IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Vithana Arachchilage Rupawathie
Halimulle Watta
Yakkennehera
Metiyagane

Defendant-Appellant

C.A.NO.656/98 (F)
D.C.KULIYAPITIYA
CASE NO.10947/L

Vs

1. Herath Mudiyanselage Lionel
Bandara Rathnayaka

And others
All of Ihala Nakalagamuwa
Nakalagamuwa

Plaintiff-Respondents

BEFORE : **K.T.CHITRASIRI, J.**
MALINIE GUNARATNE, J.

COUNSEL : Bimal Rajapaksha with S.A.Kulasoorya
for the Defendant- Appellant

Collin A. Amerasinghe with R.Munasinghe
for the Plaintiff-Respondents

ARGUED ON : 28.07.2014

WRITTEN SUBMISSIONS FILED ON : 21.05.2014 by the Defendant-Appellant
09.07.2014 by the Plaintiff-Respondents

DECIDED ON : 17TH SEPTEMBER 2014

CHITRASIRI, J.

This is an appeal seeking *inter alia* to set aside the judgment dated 21.07.1998. In that judgment, the learned Additional District Judge of Kuliyapitiya made order to enter decree as prayed for in the plaint dated 11.05.1994, filed by the plaintiff-respondents. (hereinafter referred to as the respondents) As a result, the respondents along with two others were declared entitled to the land referred to in the schedule to the plaint and an order also was made evicting the defendant-appellant from the aforesaid land described in the schedule to the plaint. The respondents were made entitled to the damages as well. Being aggrieved by the said judgment the appellant preferred this appeal to this Court.

Learned Counsel for the appellants, at the commencement of the argument restricted this appeal to two grounds. His first argument is that the respondents being the plaintiffs in this case have failed to terminate the licensee status of the appellant alleged by the respondent themselves before filing the action. This action has been filed accepting the appellant as a licensee having averred so in paragraphs 7, 8 and 9 in the plaint. In those paragraphs contained in the plaint, respondents have averred that the defendant and her husband came into occupation of the land referred to in the schedule to the plaint, with the permission of the predecessors-in-title of the appellants. Indeed, the respondents have sent a notice to the defendant-appellant (hereinafter referred to as the appellant) directing him to hand over the premises in dispute to the 1st plaintiff-

respondent. Accordingly, learned Counsel for the appellant contended that the respondents could not have filed and maintained this action without terminating the licensee status of the appellant, upon which ground the respondents have filed this action.

Even though the respondents have pleaded in such a manner accepting the appellant as a licensee, neither the respondents nor the appellant have raised issues on such a basis when the trial was taken up in the Court below. Hence, it is seen that the issue of terminating the licensee of the appellant was not at all an issue when this case was pending in the District Court. Indeed, this case had proceeded there in the District Court, treating the defendant as a trespasser. Even the line of questioning by the learned Counsel for appellant at the trial held in the District Court would clearly show such a proposition. Therefore, it is apparent that the issue of over-holding licensee of the appellant was never an issue in the Court below.

Moreover, averments in the plaint had been set out to establish basically the title of the land put in suit treating the defendant as a trespasser even though the matters as to a licensee also had been averred therein. The appellant too, in her answer has claimed prescriptive title to the land which she has described in the schedule to her answer filed in this case. In that answer, the appellant has pleaded that she had been in possession of a land in extent of 1 and 1/2 acres, having refuted the status of licensee referred to in the plaint. The issues raised by the appellant also are to claim prescriptive title to the land that she has claimed title. In the circumstances, it is clear that the action of the plaintiff-respondents

is to have a decree as to the title of the land put in suit on the strength of their title deeds and accordingly to have the appellant evicted therefrom rather than to evict him on the basis of a licensee.

Accordingly, it is my view that merely because the respondents in their plaint have referred to a letter addressed to the appellant directing him to leave the premises in suit considering her as a licensee, it will not be a bar to obtain the reliefs prayed for in the plaint relying upon the title deeds they have submitted and then treating the appellant as a trespasser. In the circumstances, failure to terminate the licensee of the defendant will not be a reason in this instance to disturb the findings of the learned Additional District Judge.

The second argument advanced by the learned Counsel for the appellant is the failure on the part of the plaintiff-respondents to identify the land from which the defendant is to be evicted. Section 41 of the Civil Procedure Code stipulates that when the claim is for a specific portion of land, then that specific portion also must be described in the plaint so far as possible by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan to be appended to the plaint.

The necessity to identify the land to which title is claimed by a party to an action had been discussed by **Marsoof, J** in the case of **Jamaldeen Abdul Lateef v. Abdul Majeed Mohamed Mansoor another [2010 (2) SLR at page 333)** as well. It was again referred to in **Ananda Kodagoda vs. Moraj Megji Udeshi** by this Court. **[C.A.Minutes dated 22.1.2014 in C.A.No.175/98 (F)**. Then the issue

is; were the plaintiff-respondents successful in identifying the land that they claim title in this instance?

Admittedly, the respondents' claim is to a larger land which has an extent of 16 acres. The boundaries to the aforesaid 16 acre land had been clearly described in the schedule to the plaint. However, no sketch or plan has been produced either with the plaint or in evidence to establish identity of the part of the aforesaid 16 acre land which is subjected to in this case as alleged by the appellant. Appellant has claimed only a land in extent of 1 ½ acres from the said larger land. In such a backdrop, the question arises as to the identity of the part of the larger land occupied by the appellant. Then it is necessary to ascertain whether the plaintiff-respondents were able to identify the land where the defendant-appellant was occupying or in other words the land subjected to in this action as alleged by the appellant.

As mentioned hereinbefore in this judgment, identification of the land in dispute was never an issue when the case was taken up before the learned District Judge. The manner in which the case has proceeded show that the parties were well aware of the land that the plaintiffs were claiming and there had not been a dispute as to the identity of the corpus at that stage. The appellant herself has admitted that she is claiming prescriptive title to a land that has an extent of 1 1/2 acres which falls within the land called Halimulla Estate. The name of the land claimed by the respondents also is Halimulla Estate to which they have established the ownership.

Northern boundary of the 16 acre land called Halimulla Estate claimed by the respondents is the land belonging to Piyatunga. Eastern boundary of both the lands referred to in the two schedules found in the plaint as well as in the answer is the roadway. Southern boundary of the lands referred to in both the said schedules is the land belonging to Piyasena. Western boundary of the 16 acre land is the paddy field belonging to villagers whereas the western boundary of the land claimed by the defendant is the land claimed by the plaintiffs. Northern boundary of the land claimed by the appellant is the land belonging to villagers.

When considering those boundaries, it is clear that the land occupied by the defendant falls within the 16 acre land claimed by the respondents. Clear evidence also is forthcoming to show that the appellant had been in occupation of a land within the land claimed by the respondents which has an extent of 1 1/2 acres. The appellant has not disputed the location of the land at any stage. Indeed, the defendant-appellant has claimed a land in extent of 1 1/2 acres within the land claimed by the respondents.

In the circumstances, it is clear that the respondents have successfully established that the land claimed and occupied by the appellant falls within the land described in the schedule to the plaint to which the plaintiff-respondents along with two others have claimed title. Appellant also was well aware of the identity of the land claimed by the respondents. Therefore, it is clear that the identity of the land put in suit had been established by the respondents even

though no sketch or map had been submitted to Court by them for the purpose of identifying the land where the appellant is in occupation. In the circumstances, I am not inclined to accept the position that the respondents have failed to identify the land as required by law.

Learned Counsel for the appellant did not dispute the title of the respondents to the land described in the schedule to the plaint. Indeed, the deeds marked P1 and P2, clearly show that the plaintiffs have become co-owners to this land. When they established the co-ownership to the land, they have the right to seek for eviction of the persons who has no right or title to occupy the same. This position was clearly upheld by S.N.Silva J (as he then was) in the case of **Hariette v. Pathmasiri. [1996 (1) SLR at page 358]** Accordingly, it is my opinion that the learned Additional District Judge is correct when he decided the case in favour of the plaintiff-respondents as prayed for in the plaint.

For the aforesaid reasons, I am not inclined to interfere with the judgment of the learned Additional District Judge. Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J

I agree

JUDGE OF THE COURT OF APPEAL