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

C.A. No. 534/97(F)

Anulawathie Menike alias Mallika Samarathunga, 685, Pallegama, Meddepattuwa, Ampitiya, Kandy.

Defendant-Appellant

DC Kandy 16866/L

1. D.M.M. Fernando
2. L.S.P. Weerasinghe

Both of Pallegama, Ampitiya, Kandy.

Plaintiff-Respondents

BEFORE : Deepali Wijesundera, J. and
M.M.A. Gaffoor, J

COUNSEL : D.M.G. Dissanayake with S.C. Balasuriya for the Defendant Appellant.
Shantha Jayawardena with Chamara Nanayakkarawasam for the Plaintiff Respondent.

ARGUED ON : 13.02.2015

DECIDED ON : 16.07.2015

Gaffoor J.,

The 1st and 2nd Plaintiffs have on 02.10.1991 filed this action in the District Court of Kandy for a declaration of title of the lands morefully described in schedule " ඇ, ඈ, ඇ² of the Plaintiffs, ejectment of the Defendant therefrom, damages and costs.

They state that the lands described in "ඇ ඈ schedules are depicted as Lot 1 in Plan No. 18/35 made by C.G. Kreltszhein, Licensed Surveyor, and the full land including the land described in schedule "ඇ² . Is shown as Lot 1 and 2 in Plan No. 2252 made by G.W. Wijewardena, Licensed Surveyor.

The Plaintiffs further say that on or about 19.12.1989 the Defendant disputed the south-east portion of the said land and thereby caused damages in a sum of Rs. 3000/- and further damages in a sum of Rs. 500/- per month. However, it will be noted that the plaintiffs have failed to give a schedule of the portion in south-eastern side of their land in the Plaint, this is a grave irregularity. When the Plaintiffs are asking for ejectment of the Defendant from a portion of their land, they must state the exact portion with metes and bounds in their plaint.

Section 41 of the Civil Procedure Code states: "when the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land then the portion of land must be described in the plaint, so far as possible by reference to physical mates and bounds or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only". In otherwords the Plaintiff must describe the portion disputed by the Defendant in a separate schedule in the plaint.

In Dayawathie vs Baby Nona Panditharatne CA 728/93(F) – District Court Kalutara case No. 3597/L, C.A. Minute dated 10.05.2001, it was held that, a party who claims prescriptive title to a particular allotment of land is obliged to clearly describe it either by boundaries or extent of the land that he claims to have prescribed. Section 41 of the Civil Procedure Code requires to define such land with reference to physical metes and bounds or by map or sketch.

It is, thus, an imperative requirement on the part of the Plaintiff to give or described the portion of their land described or alleged to be possessed by the Defendant.

Furthermore, the Plaintiff say that their lands are shown as Lot 1 and 2 in Plan No. 2252 made by P.W. Wijewardena, Licensed Surveyor. If that be so, they must be owning their land dividedly and with clear boundaries. But they have not stated who are the owners of Lot 1 and Lot 2. In other words, the Plaintiffs have failed to state which lot belongs to 1st Plaintiff and which lot to the 2nd Plaintiff. This is important because the court must know if the south-eastern portion is disturbed by the Defendant, this south eastern portion falls within which lot is to be clearly ascertained.

In paragraph 18 of the amended Plaint the Plaintiffs state that their possession on the eastern portion of the land is disturbed. But in paragraph 21(b), the Plaintiffs are asking to eject the Defendant from these lands (referring to the lands described in schedule "A", "B" and "C" of the Plaint). This prayer contradicts the averment in para. 18 of the Plaint. The plaintiffs clearly state that the Defendant had disturbed only the south eastern and not the entire land. Then how can they ask for relief for ejectment from the entire land? This relief cannot

be granted, as they have not alleged that this Defendant had disturbed possession of the entire land.

When the Surveyor P.W. Wijewardena gave evidence, the Plaintiff's attorney or the court had failed to elicit evidence to identify the south-eastern portion alleged to be disturbed by the Defendant through the Surveyor. This is a fatal irregularity. Also when considering the boundaries given for the three lots and the boundaries shown in Plan No. 18/35 (P3) they are not the same. Surveyor Wijewardena also admitted that these three lots are separate lots and their boundaries differ from each other (page 97 of the appeal brief). This evidence of the Surveyor corroborates the position of the Appellant that these three portions of the land described in schedules A, B and C of the Plaint have three different names, different extents and different boundaries which do not tally with the lots shown in Plan No. 2252.

The Plaintiff's position is that the lands described in schedule A, B and C of the plaint depicted as Lots 1 and 2 in Plan No. 2252(P1) made by P.W. Wijewardena, Licensed Surveyor (para 6 of the amended plaint). But the 1st Plaintiff in her cross examination admitted that the 12 boundaries given for the three lands are not described in P1 (page 133). It is, therefore, clear that the boundaries given in the plaint and in P 1 are not identical but differ, as such, it cannot be clearly said that the lands of the Plaintiffs have been clearly identified by the Surveyor. Though there are several plans submitted by the plaintiffs, none of the plans show the land in dispute with clear metes and bounds. The 1st Plaintiff has admitted in her evidence that except for Plan marked P2, all other plans were made after she bought the lands in dispute by deed marked P16. (pages 151 and 155 of the appeal brief).

The 1st Plaintiff states in her cross examination that she and her son (2nd Plaintiff) are the owners of the lands A, B and C which she bought on 25.02.1981 and after she bought the lands she got the lands surveyed by the Surveyor Wijewardena on 28.02.1981 (P1). She also says that her vendor showed the boundaries of the land. From this evidence , it is clear that when the lands were bought by the 1st Plaintiff she did not know the boundaries of the land (see pages 151, 152 of the appeal brief).

When the case was taken up for trial, 1 -15 issues had been raised by the Plaintiffs and 16-31 Issues by the Defendant. One admission was recorded to the effect that in respect of the lands the Plaintiff had instituted an action No. 13242/L against the Defendant's mother and after her death, the Defendant was substituted in her place and thereafter the Plaintiff had withdrawn the action with liberty to file a fresh action. However, no reason is given as to why or on which ground the action was withdrawn. If the Defendant had been substituted in place of the deceased Defendant, that action could have been continued and decided by court without a fresh action. There was no necessity to withdraw the action.

The Defendant has raised two Issues, Nos. 25 and 26 about a case No. 9221/91 filed in the Primary Court of Kandy in respect of the land alleged to be possessed by the Defendant. Learned Primary Court Judge had decided the case in favour of the Defendant, affirming her possession of the land in dispute. The Defendant states in para. 40 of her amended Answer that in terms of the Primary Court order, she had proved that she is in possession of the land morefully described in schedule "A" of the Answer.

On a careful perusal of schedules A, B and C in the Plaint it is manifest that the said two lots, as stated by the Plaintiff are depicted as Lot 1 and 2 in Plan No. 2252. The Plan is marked as P1. In her evidence in chief (page 42 of the appeal brief) the Plaintiff says that Lots 1 and 2 in Plan No. 2276(V1). I claim rights and also I claim right to a portion of Lot 3. Whereas the Defendant in her answer (see schedule "A" and "B") claims rights to schedule I and 2 morefully described in Plan No. 2276(V1).

On a comparison of Plan No. 2252 and 2276 only lot 1 in 2252 resembles lot 3 in 2276 and other lots in 2252 and 2296 differ in shape, size and extent, when both parties are claiming the same land with some discrepancies, the lands claimed by the Plaintiff and the Defendant should be clearly identified in the said Plans, which has not been done in this case. As such the Plaintiffs have failed to identify the lands claimed by them. With regard to this the learned District Judge's observation is important. He says "Defendant says that she possesses lot 2 and 3 in Plan V1 and that Lot 3 is shown as Lot 2 and 3 in Plan marked V3 (Plan No. 2002 Several Plans are submitted in connection with this case. On an examination of all these plans, the only reason that is clear is that the lots claimed by the Plaintiffs and the land (lots) belonged and claimed by the Defendant are all situated adjoining each other" – (see page 7 and 8 of the judgment).

If this is the findings of the learned Judge, it is manifestly clear that the learned Judge has failed to identify the lands claimed by the Plaintiffs and the Defendant. Hence, the judgment is misconceived and wrong.

If the lands claimed by the Plaintiff and the Defendant are adjacent lands, it is easy to identify with the help of superimposition of the Plans submitted in this case. But it has not been done . Identification of the corpus is necessary in a rei-vindicatory action.

In the absence of the identification of the portion on the south eastern side with metes and bounds, the judgment is on a wrong footing.

For the reason stated, we allow the appeal and set aside the judgment of the learned District Judge. We make no order as to costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL.