 785 (P5) of 8.5.1983 is null and void. Appeal is from the said judgment.

Parties proceeded to trial on 7 admissions and 17 issues. However issue No. 14 was withdrawn and in the judgment the trial Judge observes that since issue No. 15 is connected to issue No. 14, court had considered that both issue Nos. 14 & 15 are withdrawn. Therefore 15 issues were tried by the learned Additional District Judge. In the judgment the trial Judge has identified the main problem in this case and state that what has to be decided is the validity of deed No. 785 (P5) of 5.8.1983. Prior to execution of deed No. 785 (P5) it was admitted between parties that the 1st Defendant-Appellant was the owner of the premises in question (P4).

To state very briefly the background facts, the 1st Defendant-appellant and 3rd Defendant-Respondent were residing in the same house for long years since the 1st Defendant-Appellant had been either adopted or brought up by the 3rd Defendant-Respondent's parent, from childhood. As

such they were like brothers and sisters of one family though may not be in a legal sense. All this evidence had transpired in the District Court. Having admitted paragraphs 1 – 6 of the plaint more particularly the corpus and the devolution of title from the original owner, Plaintiff-Respondent contends that the corpus of the case is contained in the 4th schedule to the plaint and is in extent of 11 perches. At a certain point (since several deeds were executed) the 3rd Defendant-Respondent by deed 1885 (P4) of 8.9.1976 gifted to the 1st Defendant-Appellant and the 1st Defendant-Appellant became the owner, subject to the life interest of the Donor (3rd Defendant) and his brother one Senath Lakshman de Silva. The deed P4 in its schedule refer to lot 'A' of Pelangahawatta in extent of 25.35 perch in plan 3830 of 1976. In the same deed there is reference to a larger land of 36.3 perches in terms of plan 687 of 1967. Deed P4 does not give details of previous owner of the 3rd Defendant-Respondent.

At the hearing before this court the learned President's did not stress on the question whether the deed in question No. 758 of 8.5.1983 (P5) was duly proved, but suggested and urged another line of argument which was not tried by the original court. I would prefer to incorporate learned President's Counsel submissions in his oral and written submission as

follows, to demonstrate that the 3rd Defendant-Respondent could not have alienated an extent of land which he had not actually owned. The following to be noted and examined.

(1) Deed P6 (No. 814 of 17.10.1983) executed by 3rd Defendant-Respondent and he transferred an extent of 13.5 perches from and out of 25.35 perch morefully described in the 3rd schedule to the plaint, to Nawagamuwage Lawrence Perera.

(2) Having done so as described in (1) above the remaining portion in the hands of 3rd Defendant-Respondent would be 11.83 perches (after execution of deed P6 No. 814) of land from the 3rd schedule.

(3) By deed No. 1168 (P7) of 15.7.1986 the 3rd Defendant-Respondent transferred to Plaintiff an extent of 11 perches (as in paragraph 9 of plaint).

(4) On the same date as (3) above the 3rd Defendant transferred 9.6 perches from an extent of 13.5 perches to Chitra Arachchige Tilini Ereshani by deed No. 197 (P9)

(5) At the time of executing aforesaid two deeds bearing Nos. 1168 (P7) and 197 (P9) the said Ranjith Padman De Silva owned only a portion in extent of 11.85 perches out of the land described in the 3rd schedule to the plaint. By aforesaid deeds Ranjith Padman De Silva had already alienated 20.5 perches.

(6) It is crystal clear that the Plaintiff has no right whatsoever to the land described in the 4th schedule to the plaint. If at all he may have had unidentified portion in extent of 4.85 perches (perches 25.35 less perches 20.5).

I will consider the position of the Plaintiff-Respondent who vehemently objected to the stance taken by the Appellant at the hearing of this appeal on the basis that the Appellant cannot take a new stand which was never tested or taken up at the trial before the District Court. Learned Counsel for Respondent urged that the trial Judge based his judgment on the admissions and issues raised between parties and the evidence emerging on the issues raised at the trial. As such Appellant cannot be permitted to raise a new ground in the appeal. He further contended that the Appellant need to be restricted to issue Nos. 10 & 11 for the reason, as challenged in the Original Court the deed No. 785 (P5) to be a fraudulently executed deed.

There is information by way of written submissions available to court that the 1st Defendant married the 2nd Defendant in the year 1975 and the 3rd Defendant-Respondent had given the property described in the 3rd schedule to the plaint as dowry by deed No. 1885 (P4) of 8.10.1976.

The Plaintiff-Respondent urge that after she became the owner entered the property and put up a fence on the boundaries. Thereafter the 1st Defendant-Appellant and 2nd & 3rd Respondents attempt to remove the fence and consequently on a complaint to the police, proceedings under Section 66(1) of the primary Count's Procedure Act was instituted. Magistrate in the said case directed the Plaintiff to file a civil action. 1st & 2nd Defendants

alleged that the 3rd Defendant-Respondent requested for 3 perches of the land described in the schedule to the plaint, and pay Rs. 9000/- for that extent of land. Thereafter in keeping with the trust on the 3rd Respondent signed a deed written in English language. The 1st Defendant-Appellant intended to convey only 3 perches out of the land described in schedule 3 but the 3rd Defendant-Respondent fraudulently got the entire land. Thereafter again on 15.7.1986 the 3rd Defendant-Respondent conveyed 9.6 perches to the 1st Defendant-Appellant's minor daughter (deed P9).

Plaintiff-Respondent refer to the admissions recorded as follows:

(i) The subject matter of the said case is admitted
(ii) Devolution of title set out in paragraphs 1 – 6 admitted
(iii) Due execution of exhibits P1, P2, P3, P4 P4a P6 and P8 are admitted
(iv) The execution of deed marked P5 along with the paint is admitted
(v) The existence of Magistrate Court proceedings and exhibit 9 annexed to the plaint is admitted.
(vi) The information filed by the Welikada OIC at the Primary Court is admitted
(vii) The averments contained in paragraph 17 of the plaint is admitted as mentioned in paragraph 9 of the answer.

Plaintiff-Respondent contends that she genuinely purchased the property for valuable consideration and that she is a bona fide purchaser of land for valuable consideration.

Plaintiff-Respondent also take up the position that transactions between the 1st Defendant-appellant are all inter family transaction and no basis to complain against the 3rd Defendant who previously gifted the property to the Appellant and in fact transferred an extent to Appellant's minor daughter.

The Plaintiff-Respondent though in the District Court did not have the opportunity to meet the point referred to in the argument and submissions of the learned President's Counsel, made in this appeal, has sought and attempted to reply and resist the position of the 1st Defendant-Appellant in appeal, as follows in the written submissions filed in this court.

(a) To consider the new position the trial Judge has to go through the schedules in the original title deeds.

(b) No party disputed the schedules of the properties challenged or ownership of Plaintiff-Respondent on the basis now put forward by the Appellant.

(c) In fact at the out set an admission was recorded admitting the corpus. i.e admission of the situation of the property in dispute or subject matter of the case.

(d) Plaintiff-Respondent sought a declaration for the land in dispute referred to in the 4th schedule to the plaint in extent of 11 perches.

(e) By deed P4 (1885) of 8.10.1976 the 3rd Defendant-Respondent gifted the property to the 1st Defendant-Appellant (subject to life interest). Schedule of the

said deed refer to lot A Pelengahawatte in extent of 25.35 perches as in plan 380 of 17.9.1996. In the same deed reference is made to a larger land of 36.3 perches in terms of plan 687 of 18.9.1967 P4 does not give a clue of the previous ownership of 3rd Defendant-Respondent.

(f) Issues raised on P5 to be fraudulently executed deed.

(g) By deed P6 (814) of 17.10.1983 the 3rd Defendant conveyed 9.75 perches from and out of 36.5 perches.

(h) The said deed refers to impugned deed No. 785 which is marked P5 and also to a deed No. 469 dated 21st September 1967 attested by K.S.M. Perera N.P as deeds by which the 3rd Defendant Respondent became entitled to the rights he conveyed to said Lawrence Perera.

(i) The said deed No. 469 which is marked P3 and at page 305 of the appeal brief and by the said deed the 3rd Defendant Appellant had become entitled to a specific 36.3 perch land which is described as Lot A in plan No. 687 dated 18th September 1967 made by N.H.G. Yapa Licensed Surveyor.

(j) By deed P3 the 3rd Defendant Respondent who is in fact the original owner of the properties had in fact become entitled to a larger land in extent of 36.3 perch and the other portion of land described in deed P5 as well as P4 which is in extent of 25.35 perch area is a part of the said 36.3 perch land which was owned by the 3rd Defendant Respondent.

(k) The 3rd Defendant Respondent in fact had 36.3 perch area and therefore he can easily execute deed up to an extent of 36.3 perch.

(l) The title deed of the Plaintiff Respondent is deed No. 1168 dated 15th July 1986 attested by Hemalatha de Silva N.P which is at page 92 of the appeal brief and marked as P7.

(m) The said deed is 11 perch, the extent of the deed given to Nawagamuwage Lawrence Perera by the 3rd Defendant Respondent which is deed No. 814 dated 17th October, 1983 attested b A.W.A de Silva N.P is in relation to a land in extent 9.75 perch and the deed which is executed in favour of the 1st Defendant Appellant and the 2nd Defendant Respondent daughter Chithra Arachchige Thilani Iroshini bearing No. 197 dated 15th July, 1986 attested by N.H.K. G.P. de Silva N.P is in relation to a property in extent of 9.6 perch.

(n) The aggregate extents of deed P8 (deed No. 197 at page 97) deed P7 bearing No. 1168 which is at page 92 of the appeal brief and deed P6 which is deed No. 814 executed in favour of Lawrence Perera dated 17th October, 1983 amounting to 30.35 perch which is well within the 36.3 perch land in fact owned by the 3rd Defendant Respondent.

(o) Even after leaving out areas for access road the 3rd defendant Respondent could have easily conveyed an extent of 30.35 perch which is apparent in perusing the schedules of the aforementioned deeds.

This is a re vindicatio action and usually Plaintiff should plead his title and prove his title against the Defendant. Parties proceeded to trial on the issues and admissions raised in the Original Court. Once it is done pleadings recede to the background. I find that the recording of several admissions in this case resulted in easing the burden of the Plaintiff to a very great extent. Devolution of title as in paragraphs 1 – 6 of plaint admitted.

Deeds P1, P2, P3, P4 & P6 were admitted. Plans P6a & P8 were admitted. The signing of deed P5 admitted (which was the deed, appellant sought to contest it's validity). The issues raised by the Plaintiff is more or less focused to prove his title. Plaintiff has not unnecessarily raised questions pertaining to extent of schedules. In fact he need not do so to prove his case. Defendant's issues pertains to validity of deed P5 and that it was a fraudulently executed deed. There is no issue raised by the Appellant party on extent of the several deeds produced in this case to prove any discrepancy in extent. Nor was the learned District Judge called upon to rule on a matter of extent at any stage of the trial.

The purpose to raise issues and admissions in terms of the Civil Procedure Code is in one respect to identity each parties case before court. Issues are generally raised from the pleadings and it is also permissible to raise issues when evidence transpire in court and based on the evidence issues could be suggested. Framing of issues not restricted to pleadings 76 NLR 444. That would not concern this case. Therefore Plaintiff-Respondent placed his case on the footing of the case presented to the Original Court. Plaintiff-Respondent had no opportunity to go out side the scope of the action filed in the District Court.

As such I am very much inclined to accept the position of the Plaintiff-Respondent's argument before me in this appeal based on oral and written submissions. It would be extremely unfair to call upon a party to reply and answer to a question what was never tried in the District Court. In a way court cannot grant relief for other than what was prayed for in the pleadings (2003 (3) SLR 35). However I am also convinced of the reply of Plaintiff-Respondent by which he referred to the extent in his submissions in answer to learned President's Counsel. However the Court of Appeal cannot consider arithmetical calculations which were not made known to the learned District Judge, at the trial. To prove same evidence may also have to be led.

The learned District Judge has entered judgment in favour of the Plaintiff-Respondent based on admissions and issues recorded at the trial. I have considered the entire judgment, and I see no basis to interfere and the trial Judge has given cogent reasons inter alia on the validity of deed P5 which was the case of the 1st Defendant-Appellant in the District Court. Primary facts have been considered and this court has no reason to interfere with primary facts 1993 (1) SLR 119; 20 NLR 332; 1955 (1) All E.R 326. Trial Judge has very correctly held that Plaintiff's documents P1 – P13 were

read in evidence without any objections at the closure of Plaintiff's case, and the said documents becomes evidence for all purposes of the case and law. Refer to Sri Lanka Ports Authority & others Vs. Jugolinija – Boal East 1981 (1) SLR 18 at 24.

I would also refer to the case discussed in Latheef and another Vs. Mansoor and another 2011 BLR at 204; Silva Vs. Kindersle 18 NLR 85; 31 NLR 385, 58 NLR 246; 1997 (2) SLR 101.

In all the above circumstances I affirm the judgment of the District Court and dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL