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

C.A 226/1997(F)
D.C. Kalutara 3797/L

W. Chandrasiri Fernando
No. 218, Galle Road,
Aluthgama.

PLAINTIFF

Vs.

1. Titus Wickramanayake
No. 210, Galle Road,
Aluthgama.

And three others

DEFENDANTS

AND NOW

W. Chandrasiri Fernando
No. 218, Galle Road,
Aluthgama.

PLAINTIFF-APPELLANT

Vs.

1. Titus Wickramanayake
No. 210, Galle Road,
Aluthgama.

And three others

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Ranjan Guneratne for Plaintiff-Appellant

Priyantha Alagiyawanna with Nuwan Ratnayake
For Defendants-Respondents

ARGUED ON: 17.11.2011

DECIDED ON: 14.02.2012

GOONERATNE J.

This was an action for declaration of title and ejectment/damages against the Defendants filed in the District Court of Kalutara. The learned District Judge delivered judgment on 21.4.1997dismissing Plaintiff's action, and Plaintiff-Appellant filed this

appeal seeking to set aside the said judgment and for a prayer to be entered in his favour as prayed for in his plaint. The prayer (c) of the Petition of Appeal, the Appellant also seek as relief a Trial De Novo. It is interesting to note the grounds of Appeal set down in paragraph 22(1) – (7) and or (2) to (7) of the Petition of Appeal more particularly for the reason that, at the hearing before the Court of Appeal learned Counsel for the Plaintiff-Appellant did not pay much attention to the grounds pleaded in the Petition of Appeal but sought to attack the judgment of the original court on another basis which will be dealt in this judgment.

I have noted the proceedings in the District court of 2.1.1996 (Folio 307 of the original brief) where it is recorded that trial commence from the beginning (නඩුව මුල සිට ආරම්භ කරමි) It is essential to give ones mind to the issues raised because of the position taken up by the Appellant in his oral and written submission before this court which would not strictly relate to the grounds of appeal pleaded in the Petition of Appeal. Plaintiff had raised issue Nos. 1 – 8 and further issue Nos. 22, 36 – 37. 1st & 2nd Defendants Nos. (9) – 15 and the 3rd Defendant from 16 – 21 and 4th Defendant issue Nos. 23 – 35. As such parties proceeded to trial on 37 issues.

At this point I have also to observe that the learned District Judge has not answered all the issues, since as recorded, he thought it fit to answer the issues may be relevant, to the entire case. However trial Judges must attempt to answer all issues however irksome it is though there is an unusually long line of issues. It is possible to argue that there is a breach of Section 187 of the Civil Procedure Code vide Warnakula Vs. Ramani Jayawardena 1990 (1) SLR 206; 59 NLR 214.

I would very briefly refer to Plaintiff's evidence, though examined at length by all parties, as regards the position which transpired in evidence only as regards the ownership, as follows.

Plaint filed regarding lots A & B of land called Puranage Watta/Kuranage Watte... Plaintiff is the owner of the entire land. The question and answer at pg. 322 (proceedings of 2.1.1996) of the brief reads as:

ප්‍ර: මේ ඉඩමේ සම්පූර්ණ අයිතිකරු තමන් ?

උ: ඔව්

Then again at pg. 337

ප්‍ර: නඩුව තමා දමා තියෙන්නේ මේ ඉඩම තමන්ට සම්පූර්ණයෙන් අයිති බව ප්‍රකාශ කරවා ගැනීමට?

උ: ඔව්

Issue No. 1 raised by Plaintiff-Appellant support the above evidence. At pg. 307. The said issue reads thus:

(1) පැමිණිල්ලේ උප ලේඛනයේ විස්තර කර ඇති ඉඩම් කට්ටිය පැමිණිල්ලේ විස්තර කර ඇති පරිදි මෙම නඩුවේ පැමිණිලිකරුට පමණක් අයිතිද? It suggest sole ownership of Plaintiff. This is the footing on which the Plaintiff-Appellant based his case, in the Original Court.

The learned trial Judge has considered Plaintiff's evidence and refer to certain items of evidence which confirm the fact that Plaintiff-Appellant was a co-owner and not the sole owner as urged by him. The following items of evidence would be significant to establish same.

(a) According to the order in District Court, Kalutara case No. 40051, two lots were sold by auction sale and one E. Louis Fernando as Plaintiff in that case purchased 29/32 share of land. By Fiscals Conveyance P1, the said Louis Fernando purchased but prior to the sales order he died and Fernando 's rights passed to 12 persons named in paragraph 5 of the plaint but the purchase money was paid by Siddho and Salamon who had 3/32 share.

(b) Plaintiff seeks to establish in his evidence in court, paragraphs 3 – 5 of plaint (pg 5/6 of proceedings of 15.3.1996)

(c) The 3rd Defendant filed 2 cases L 2869 & 3250 and in L 2869 Plaintiff had been a Defendant and the decree in that case shows Plaintiff was a co-owner. This had been admitted by Plaintiff (vide P3 & issue No. 7 of same).

(d) By deed P2 Plaintiff's mother had not claimed the entirety of the land but undivided shares.

The judgment of the learned District Judge refer to certain items of evidence and the judgment could be supported in every respect by evidence and it proves that Plaintiff-Appellant was only a co-owner. As such learned Counsel for Appellant at the hearing of the appeal approached this case in another way. He argued at the hearing of this appeal that the Appellant is a co-owner and is entitled to judgment and Plaintiff be declared entitled to the land for a lesser extent. Counsel also urged that a co-owner could sue a trespasser and get him evicted from the common land. As such Plaintiff as a co-owner is entitled to eject the 1st and 2nd Defendant on the basis both are trespassers as the trial Judge has rejected the claim of the 1st and 2nd Defendant. This court observes that the argument of the very learned Counsel for Appellant is sound and has much force in it. It is in fact established law that a co-owner could sue a trespasser since he would have an interest/right though his share is undivided to every portion of the common land. In support of the above argument I have carefully considered the following authorities cited by the learned counsel for Appellant.

In Meera Lebbe Casy Lebbe Markar and two others vs. Kalawillage Baba 7 S.C.C 49 (annexure 2). In that case, the Plaintiffs, three in number, claimed the whole of the garden in question. One of the plaintiffs in evidence admitted that half of the garden belonged to his uncle. He left several children. According to this admission there are other outstanding parties, who are entitled to shares of the garden. Dias J held "The court has repeatedly held that one of several co-owners of land may sue a trespasser without

joining the rest of the co-owners ..... If the plaintiffs can establish their rights to even less than what they claim, they may have judgment for that reduced share. Though a plaintiff cannot recover more than he claims, there is nothing to prevent him recovering less.

In Allis V Fernando 1989 2 S.L.R 335
The plaintiff pleaded that he was the sole cultivator. In fact he was a joint cultivator. Gunawardena J held "When a joint – cultivator has been evicted, he would be as much entitled to be restored to his cultivation rights as a sole tenant-cultivator..
The fact that the appellant has asked for larger relief than he is entitled to, should not in my view prevent him from getting the lesser relief which he is entitled to."

Appellant seeks to demonstrate that the trial Judge was wrong and attempt to compare the above decided cases with the case in hand. There is no doubt that a co-owner could file action to eject a trespasser (17 NLR 49).

Let me consider the case fo Meera Lebbe Casy Lebbe referred to above. In that case Defendant failed to file answer, judgment was entered ex-parte against him. It is stated that subsequently the case was put down for ex-parte trial and when the Defendant appeared and was examined as a witness. This case is somewhat different to the case in hand. The present case is an inter partes trial and in the above decided case Defendant's position has not been dealt since it was an ex-parte trial. It is evident from the record of the said case Plaintiff claimed the entirety of the land and court

held that Plaintiff's could claim for a lesser amount and no evidence about extent. Though the dicta in the above case is sound I do not think that one could blindly or haphazardly apply the above case to the case in hand. Merely because the principle is correct one cannot extend that to the present case and I would reject the argument that the two cases are identical. It is not so.

In the case in hand Plaintiff by his issue No. 1 sought a ruling for the whole land. He is a co-owner and should not be declared entitled to the entire land. As such the trial Judge has answered the issue correctly in the negative. He could not answer that issue in the affirmative. Let me look at issue No. 12, and the trial Judge answers same in the affirmative. The said issue reads thus. "මෙම නඩුවේ පැමිණිලිකරු, පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩමේ හවුල් අයිතිකරු වෙක්ද"? Very correctly the trial Judge gives the correct answer. What more can he do?

However issue No. 13 and it's answer is arguable? Whether the Plaintiff could have and maintain the action in view of the answer to issue No. 12. There are two ways to look at this issue. Co-owner has a right to evict a trespasser, but in the context of this case issue No. 14 & 15 would be the material and relevant issues. If the court finds, the access road relevant to the issue No. 14 & 15 had not been subject to long user and whether same

could be declared as an access road in the future, is something dependant to issue No. 13. Very correctly the Judge based on evidence held that the 1st & 2nd Defendant had not used the road for 10 years and has not been subject to long user. Very correctly the District Judge answers same in the negative. (Folio 454/455 of the original record which refer to Judge's reasoning material). Therefore in the circumstances of the case in hand and in the context of the case, based on facts it is no comparison with the above decided case of Meera Lebbe Casy. Dicta in a decided case could be applied but a court should not haphazardly apply it without examining the facts. If a court blindly follow, tendency is to get misled. So is the case of Allis Vs. Seneviratne.

I have to emphasis that once issues are raised and accepted by court the pleadings would recede to the background and parties proceed to trial on the issues. This is a well established rule. Vide 1998 (1) SLR 73

The learned counsel for Defendant-Respondent although did not succeed in the District Court regarding the 1st & 2nd Defendant's claim, support the trial Judge's judgment in the appeal. There is much force in the argument of the learned counsel for the Defendant-Respondent that the Appellant is not entitled to urge the position suggested in the appeal since

Appellant did not establish such a case in the District Court. He referred to explanation 2 of Section 150 of the Civil Procedure Code. I am convinced of the position and the case cited by learned counsel, should be considered seriously as regards the case in hand. 1st & 2nd Defendant did not have an opportunity to meet the Plaintiff's position in the original court, as argued in the Appeal.

In the case of Y.M.B.A. Kurunegala Vs. A.M.S.H. Abdul Azeez and another ((1997) Bar Association Law Journals VOI VII Part II page 33) His Lordship G.P.S De Silva C.J at Page 34 held that,

> "It would be wholly unreasonable to take the view that the averments in the plaint, the content of P2 and the oral evidence adduced on behalf of the Plaintiff, are all the result of a "mistake", P2 in particular contained a clear and categorical statement that Meera Rawther was a tenant. In this connection Explanation 2 to section 150 of the Civil Procedure Code is of intense relevance. It is in the following terms "the case enunciated must reasonably accord with the party's pleading...And no party can be allowed to make at the trial a case materially different from that which he has placed on record...."

The learned counsel also emphasis in the written submissions as follows:

If the Appellant has prayed for relief as to the declaration of co-ownership and prayed for ejectment on that ground, the Respondents would have fought the case on different footing and the Respondents would have produced title Deeds of their rights and would have called more witnesses.

In all the above circumstances I am not inclined to interfere with the judgment of the District Court. The media upon which Plaintiff-Appellant based his cause of action and in other words the footing on which he urged and contested the Defendants was that he was the sole owner. Further precise proof of extent in evidence and by way of an issue, Plaintiff should have emphasized his co-ownership to the land in dispute. There was not even an attempt to prove co-ownership by Plaintiff in the alternative until evidence transpired in court. Even at that point an issue should have been raised. It was not done. As such the Defendant party merely met the case of Plaintiff and in the process no doubt evidence of co-ownership surfaced. As such there was no duty cast on the District Court to grant a declaration for a lesser extent when the Plaintiff failed to make a claim for co-ownership (notwithstanding issue No. 12 raised by the Defendants and answered in the affirmative). Therefore I affirm the judgment of the District Court and dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL