IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Ananda Kodagoda
No.53/4, Kandawala Watta
Ratmalana.

Defendant-Appellant

C.A.No.175/98 (F)
D.C.MT.LAVINIA CASE NO.99/92/L

Moraj Megji Udeshi
No.16, Queen Terrace
Colombo 3.

Plaintiff-Respondent

BEFORE	:	**K.T.CHITRASIRI, J**
COUNSEL	:	U.L.A.Majeed with K.R.M.Abdul Raheem for the Defendant-Appellant Manohara De Silva P.C . with S.K.Lankathilake and Charith Galhena for the Plaintiff-Respondent
ARGUED ON	:	08.07.2013
WRITTEN SUBMISSIONS FILED ON	:	29th August 2013 by the Defendant- Appellant 27th September 2013 by the Plaintiff-Respondent
DECIDED ON	:	**22.01.2014**

CHITRASIRI, J.

This is an appeal preferred by the defendant-appellant (hereinafter referred to as the defendant) to have the judgment dated 13th February 1998 of the learned District Judge of Mt.Lavinia, set aside. In the petition of appeal, the defendant also has prayed that a judgment be entered in his favour as prayed for in the prayer to the answer filed by him in the District Court.

This action was filed by the plaintiff-respondent (hereinafter referred to as the plaintiff) to obtain a declaration, declaring that he and/or Narhari Choonilal Bhatt or his successors are entitled, to the land morefully described in the 3rd schedule to the plaint and also to have the right of way as described in the 4th schedule to the plaint. The plaintiff also sought to have the defendant evicted therefrom.

The defendant in his answer whilst seeking to dismiss the plaint has also claimed prescriptive title to the land referred to in the 3rd schedule to the plaint. Having framed the issues in accordance with the aforesaid matters contained in the pleadings, learned District Judge proceeded to record the evidence of the witnesses called by the respective parties and then delivered the impugned judgment which is in favour of the plaintiff. At the same time, learned District Judge declined to accept the prescriptive claim of the defendant.

At the outset, it is necessary to note that in a *rei vindicatio action,* the burden of proving the required ingredients rests on the person who claims ownership to the property he claims. This position in law has been clearly explained in the book **"Wille's Principles of South African Law". [9th Edition – 2007]** The following paragraph found at pages 539 & 540 in that book summarizes the position referred to above.

> *"To succeed with the rei vindicatio,, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name.* ***Secondly, the property must exist, be clearly identifiable*** *and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration".*
> (emphasis added)

As mentioned above, in order to claim ownership, it is first necessary to establish the identity of the land to which the claim is made. This requirement, needed in a *rei vindicatio action* had been upheld by the Supreme Court in **Jamaldeen Abdul Lateef v. Abdul Majeed Mohamed Mansoor and another. [2010 (2) S.L.R. at page 333]** Accordingly, it should have been the duty of the trial judge to ascertain whether the plaintiff in this case too has properly discharged his burden of proving the identity of the land to which he claims title even before proving the ownership to same.

As mentioned hereinbefore, the plaintiff claims title to the land described in the 3rd schedule to the plaint with the right of way referred to in the 4th schedule thereto. *(prayer (අ) in the plaint dated 16.7.1992)* Hence, it becomes necessary to ascertain whether the plaintiff was successful in establishing the identity of those two lands referred to in the 3rd and the 4th schedule to the plaint.

In establishing identity of a land in suit, the extent of which plays a vital role. The extent of the land shown in the 3rd schedule is 18.56 perches. The title of the plaintiff to the land he claims derives from the deed bearing No.914 dated 7.4.1967 marked P2 executed by V.N.Thurairajah, Notary Public. This deed too entitles the plaintiff to claim title to a land in extent of 18.56 perches which is the exact extent claimed by the plaintiff in the prayer to the plaint as well.

It is the only deed that had been produced in evidence to establish title of the plaintiff. The evidence in relation to the aforesaid deed was not subjected to cross-examination. Therefore, learned District Judge has relied upon the evidence contained in the aforesaid deed bearing No.914 marked as P2 and has decided the case as prayed for in the plaint. The decision of the learned District Judge in this regard is as follows.

"පැමිණිලිකරුවන් මෙම නඩුව ඉදිරිපත් කර තිබුනේ පැ: 3 දරණ පිඹුරේ කැබලි අංක: 13 හි කොටසක් වූ කැබලි අංක: 7 ට නිමිකම් ප්‍රකාශයක් සහ විත්තිකරු

නෙරපීමටත්, අලාභ අයකර ගැනීමත් සඳහාය. මෙම ඉඩම පැමිණිලිකරුවන් විසින් පැ:2 දරණ ඔප්පුව මත 1967 වර්ෂයේදී මිලයට ගෙන ඇත. ඒ සම්බන්ධයෙන් ආරවුලක් නැත.

(vide proceedings at page 124 in the appeal brief).

However, as seen in the above paragraph, learned District Judge in coming to his findings has also referred to and taken into consideration, Lot 7 in the plan 8651/1961 dated 1.2.1961 drawn by G.W.Ferdinands, Licensed Surveyor that was marked P3 in evidence. In the 3rd schedule to the plaint, this particular Lot 7 has been identified as a sub-division of Lot 13 found in the aforesaid Plan 8651/1961 marked P3. Therefore, it is implied that the plaintiff is relying upon the extent of the aforesaid sub divided lot 7 in plan 8651/1961 to establish the identity of the corpus in this case.

Significantly, the extent of the sub-divisions of Lot 13 including the sub divided lot 7 is not given in the plan marked P3 even though the extent of the same lot 7 is given as 18.56 perches in the deed marked P2. It is important to note at this stage that the plaintiff as well as the defendant has taken out two Commissions to identify the land in dispute on the basis of the sub divided lot 7 referred to above in plan marked P3. Accordingly, the two plans bearing Nos. 1838 and 1678 had been prepared by two different surveyors pursuant to those Commissions issued through Court and those were marked in evidence as P6 and P7

respectively. Both the surveys had been carried out taking into consideration the aforesaid larger plan 8651/1961 marked P3 in preparing the plans marked P6 and P7.

The extent of the sub-divided lot 7 in plan 8651/1961 which is shown in both the plans marked P6 and P7 comes to more than 27 perches. However, as referred to earlier, plaintiff's entitlement according to the title deed is only to a land in extent of 18.56 perches. In the circumstances, it is seen that the plaintiff having referred to the sub divided Lot 7 in plan 8651/1961 in the plaint to support his claim is now seeking to claim a land identifying it as having more than 27 perches in extent by producing the plan marked P6 though his entitlement under the deed P2 is only to a land in extent of 18.56 perches.

Certainly, Court cannot grant title to a land that has considerably more extent than what is entitled to, unless such a difference can be explained with cogent reasons. In this instance, the plaintiff is to obtain title and possession of a land in extent of more than 27 perches in the event the impugned judgment is to stand whereas his entitlement is only to a land in extent of 18.56 perches according to the title deed marked P2.

The learned District Judge has not addressed his mind to this aspect at all. In fairness to him, it is necessary to note that the difference in the extent between the land that the plaintiff is entitled to and the

land he claims upon returning the commissions, had not been brought to his notice to consider. In the circumstances, it is clear that the plaintiff has failed to identify correctly, the land to which he claims title. Accordingly, the case of the plaintiff should fail. For the aforesaid reasons, it is my opinion that the learned District Judge should have dismissed the plaint of the plaintiff for the reasons set out above.

At this stage, it must be noted that the identification of a land in suit is necessary even to have proper execution of the decree against a judgment debtor. Therefore, it is very necessary to identify the land enabling the proper execution of the decree without affecting the rights of the others who are not made parties to the action.

Indeed, the sister of the defendant has given evidence in this case explaining her longstanding possession to the land which supposed to have been commenced during the time of her father. Also, there is evidence as to the manner in which they possessed the land having divided it amongst the brothers and sisters of their family. The two Commissioners who have submitted plans marked P6 and P7 also has sub-divided Lot 7 once again, having considered the manner in which the family members of the defendant had possessed the land. In those sub-divisions, the persons who are in occupation of the land also are clearly mentioned.

Those who claimed possession before the surveyors had never been made parties to this action. Therefore, it is clear that the rights of the persons who are in possession of the land also be liable to be prejudiced in the event the decision of the learned District Judge is to prevail.

In the circumstances, it is my opinion that the learned District Judge has misdirected himself when he decided the case without properly identifying the land to which the plaintiff is entitled to. Therefore, the judgment of the learned District Judge cannot be allowed to stand. For the same reason namely for not identifying the land in suit, the plaintiff is not entitled to have the releifs as prayed for in the prayer to the plaint.

The defendant also has prayed that he be declared entitled to the land claimed by the plaintiff on the basis of prescription. Learned District has considered this claim of the defendant and he was of the view that the defendant is not entitled to claim prescriptive title basically due to his failure to give evidence claiming the rights he has to this land.

On behalf of the defendant, one of his sisters has given evidence. She is the only witness who gave evidence on behalf of the defendant. Defendant has not come forward to give evidence. The defendant, without claiming prescriptive rights in evidence or at least not showing the reason as to why he is not coming forward to give evidence, it is not incorrect to decide that the defendant in this instance has failed to

establish his prescriptive claim. Therefore, I am not inclined to interfere with the decision of the learned District Judge as to the prescriptive claim of the defendant.

For the aforesaid reasons, the judgment dated 13.02.1988 of the learned District Judge is set aside. The plaint of the plaintiff is dismissed. The decision of the learned District Judge as to the prescriptive claim of the defendant is affirmed

Having considered the circumstances of this case, I do not wish to make any order as to the costs of this appeal. The parties are to bear their own expenses.

Appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL