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

Aluth Muhandiramge Somawathie
(Deceased)

PLAINTIFF

Amarapathy Mudiyanselage Podisingho
(Deceased)

C.A 257/1997 (F)
D.C. Kurunegala 4009/L

And

1. (A) Sumanasiri Harischandra
1. (B) Susila Muthulatha
1. (C) Chithra Dharmalatha
1. (D) Liliat Chandrawathie
1. (E) Piyaseli Sarathchandra
1. (F) Jayasiri Nimalchandra
1. (G) M. Aratchilage Ariyasiri
1. (H) Bayani Fonseka
1. (I) Pradeep Premachandra
1. (J) Dilhara Fonseka

SUBSTITUTED PLAINTIFFS

Vs

1. (A) Lucy Nona
1. (B) Amarapathy M. Senarathne
1. (C) A.M. Indra Amarapathy
1. (D) A.M.M.J. Amarapathy
1. (E) A. M. Jane Nona Amarapathy
1. (F) A.M. Ashoka Chandrawathie
1. (G) A.M. Wijeratne
1. (H) A.M. Premawathie
1. (I) J.T. Somawathie

1. (J) A.M. Ramyalatha Sriyakantha
1. (K) A.M. Ranjit Senaratne
1. (L) A.M. Pushparani Chaminda
1. (M) A.M. Priyantha Damayanthi
1. (N) A.M. Samangtha Amarapathy
1. (O) A.M. Dhammika Amarapathy
1. (P) A.M. Wijesiri Amarapathy

SUBSTITUTED-DEFENDANTS

BETWEEN

Amarapathy Mudiyanselage
M.J. Amarapathy of
Ihala Keppitiwalana, Alawwa.

1. D. **SUBSTITUTED-DEFENDANT-APPELLANT**

Vs.

1. (A) Sumanasiri Harischandra
1. (B) Susila Muthulatha
1. (C) Chithra Dharmalatha
1. (D) Liliat Chandrawathie
1. (E) Piyaseli Sarathchandra
1. (F) Jayasiri Nimalchandra
1. (G) M. Aratchilage Ariyasiri
1. (H) Bayani Fonseka
1. (I) Pradeep Premachandra
1. (J) Dilhara Fonseka

All of Keppitiwalana, Alawwa.

SUBSTITUTED-PLAINTIFF RESPONDENTS

1. (A) Lucy Nona
1. (B) Amarapathy M. Senarathne
1. (C) A.M Indra Amarapathy
1. (D) A.M.M.J. Amarapathy
1. (E) A. M. Jane Nona Amarapathy
1. (F) A.M. Ashoka Chandrawathie
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1. (P) A.M. Wijesiri Amarapathy

All of Keppitiwalana, Alawwa.

SUBSTITUTED-DEFENDANT RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Rohan Sahabandu for the 1D Substituted-Defendant-Appellant

W. Dayaratne P.C with R. Jayawardena
For the Substituted Plaintiff-Respondents

WRITTEN SUBMISSIONS TENDERED ON: 11.11.2011 – 1D Substituted Defendant-Appellant
09.11.2011 – 1A Substituted Plaintiff-Respondent

ARGUED ON: 26.08.2011 & 02.09.2011

DECIDED ON: 02.12.2011

GOONERATNE J.

This was an action from the District Court of Kurunegala in a case where Plaintiff-Respondent sought a declaration to the land described as 'Damunugahamulawatta' depicted in plan No. 450 as lots 5D & 5E in an extent of 2 roods 10 perches and also sought the eviction of the original Defendant. Parties proceeded to trial on 8 issues, and after trial judgment was entered in favour of the Plaintiff on or about 28.4.1997. Previously this is a case where an appeal was taken on the judgment delivered by the original court on 29.3.1975 in favour of the Plaintiff, but the Defendant-Appellant having appealed from the judgment of 29.3.1975, the Court of Appeal had set aside the said judgment and sent the case back to the District Court for re-trial. As such this appeal arises from the 2nd trial held in the original court and judgment delivered on 28.4.1997 as a result of the re-trial.

One of the main arguments put forward by the learned counsel for the Appellant inter alia was that the District Court erred in it's judgment in the answer to issue No. 6 and identity of corpus He also argued that the question of the original Defendant having a lease to the property was not given due consideration and or failed to appreciate that on the lease agreement the Defendant had a right to possess and therefore no cause of action had accrued to the Plaintiff-Respondent to sue the Defendant. Trial Judge's answers to issue Nos. 4 and 7 does not show consistency. There was also much emphasis by the learned counsel for the Appellant that the learned District Judge failed to appreciate the law and, the rules regarding proof of documents, which greatly prejudice the case of the Defendants. Learned District Judge in the judgment states the Defendant failed to prove the documents (deeds) tendered to court. Counsel argued that if the documents are objected and allowed to be marked in evidence subject to proof and at the conclusion of the case where the documents are read in evidence without the opposing party objecting to same the documents are deemed to be proved. Learned District Judge has failed to appreciate the law in this regard.

This is something that this court need to consider as the law is settled on this aspect. On 23.10.1996 the case of the Defendants were closed

reading in evidence documents D1 to D10. The proceeding of that day does not indicate that the Plaintiff objected to any of the above documents at the closure of the defendant's case. As such the above submissions of the learned counsel for the Appellant cannot be faulted. At folios 276/277 of the original brief and perusing same being a portition of the judgment, the trial court Judge states that the answer of Podisinghe is that by deed of lease V4 to V7, his brother Ausada Hamy got a lease of the property and he (Podisinghe) possessed the property on the strength of the said deeds. On the demise of Podisingho the original Defendant, the substituted Defendant in the answer takes up the position that Halaldeen sold the property to Podisingho's daughter (was never pleaded in the original answer of the original Defendant). District Judge observes that there is no right to plead such a position in the answer of the substituted Defendant-Plaintiff also denies such transfer by deeds. Substituted Defendants cannot on deeds V2 & V3 claim ownership since the original owner does not bring out such a position. As such the Trial Judge states in the judgment that in these circumstances the burden is on the Defendant to prove the deeds, under section 68 of the Evidence Ordinance and the Defendant has not proved the deeds in compliance with Section 68. Court also states that nor has plan No.

3961 of Surveyor General proved in court. The Surveyor was not called to give evidence.

I have to disagree with the learned District Judge regarding the above point. The law is settled and it is trite law that if a party fails to object to documents at the closure of the case it is evidence for all purposes of the law. There is a long line of authorities on this practice that had been adopted by the original court from time immaterial. The following to be noted.

Sri Lanka Ports Authority vs. Jugolinija – Boal East 1981 (1) SLR at pgs 23/24 .....

> ...When P1 was marked during the trial objection was taken "as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the cursus curiae of the original Civil Courts. The contents of P1 were therefore in evidence as to facts therein (vide section 457 Administration of Justice Law, No. 25 of 1975) and it is too late now in appeal to object to its contents being accepted as evidence of facts. Furthermore the trail Judge has, in the course of his order, accepted the document in evidence in terms of the provisions of section 32 (2) of the Evidence Ordinance. I cannot therefore agree with the contention that the order of the trial Judge on this point is wrong.

The latest case on this aspect is the case of Latheef and another vs. Mansoor 2100 Bar Association Law Reports pg. 204...

> There remains, however, one more matter on which learned Counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27th April 1993. This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. For instance, in Sri Lanka Ports Authority and Another v. Jugolinija – Boat East (1981) 1 Sri LR 18 Samarakoon, C.J., commented on this practice, and ventured to observe at pages 23 to 24 of his judgment that if no objection to any particular marked documents is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held that this is the cursus curiae of the original courts. See, Silva v. Kindersle (1915-1916) 18 NLR 85; Adaicappa Chettiar v. Thomas Cook and Son (1930) 31 NLR 385 Perera v. Seyed Mohomed (1957) 58 NLR 246; Balapitiya Gunananda Thero v. Tolalle Methananda Thero (1997) 2 Sri LR 101; Cinemas Limited v. Sounderarajan (1998) 2 Sri LR 16; Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Others (2010) BLR 249.

The last date of the trial proceedings in this case dated 23.10.1996, the Defendant has closed the case for the Defendant reading in evidence documents V1 to V10. There had been no objection at that stage by

the Plaintiff to the said documents. Then the earlier proceedings dated 21.3.1995 at folio 233 indicates that after the Plaintiff was re-examined and further trial was put off for 14.6.1995. On 14.6.1995 it is recorded that Plaintiff has given evidence and has closed the case of the Plaintiff on that date (folio 234). It is also recorded that as the Plaintiff is unwell counsel cannot state whether Plaintiff's case would be closed or not. Further trial had been put off for 13.9.1995.

On 19.6.1996 it is again recorded that Plaintiff has closed her case. Defendant had commenced the Defendant's case on that date. Between 13.9.1995 and 19.6.1996 it appears that Plaintiff had expired and certain substitution steps had been taken. What has to be observed is that Plaintiff has closed the case on 19.6.1996 and no indication that Plaintiff's documents were marked and read in evidence. Both the trial Judge and counsel for Plaintiff has not followed the accepted procedure adopted by our courts from time immemorial This is no doubt a serious lapse on the part of the District Court. This court as well as all trial courts in the island would be bound by the dicta developed over the years. Vide Sri Lanka Ports Authority vs. Jugolinija – Boat East. As such all documents marked in evidence would be legally admissible as evidence of the case inclusive of Defendant's documents marked V1 to V10. As such it appears to me that the Defendant-

Appellant's version becomes more probable. On the death of the original Defendant during the course of the trial children of the Defendant were substituted. The legal heirs of Defendant filed amended answer dated 24.4.1992. I think issue No. 6 is important. By D2 deed of 1964 and D3 deed of 1967 original owner Halaldeen transferred his interest to 1F Defendant Respondent, prior to deed P8.

I also cannot subscribe to the view of Plaintiff that the original Defendant did not plead 1E Defendant's title. The several lease bonds were in operation and at least until 1980 the lessees could have continued to possess. Plaint filed on or about 1972. As such on the strength of the lease bonds possession cannot be disturbed. As such question of ejectment cannot arise till 1980. Therefore pleading 1F Defendant's title prior to 1980 may not arise. Further all documents marked by the Defendants are legally admissible and would be evidence for all purposes of the case. All lease bonds D4 to D7 should have been considered by the learned District Judge. Further deeds D4 – D7 refer to buildings. The title deeds D2 & D3 in favour of 1F Defendant refer to buildings. Plaintiff's deed P8 has no reference at all to buildings. There is also evidence of payment of rent to Podisingho the Defendant from 1.4.1968, prior to alleged date of ouster.

In view of above I am inclined to take the view that learned District Judge has failed to accept the fact that the deeds executed in favour of 1F Defendant in terms of the Registration of Documents Ordinance takes priority as that Defendant's deed had been registered prior to 1969. Deed 10861 executed in 1964 and deed No. 12644 in 1967. Plaintiff's deed No. 462 was executed in 1969. Evidence was led to support issue No. 6 and that fact is something that cannot be ignored or merely rejected on the basis that the original Defendant failed to prove title derived by D2 & D3. The other aspect of the case, is that of the evidence of witness Wickramasinghe. It is in evidence that from 1968 to 1971, Podisingho the original Defendant received rents, from the Co-operative Society. Thereafter from 1971 rent was paid to the substituted Defendant's daughter of the Defendant, A. Chandrawathie (1F Defendant).

Document V9 also cannot be ignored where payments of rents are concerned. This would fortify the position that the Defendant is in possession of the land in question. The other doubtful position of Plaintiff as alleged by Plaintiff is that Plaintiff was ousted by Defendant on 30.1.1969. Plaintiffs title deed is also dated 30.1.1969. This position of Plaintiff gives rise to doubts with reference to ouster on the same date and title. I agree with

Defendant-Appellant that Plaintiff's possession gives rise to false possession.

There are items of evidence (not contradicted) that the learned District Judge should have considered. A person or authority/organization would not pay rent without any basis to a person unless nature of the business or details of land in dispute or transaction is made known (vide V9).

I have already observed that deeds D2 & D3 were executed in 1964 & 1967 and those deeds are legally admissible and has to be considered as evidence for all purposes of the law. Above deeds were executed prior to Deed P8. Therefore the Plaintiff-Respondent's argument that Halaldeed did not have title to execute the deeds of leases in favour of the Defendants is not tenable. As such the substituted Defendants could claim lease hold rights by deed V7. I do not think that the question of trespass would arise at all once a person is in occupation by a valid lease document. Therefore collection of rents as by the Defendants as urged by the Plaintiff-Respondents would not offend but fortify the Defendant's position. The lease period has commenced from 1959 and would be operative at least till 1980 on executing deed V7.

The learned President's Counsel for Plaintiff-Respondent contested the submission of learned counsel for Defendant-Appellant and supported the judgment of the learned District Judge. It was the position of the learned President's Counsel that Plaintiff has discharged the burden of proof and with deed P8 proved title to the property in dispute which deed was not challenged by the Defendant-Appellants at the trial. As regards issue No. 6 President's Counsel argue that deed V2 & V3 in favour of Chandrawathie would not support the Appellant's case since Chandrawathie has no right to plead a different title as a substituted Defendant. As such he stated issue No. 6 has been answered correctly by the District Judge. He also urged that the title deeds were not proved as required by Section 68 of the Evidence Ordinance. At this point I also refer to the case of Cinemas Ltd. v. Sounderarajan (1998) (2) SLR 16...

(1) In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal – S. 154 CPC(explanation)

(2) Where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross-examination and also fails to lead evidence in rebuttal, it is a "matter' falling within the definition of the word "proof" in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting, to a misdirection.

(3) Once a Court accepts and acts on a proxy or a power of attorney presumably because no defect appears on the face of such document, any party who desires to question the authority of that document has the onus of showing, the want of authority. This rule is based on the presumption- omnia praesumuntur rite et solemniter esse acts donec probetur in contrarium.

Learned President's Counsel vehemently argued that the lands claimed by deeds V2 & V3 are not lands within the corpus or that it refers to a different land. He demonstrated to court the schedule to the deeds V2 & V3 and emphasized that it refers to a different land. It was also suggested by him that no leasehold rights flow from deed V7, since Halaldeen by executing deed P8 on 30.1.1969 (at least 1 year and 10 months after executing V7) had no rights to the property and it would be an invalid deed of lease (V7).

I have to emphasis that in this case Plaintiff's case had been closed as observed above without following the dicta in the Sri Lanka Ports Authority vs. Jugolinija Boal East; Latheef & Another Vs. Mansoor. As legal practitioners in a Civil Court has to follow the mandatory practice which had been followed from time immemorial. Failure to do so would put his client's case into jeopardy. This practice cannot be ignored and counsel

cannot make excuses, for not doing so. Leaving room for human error I would still emphasis that one's omission should have been rectified (if court permits) without any delay at all. It is for the Plaintiff to prove his title in an action revindicatio and Defendant need not prove anything, and Plaintiff need not show the weaknesses of the defendant's case. Burden of proof is with the Plaintiff throughout the case. Wanigaratne vs. Juwanis 65 NLR 167; Peeris vs. Savunhamy 54 NLR 207; to establish dominium to the land in dispute Abeykoon Hamine Vs. Appuhamy 52 NLR 49.

There is another important aspect of this case regarding identity. On the amended plaint (pg. 2107) Plaintiff predecessor in title Jabar was owner of schedule 'B' to the plaint in lieu of his rights to that land, possessed schedule A. (lots 5D1 & 5E1 in plan 450). On evidence Surveyor has surveyed only lot 5D1. (pg. 176) The land consists of lots 5D1 & 5E1. The commission to superimpose plan 3961 was not done (pg. 181). Lot (2) in Surveyors plan not found (Plan 3961). There is disparity as regards lot 2. As such identity is doubtful and Plaintiff did not attempt to show that two lands are different. As such Plaintiff could not have filed action against the Defendants when there was a subsisting deed of lease at least till 1980 (issue 7 answered in the affirmative). The action filed in 1972 to evict Defendants

whilst a lease is in operation. Can a cause of action arise against the Defendant?

Original action instituted on or about 1972. Amended plaint filed on January 1992. Podisingho (defendant) filed answer in June 1973, where he moved for dismissal of action. Defendant pleaded his brother Ausada Hamy possessed the land on his behalf. Plaintiff amended the plaint to bring the said land claimed by Defendant. On the death of Defendant the substituted Defendant filed amended answer on 24.4.1992. Whilst pleading the matters in the original answer also pleaded 1E Defendant became owner by deed V2 & V3 and sought permission to add 1E Defendant as a party. Court refused. 1E Defendant however remained as a substituted heir of the original Defendant. The lease agreements were in force in 1972. I also note that land had been leased from 1959 to 1980. 1E Defendant gave evidence at the trial. Plaintiff-Respondent cannot have a cause of action to evict the Defendant whilst the deed of lease was in force. Further there is some difficulty, where identity of property is concerned. It is Plaintiff's burden to establish identity of property and prove proper title to the land in dispute. Answer to issue No. 7 in the affirmative would fortify Defendant's position. I have already stated about issue No. 6. Trial Judge's reasoning in answer to the said issue in the negative cannot be supported by his reasoning. The

rentals paid by the Co-operative Society is another relevant fact. (vide V9). Plaintiff was not in a position to place evidence of possession through an independent witness or at least through a witness other than Plaintiff. All documents produced by the defendants inclusive of title deeds are admissible as evidence for all purposes of this case.

Attention of this court was drawn to the schedules of deeds marked V2 & V3 by the Plaintiff-Respondents. It is stated therein that the land is not Damunugahamulawatta but Megahamulawatta. By this, Respondent attempts to demonstrate that the land claimed by the Defendant-Appellants is different. However one cannot arrive at such a conclusion by merely reading a portion of the schedule in deeds V2 & V3. The entire schedule need to be read along with the other recitals. As such I am unable to accept the contention of the Plaintiff-Respondent.

In all the above circumstances I am not inclined to affirm the judgment of the District Court. Plaintiff-Respondent has not discharged the

burden of proof properly to establish title, and identity of the land in dispute. As such I set aside the judgment and dismiss Plaintiff-Respondents action. Appeal allowed with costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL