IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

E. A. Sirisena
No.A/98, Kanduboda,
Delgoda.
Plaintiff-Appellant

C.A.No.957/98 (F)
D.C.GAMPAHA CASE NO.23385/L

1. E. A. Piyadasa
2. E. A. Dona Chandrawathie
Deceased Defendants

1.a) E A. L. N. Edirisinghe
2.a) S.A.Don Hemapala
No.98,Kanduboda, Delgoda.
and others
Substituted -Defendant – Respondents

BEFORE	:	**K.T.CHITRASIRI, J**
COUNSEL	:	W.Dayaratne, P.C. with D. Dayaratne for the Plaintiff-Appellant C.J.Ladduwahetti for the 1a. substituted Defendant- Respondent P.K.Prince Perera with A.H.T.L.Shan Buddhika de Silva for the 2(a) – 2(d) Substituted - Defendant-Respondents
ARGUED ON	:	05.08.2013
WRITTEN SUBMISSIONS FILED ON	:	22nd August 2013 by the 1A Defendant-Respondent 29th October 2013 by the Plaintiff-Appellant
DECIDED ON	:	**30.01.2014**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 18th September 1998 of the learned District Judge of Gampaha. In the petition of Appeal, the plaintiff-appellant (hereinafter referred to as the plaintiff) also sought to have a declaration as prayed for in his plaint filed on 2nd March 1981. In the prayer to the plaint, the plaintiff sought to have a judgment declaring that he is the sole owner (එකම හිමිකරු) of the lands morefully described in the five schedules to the plaint and to have the defendant evicted therefrom. Admittedly, the land described in the 5th schedule comprises the amalgamated lands referred to in the 1st to 4th schedules to the plaint.

The defendant-respondent (hereinafter referred to as the defendant) in his answer dated 29th June 1981 merely sought to have the plaint dismissed though he has stated that he is in possession for a long period of time of the land referred to in the first schedule to the plaint having made improvements thereon. Having considered the merits of the case learned District Judge dismissed the plaint of the plaintiff.

As mentioned hereinbefore, the plaintiff's claim is basically to have a judgment declaring that he is the sole owner of the lands referred to in the five schedules to the plaint and to have the defendant evicted therefrom. In a *rei vindicatio* action such as this, the burden of proving the required ingredients rests on the person who claims ownership of the

property he/she claims. In the Book **"Wille's Principles of South African Law" [9th Edition – 2007]** refers to three requisites that need to establish in a *rei vindicatio* action. Those are namely:

- Proof of ownership in the property;
- The property must exist, and be clearly identifiable and most not have been destroyed or consumed;
- The defendant must be in possession or detention of the thing at the moment the action is instituted.
  (at pages 539 and 540).

This position in law had been upheld in the case of **Jamaldeen Abdul Lateef v. Abdul Majeed Mohamed Mansoor and another [2010(2) S.L.R. at page 333]** as well.

Therefore, it is necessary to ascertain whether the plaintiff in this case has discharged his burden of proving the necessary requisites referred to above on a balance of probabilities. Learned District Judge, in this instance has come to the conclusion that the plaintiff has failed to establish the title particularly to the land referred to in the 3rd schedule to the plaint. His decision in this regard is as follows:

"පැමිණිල්ලේ 3වන උපලේඛණයේ දැක්වෙන ඉඩම් කොටස කොළඹ දිසා අධිකරණයේ අංක. 49240/එල් නඩුවේ තීන්දුව ප්‍රකාරව ලැබුනු බවට පැමිණිලිකරු තර්ක කර ඇති නමුත් එම තීන්දුව මෙම නඩුවට ඉදිරිපත් කර නැත. එසේම එම නඩුවේදී සකස් කල පිඹුරු අංක. 625 දරන සැලැස්මද පැමිණිලිකරු ඉදිරිපත් කර නොමැත. එකී සැලැස්මේ 'ඩී' දරන කොටස එම

නඩුවේ 7 වෙනි විත්තිකරුට හිමිවු බවට පැමිණිලිකරු දක්වා ඇතත්, එම කරුණ තහවුරු කරන සාක්ෂි කිසිවක් මෙම නඩුවට ඉදිරිපත්කර නොමැත. පැ.10 ඔප්පුව ඉදිරිපත් කිරීමෙන් පැමිණිලිකරු පෙන්වා සිටින එම තීන්දුව ප්‍රකාරව අංක.625 දරන සැලැස්මේ 'ඩී' දරන කොටස මෙම දාවිත් සිංහෝ විසින් විකුණා ඇති, පැ.10 ඔප්පුවේ උපලේඛණයේ 2වන ඉඩම වශයෙන් මෙම කොටස දක්වා ඇත. පැ.10 ඔප්පුවේ 2වන උපලේඛණයේ විස්තර කෙරෙන අංක.625 දරණ පිඹුරේ එලෙස 'ඩී' වශයෙන් විස්තර කර ඇති ඉඩම් කැබැල්ල පැමිණිලිකරුට පවරා ඔහු හිමිකරගත් බවට පැමිණිලිකරු සඳහන් කරතත්, එදිරිසිංහආරච්චිගේ සිරිසේනට එකී 625 සැලැස්මේ අංක.'ඩී' දරණ කැබැල්ල හිමිවු බවට සනාථ කරන සාක්ෂියක් නොමැත."

(vide proceedings at page 173 of the appeal brief)

When the plaintiff has failed to establish title even only to the land referred to in the 3rd schedule to the plaint, Court has no option than to dismiss the action since it is a part of the land claimed by the plaintiff. Hence, I will now consider whether the learned District Judge is correct in concluding so.

As mentioned hereinbefore, the plaintiff has prayed to have a judgment declaring that he is the sole owner of the lands referred to in the five schedules to the plaint. In order to prove his entitlement, the plaintiff has produced in evidence *inter alia* the deeds marked P5, P9 and P10 bearing Nos.3799, 205 and 752 respectively. At page 3, found in the

deed marked P5, the Notary who executed the same has made an endorsement stating that he, himself by deed bearing No.1726 has executed a deed, gifting 15 perches from the land subjected to in that deed to an outsider. (vide at page 233 in the appeal brief) The land referred to in the deed marked P5 is the land referred to in the 1st schedule to the plaint. The plaintiff has not even produce the said deed 1726 to consider the details of this position.

A similar endorsement has been made in the deed marked P9 as well where the Notary has stated that 15 perches of land had been gifted from the land referred to in the schedule to that deed which is the land referred to in the 2nd schedule to the plaint. (vide at page 247 in the appeal brief) Similarly, in the deed marked P10 too, such an endorsement had been made by the Notary who executed the deed of gift bearing No.1726 by which 15 perches had been disposed of, from the two lands referred to in the 3rd and the 4th schedules to the plaint. (vide at page 251 in the appeal brief)

The aforesaid deed bearing No.1726 had been executed on 29.10.1995 while pending this action in the District Court. (vide pages 233,247 and 251 in the appeal brief) It is a date prior to the date of the impugned judgment and even much before the closure of the plaintiff's case. In such a situation, the plaintiff possibly could not have proceeded

with the case praying for title to a land part of which has been disposed of by himself even before the closure of his case. However, the plaintiff without disclosing it, has proceeded with the case. If not for the endorsements made by the Notary who executed the deeds marked P5, P9 and P10, Court could have accepted the title referred to in those three deeds as clear title. It is also necessary to note that the plaintiff has not taken any effort at least to explain the circumstances of the said disposition of the land which is in extent of 15 perches.

In the circumstances, it is clear that the plaintiff is not entitled to claim clear title to the entirety of the land referred to in the 1st, 2nd, 3rd and the 4th schedules to the plaint in view of the endorsements made in the deeds marked P5, P9 and P10 by which 15 perches of land had been disposed of, from the land referred to in the 5th schedule to the plaint upon executing of the deed bearing No.1726.

In the circumstances, it is evident that the plaintiff cannot claim title to the entirety of the four lots referred to in the first four schedules which is the land referred to in the 5th schedule to the plaint. Accordingly, as the learned District Judge has concluded, it is clear that the plaintiff has failed to establish that he is the sole owner (එකම හිමිකරු) to the lots referred to in the five schedules to the plaint.

Moreover, the plaintiff has failed to produce the Final Decree entered in case No.1666 and also the decree entered in case bearing No.49240 by which he supposed to have derived title to the land referred to in the 3rd schedule to the plaint upon executing the deed 752 marked P10 in evidence. The plaintiff has not even produced any survey plan, filed in those two cases in order to identify the land referred to in the 3rd schedule to the plaint. (vide at page 173 in the appeal brief)

Therefore, it is clear that that the plaintiff has failed in establishing title as well as the identity of the land to which he claims title in this case.

Moreover, the plaintiff, though he has stated in the plaint as well as in his evidence that he permitted the defendant to occupy the land referred to in the 5th schedule, having amalgamated the lots referred to in the first four schedules by **1st January 1979**, (at page 60/89 in the appeal brief) such a permission could not have been given by the plaintiff since the said amalgamation has taken place only upon him becoming entitled to Lot H referred to in the first schedule to the plaint by executing the deed bearing No.3799 marked P5, only on the **8th January 1980.** Clearly, the date on which the plaintiff became entitled to the land referred to in the 1st schedule is a date, much after the date on which he supposed to have given permission for the defendant to occupy the land in question.

Therefore, it is seen that the plaintiff did not have full title to the land referred to in the 1st schedule to the plaint until the deed marked P5 was executed on 8th January 1980 in order to include the said land for him to amalgamate and grant permission for the defendant to occupy the entirety of the land referred to in the 5th schedule to the plaint. Accordingly, the plaintiff could not have permitted the defendant to occupy the land referred to in the 5th schedule to the plaint on 01.01.1979 though he has stated so in the plaint when describing the manner in which the cause of action has accrued to him in order to file this action against the defendant.

In the circumstances, it is visibly wrong to have mentioned that a cause of action, as described in paragraph 9 onwards in the plaint has been accrued, for him to file action against the defendant on 02.03.1981. Therefore, as the learned Counsel for the respondent has submitted, it is correct to state that it is a misconception to have mentioned that a cause of action has accrued for the plaintiff to file action against defendant. Under such circumstances, the plaintiff will not be able to seek the reliefs prayed for in the plaint since the very plaint is bad in law particularly as far as the facts are concerned.

In the circumstances, I do not wish to interfere with the findings of the learned District Judge. For the aforesaid reasons, this appeal is dismissed with costs fixed at Rs.50,000/-.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL