169/99(F)

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

W.A.Jinadasa, 16 Rest House Road,

Wellawaya. (Deceased)

Defendant-Appellant

Wawulanbokka Acharige Nimal of

Kotaveheragalayaya, Warunagama

Wellawaya.

Substituted Defendant-Appellant

C.A.Case No:-169/99(F)

D.C.Monaragala Case No:-1452/L

Vs

Multi Purpose Co-operative Society

Limited, Wellawaya.

Plaintiff-Respondent

Before:- H.N.J.Perera, J.

Counsel:-Sunil Abeyratne with P.N.Abeyratne for the substituted Defendant-Appellant

Vijaya Niranjan Perera for the Plaintiff-Respondent

Argued On:-20.09.2013

Written Submissions:-28-08-2013/28.10.2013

Decided On:-10.06.2014

H.N.J.Perera, J.

The Plaintiff-Respondent instituted this action against the original Defendant-Appellant to obtain a judgment that the Plaintiff-Respondent was the owner of the land and premises described in the schedule to the plaint and for ejectment of the Defendant-Appellant from the said premises.

The Defendant-Appellant filed his answer and took up the position that he was the lawful tenant of the premises described in the 1st schedule in his answer as assessment No. 16 and in extent of 12X12 feet and the land described in the 2nd schedule in the answer in extent of 10X20 feet was a part of the said land described in the 1st schedule in the answer.

At the trial the Plaintiff-Respondent admitted that the Defendant-Appellant was the tenant of the premises described in the first schedule to the answer and limited his reliefs to the land described in the second schedule to the answer.

After trial, the learned District Judge delivered judgment on 03.02.1999 in favour of the Plaintiff-Respondent. Aggrieved by the said judgment of the learned District Judge of Wellawaya the Defendant-Appellant has preferred this appeal to this Court.

It was the contention of the Counsel for the Defendant-Appellant that the learned District Judge in his judgment has held that the disputed portion of the land was the land in extent of 8 X 22, shed mentioned as 'A' in Plan marked X. However the learned District Judge has answered the issue No 4 affirmatively which clearly shows that the trial Judge has erred in facts and in law. Therefore it was contended that there is a serious doubt on identification of the

disputed portion of land and that the burden was on the Plaintiff-Respondent to prove the identity of the subject matter correctly.

The Defendant-Appellant contends that the disputed portion of the land described in the schedule to the original plaint and the land depicted in the Court Commissioner's plan and report No 559 marked X is substantially different.

It was contended on behalf of the Plaintiff-Respondent that a proper examination of the schedule to the plaint reveals that the schedule refers to the entire corpus belonging to the Plaintiff-Respondent with reference to a final partition plan .This was prior to the commission being issued by court to identify the disputed portion with reference to a survey plan. A commission had been issued on the application of the Plaintiff-Respondent and was executed by the Commissioner Wilmot Silva and his plan and report filed of record where the disputed portion was depicted as 'A' in the said plan. Thereafter an application has been made by the Plaintiff-Respondent to amend the plaint to describe the disputed portion with reference to the said commissioner's plan marked X but this application had been refused by court.

It is highly unfortunate that the court had refused the said application made by the Plaintiff-Respondent to amend the plaint to describe the said disputed portion with reference to the commissioner's plan. In my opinion the learned District Judge should have allowed the said application of the Plaintiff-Respondent to amend the plaint. I cannot see any prejudice being caused to the Defendant-Appellant from allowing the said application of the Plaintiff-Respondent to amend the plaint to describe the disputed portion more fully with reference to the said plan.

However at the trial the Plaintiff-respondent had led the Commissioners evidence and marked the plan No 559 dated 13.02.1994 as X and the report X1. The learned District judge has considered the evidence given by the Surveyor ,the plan marked X and the report X1 and had correctly identified the disputed portion as the lot depicted as 'A' in the said plan marked X.

It is very clearly seen that although the Plaintiff-Respondent has filed this action to eject the Defendant-Appellant from the entire land he has later confined his case to the disputed portion of the land depicted as 'A' in the plan X.

In this case the Defendant-Appellant has admitted that the entire land described in the schedule to the plaint belongs to the Plaintiff-Respondent. He has admitted that he was in possession of a room in the building as a tenant of the Plaintiff-Respondent.

The Plaintiff-Respondent has pleaded title to the said land and has proved that he is the owner. The Defendant-Appellant too has admitted the Plaintiff's title to the land.

Further it has been clearly established that the Defendant-Appellant occupied the portion of land adjoining the room with leave and license of the Plaintiff-Respondent. The Defendant-Appellant had on several occasions agreed to remove his tools and implements from the portion covered by the temporary shed.

In paragraph 5 of the answer the Defendant-Appellant had stated that he believed that the disputed portion of land to be a part of the portion which he has rented out from the Plaintiff-Respondent but later has come to know that the Plaintiff-Respondent is not the owner of the said portion of land.

In Ruberu Another Vs Wijesooriya (1998) 1 Sri L.R. 58, it was held that:-

"Whether it is a licensee or lessee, the question of title is foreign to a suit in ejectment against either. The licensee obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the plaintiff without whose permission he would not have got it. The effect of Section 16 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee obtained possession from Plaintiff is perforce an admission of the fact that the title resides in the plaintiff."

In Visvalingham Vs Gajaweera 56 N.L.R. 111,it was held that:-

"Even assuming that the Defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession to his landlord. He must first give up possession and then it would be open to him to litigate about the ownership."

The learned trial Judge has arrived at certain factual matters or has decided on primary facts i.e Plaintiff-Respondent was the owner, that the Defendant-Appellant entered the land in question with the permission of the Plaintiff-Respondent, the disputed portion is depicted is depicted as 'A' in plan X. Being a licensee the Defendant-Appellant is not entitled to dispute the title of the Plaintiff-Respondent. He must give up possession and then it would be open to him to litigate about the ownership. I have considered the entire judgment and see no reason to interfere and the trial Judge has given cogent reasons. I do not wish to interfere with the primary facts.

In Alwis Vs Piyasena Fernando (1993) 1 Sri.L.R. 119 it was held that:-

The Court of Appeal should not have disturbed the findings of primary facts made by the District Judge, based on credibility of witnesses.

In M.P.Munasinghe Vs C.P.Vidanage 69 N.L.R. 97, it was held that:-

The jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon that evidence should stand has to be exercised with caution.

"If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight....."
-Per Viscount Simon in Watt or Thomas Vs Thomas (1947 A.C. 484 at pp.485-6)

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the Defendant-Appellant is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL