

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

In the matter of an  
application for leave to  
appeal

Court of Appeal No: CALA 292/2004

District Court of MT. Lavinia No: 1583/02/L

P. Daymon Silva

Defendant-Petitioner

Vs

A.L.M. Saleem

Plaintiff-Respondent

Before: **Eric Basnayake J**  
**K.T. Chitrasiri J**

Counsel: C.J. Ladduwahetty for the defendant-Petitioner  
A.L.M. Najimudeen for the Plaintiff-Respondent

Written Submissions Tendered On: 2.7.2010

Decided On: 24.5.2011

Eric Basnayake J

The defendant-petitioner (defendant) filed this leave to appeal application to have the order dated 27.7.2004 set aside. By this order the learned Additional District Judge of Mt. Lavinia had rejected the amended answer of the defendant. Leave to appeal was granted by this court. Counsel invited court to write a judgment on the written submissions tendered.

The plaintiff-respondent (plaintiff) filed this action *inter alia* to claim a declaration of title to 10 perches of land. This land is depicted as lot No: 1 in plan No. 4747 of 20.8.1990, prepared by S. Wickramasinghe, Licensed Surveyor. The entire land (including the subject matter) contained 2 roods and 39.8 perches. This land was originally owned by the defendant. The defendant sold this land to one Mohideen by deed No. 5788 of 4.8.1990. Mohideen partitioned this land as per plan No. 4747. The plaintiff claims that he had purchased lot 1 of plan 4747 by deed No: 1459 of 5.1.1993 and got possession. The plaintiff claims that on or about 28.7.2001 the defendant had started unlawfully occupying this land causing loss to the plaintiff in a sum of Rs.5000 per month. The plaintiff is seeking a declaration of title, ejectment and damages.

The defendant filed answer on 23.4.2002 and moved for a dismissal of the plaintiff's action. The defendant made a claim in reconvention. The defendant states that the extent of the land sold by deed 5788 of 4.8.1990 and plan No. 592 of 11.6.1990 was 2 roods and 10.32 perches. The defendant claims that he is the owner of the balance land an extent of 29.28 perches (it should be 29.48 perches). The defendant stated in the answer that the plaintiff never had possession of lot No. 1 of plan 4747. The defendant further stated that from about April 1998 this land was occupied by the defendant's daughter and thereby prescribed to it.

The plaintiff filed a replication on 20.6.2003 claiming that the defendant does not disclose a 10 year prescriptive title in the answer. Thus the defendant filed an amended answer on 19.9.2003 seeking to amend the date of possession as from 1988 (from 1998). The learned counsel for the defendant submitted that the year 1998 was an obvious typographical mistake. He claims that the defendant's daughters have been living in this land from 1988 and have acquired a prescriptive title. He claims that an irreparable loss would be caused to the defendant if the amendment is disallowed.

Admittedly the original owner was the defendant. The defendant had sold some land to one Mohideen and the plaintiff purchased a portion from Mohideen on 5.1.1993 by deed 1459. The plaintiff claims that the defendant had been in unlawful occupation from

28.7.2001. This action was filed in the District Court for ejectment on 23.4.2002. There is no dispute about possession of the defendant of this land prior to 1990. The defendant stated that he never sold the entire land to Mohideen who was the plaintiff's predecessor. If that is so, the defendant would have continued to be in possession of part of the land. This possession then relates to a period before and after 1990. The defendant claims that his daughters were in occupation of the disputed land and had prescribed to it.

It is elementary that one requires 10 years possession to claim title by prescription. To that extent one can accept as reasonable the explanation that the year 1998 was nothing but a mistake and the correct year could be 1988. Reckoning 1988 as the correct year a period of over 10 years possession could be established by the time this action was filed in 2002. The defendant needs to prove prescription only if the plaintiff is successful in proving his paper title. In that event the defendant will have to prove possession from 1988. This has to be done through evidence. The required evidence will be permitted only in the event of this amendment is allowed.

The defendant relies on prescription in his answer. He had made a claim in reconvention based on prescription. The amendment was disallowed for the reason that there was delay and that it would be prejudicial to the plaintiff's case. However I see no delay in this case. The plaintiff also will not be prejudiced in the event the amendment is allowed.

I shall now lay down the law relating to amendment of pleadings. Upon an application made to it before the day first fixed for trial of the action...**the court shall have full power of amending in its discretion, all pleadings in the action...**(S. 93 (1) of the Civil Procedure Code), Wijewardene vs. Lenora 60 N.L.R. 457). An amendment which is bona fide desired should be allowed.. if it can be allowed without injustice to the other side (Cassim Lebbe vs. Natchia 21 N.L.R. 205, Senanayke vs. Anthonize 69 N.L.R. 225, Vipassi Nayake Thero vs. Jinaratne Thero 66 C.L.W.43, Menike vs. Ratnayake et al 18 C.L.W.18, Peter vs. Colombo Turf Club 6 C.L.W. 11, Seneviratne vs. Candappa 20 N.L.R. 60, Lebbe vs. Sandanam 64 N.L.R. 461, Daryani vs. Eastern Silk Emporium Ltd. 64 N.L.R. 529 & 63 C.L.W. 73 ). **An amendment of a clerical error or a bona fide wrong**

description of property should be allowed. So also an amendment clarifying the position put forward in pleadings. Amendments which do not alter the fundamental character of the action or the foundation of the suit are readily granted. But if injustice and prejudice of an irremediable character will be inflicted on the opposite party the amendment will not be allowed. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side (Mackinnon Mackenzie & Co. vs. Grindlays Bank Ltd. (1986) 2 Sri L.R. 272 (1986 2 CALR 276, Serajudeen vs. Seyed Abbas BASL 1995 Vol. VI Pt. I pg 18, Balakumar vs. Balakumar BASL 1997 Vol. VII Pt I pg 22, Charles vs. Samaraweera BASL 1998 Vol. VII Pt. II pg 21) (emphasis added).

What is the injustice that would be caused to the plaintiff if this amendment is allowed? This is a rei vindication action where the plaintiff is required to prove title. In that event the defendant will have to justify his possession. The court will have to decide who has a better title. The plaintiff claims that the defendant started occupying the land unlawfully on 28.7.2001 whereas the defendant states that he was in occupation since 1988. Should we deprive the defendant from adducing evidence to prove his possession? In that event injustice would be caused to the defendant.

I am of the view that the learned Judge had erred in disallowing this amendment. Hence I set aside the order dated 27.7.2004. The learned Judge is directed to accept the amended answer and to proceed with the trial expeditiously. The appeal is allowed with costs.

Judge of the court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal