

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

C.A. No.823/98(F)

Syed Khan Azad Khan

234. Main street,

Kekirawa

Plaintiff Appellant

D.C.Anuradhapura 14335/RE

Vs

P.V.A. Piyasena

320, Rani Cinema Hall,

Main Street, Kekirawa

Defendant Respmdemt

BEFORE: Deepali Wjesundera J.,

M. M. A. Gaffoor, J.,

COUNSEL: H. Withanachchi for the Plaintiff Appellant

**Shyamal A. collure with A.P. Jayaweera and A. Adachi for the
Defendant Respondent**

ARGUED ON : 03.11.2015

DECIDED ON: 28.04.2016

Gaffoor J.,

The Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action on 04.03.1992 against the Defendant Respondent (hereinafter referred to as "the Defendant") in the District Court of Anuradhapura, stating inter alia, that he is entitled to the land and premises morefully described in the schedule to the Plaint by Deed No. 2075 (marked "P1") and prayed for a declaration that he is entitled to the said land, for ejection of the Defendant therefrom and damages at Rs. 5000/- per month until delivery vacant possession and for costs.

The Defendant filed Answer denying the Plaintiff's cause of action and stated that one C. Pathmanathan and C. Akaramurthi were running a cinema theatre situated in the property in dispute till 1983 and thereafter due to ethnic problems they left the place and the theatre was closed and with their consent the Defendant started the cinema theatre business and paid Rs. 500/- as monthly rent to the owner of the land Pushpambikai Nadarasiah and that he entered into a Sale Agreement bearing No. 2045 with Pushpambikai Nadarasiah and Kumaravelu Nadarasiah to buy this land but they failed to execute the Sales Agreement and as such he could not purchase this property but he spent about Rs. 12 lakhs to repair the cinema hall which he claims in re-convention in

the event of the case is decided in favour of the Plaintiff. This claim in reconvention was rejected by the Plaintiff in his Replication.

When the case was taken up for trial on 20.06.1995 the following were recorded as Admissions:

- i. Averments in paragraph 4 of the Plaint;
- ii. The original owner of the land in dispute was Kumaravelu Nadarasiah;
- iii. The persons mentioned in paragraph 3 of the Plaint are the heirs of Kumaravelu Nadarasiah;

Paragraph 3 of the Plaint states that since the said Kumaravelu Nadrasiah died leaving property below the administrable value and his widow Pushpambikai Nadarasiah and three children namely (i) Kumaravelu Nadarasiah Chandrasekaram (ii) Kamala Ranjanie Rajendra and (iii) Narendevi Peter Gabriel, became entitled to the same.

Paragraph 4 of the Plaint, which is admitted by the parties, states that the abovementioned persons and the Defendant Parnavitharana Arachchige Piyasena entered into Sales Agreement to sell the land in dispute to the

Defendant. The said Sale Agreement bearing No. 2045 dated 19.09.1990 and attested by Silvius Augutus Yatawara, Notary Public is marked "P5".

Since the averment in the paragraph 4 of the Plaint is admitted by the Defendant and also he had entered into a Sales Agreement with the widow and children of the original owner of the land in dispute, Kumaravelu Nadarasiah, the Defendant has admitted the title of the persons mentioned in paragraph 4 i.e the widow and the three children of Kumaravelu Nadarasiah and the Defendant is therefore stopped from denying the title of them. Later by Deed of Transfer No. 2075 dated 26.06.1991 and attested by S.A. Yatawara, Notary Public, the Plaintiff has purchased the land in dispute from the persons mentioned in paragraph 3 of the Plaint. This Deed is marked "P1". It must be noted that the Plaintiff before purchasing the land had entered into a Sales Agreement bearing No. 2063 with the persons mentioned in paragraph 3 of the Plaint which is marked as "P2".

This is a rei-vindicatio action, where the Plaintiff has based his title from the vendors. The Defendant had admitted that the Plaintiff's vendors are the title holders to the property in dispute. It is a fundamental principle that in an action for declaration of title to the property, where the legal title is in the

Plaintiff but the property is in the possession of the Defendant, the burden of proof is on the Defendant.(see Siyaneris vs Udenis de Silva – 52 NLR 289).

Section 58 of the Evidence Ordinance states that what is admitted by the parties need not be proved. This admission may be at the hearing or before the hearing. In this case, the Defendant had admitted the title of the Plaintiff's vendors not only at the hearing but also before the hearing by entering into the Sales Agreement No.2045. It must be noted that the Defendant had been paying Rs. 500/- as monthly rent to Pushpambikai Nadarasiah by which act the Defendant had admitted the ownership of the land and premises of Pushpambikai Nadarasiah. Also see Section 8(1) of the Evidence (Special Provisions) Act No. 14 of 1995, which states, "*In any proceedings it shall not be necessary for any party to tender any evidence of any fact which is admitted by the opposing party*". Since the Defendant has unequivocally admitted the title of the Plaintiff's predecessor from whom the Plaintiff has purchased the property in dispute by Deed No. 2075 (P1). I hold that the Plaintiff has good title to the property and it is the Defendant who must establish that he is in lawful possession. In this regard the learned District Judge misdirected himself on the law and held that the Plaintiff has not proved his title. .

I now look into the possession of the Defendant. The Defendant has stated in his Answer that there is a cinema hall by the name of "Rani Theatre" in the property which was run by two persons, namely (i) D. Pathmanathan and (ii) D. Akramoorthi during the period 1955 to 1983 and after ethnic riots in 1983, these two persons had left the place.

According to the evidence of Pushpambikai Nadarasiah, the cinema hall was erected by her husband Nadarasiah and the said Paramanathan and Akramoorthi had been running only the cinema exhibiting business. They did not have any right to the building. After these two persons left the place in 1983, the theatre was idling for sometime till 1990. These two persons never came again to run the theatre business.

The Defendant has come into possession of the land, according to the Sale Agreement No. 2045(P5), only on the strength of the Sales Agreement. It is clear from the wording of the Agreement. Paragraph 2 in page 2 of (P5) states as follows :-

"It is further agreed between the party of the First Part and the Party of the Second Part that the Party of the Second Part may enter upon and

take possession of the premises and buildings standing thereon and described in the schedule hereto forthwith and occupy the same,"

From this statement it is undoubtedly clear that the Defendant has got into possession of the building and premises only upon the Sale Agreement (P5) which was executed on 19.09.1990.

The Sale Agreement P5 becomes ineffective because of the default on the part of the Defendant. Pushpambikai states in her evidence that "the Defendant agreed to buy this property for 3 ½ lakhs within 6 months from the date of the Agreement (P5) i.e. 19.09.1990 and after 6 month she said he could not get a bank loan to buy and therefore it was extended to 3 more months' and thereafter the agreement became ineffective." It is thus clear that the Sale Agreement (P5) with the Defendant became ineffective upon the failure of the Defendant to find money to buy the property.

However, the fact remains that the Defendant came into possess the land in dispute only after P5 was executed, that is, after 19.09.1990. The Defendant has given evidence to the effect that he was working in the cinema hall as an operator under the earlier owners of the cinema theatre business and thereafter as Manager and later he met Pathmanathan and on whose request

he started the cinema theatre business. When he took over there were only four walls and he made all the improvements and paid all arrears of payments to the Cinema Companies and brought the Hall into a "A" Grade theatre. All these things he had done only for his business purposes and the Plaintiff or his predecessors in title have nothing to do with these things done by the Defendant for the improvement of his business. On a perusal of the Sale Agreement (P5) entered into between Pushpambikai and her children and the Defendant it is abundantly clear that they entered into the Sale Agreement only to sell the land and premises and not about the cinema business. This Agreement does not state a word about the cinema hall or cinema theatre business.

It must be noted that in terms of (P5) the Defendant had undertaken that if the Agreement becomes ineffective he will vacate and deliver peaceful possession of the said premises and buildings to the Party of the First Part in the said Agreement. Having paid Rs. 500/- as monthly rent to the owner of the land Pushpambikai, the Defendant thereby accepted the ownership of the land and premises and he is therefore stopped from denying her and her children's ownership under Section 116 of the Evidence Ordinance.

The Defendant raised Issues 17(a) and (b) that he is the licensee of previous owner Pushpambikai and therefore the Plaintiff cannot maintain this action against him, This contention is legally wrong and cannot be accepted. The Defendant has taken up objection as to the description of the property to the effect that it is not a divided land but a part of an undivided lot is untenable because he himself wanted to buy the same land by entering into P5 without any protest to its undivisibility. By his own conduct, he cannot raise this objection and give evidence to that effect.

The land what is sold is clearly described in the body of the Deed No. 2075 (P1) in addition to the schedule. Hence the body of the Deed can be accepted as it prevails over the description in the schedule, (see Francis Assis vs Tampoe – 62 NLR 73).

Also, the Defendant's contention that he paid arrears of payment to the Film Corporation, Rates and Taxes to the local authorities in respect of the business carried on by him under the name "Rani Theatre" and electricity bills etc cannot be accepted as this action is not in relation to the cinema theatre business but on the question of declaration of title and ejection. The Plaintiff is not making a claim for the cinema business, therefore, the Defendant's claim

in reconvention cannot be maintained and should be rejected. If at all he has spent a big amount for the improvement of the theatre business, he has to claim that money from Pathmanathan on whose request the Defendant had re-started the theatre business which was totally closed, and revived by him by spending such amounts. The Plaintiff's claim is only for a declaration of title and ejection of the Defendant. As stated above, the Plaintiffs has proved his title as against the Defendant and the Defendant has failed to prove legal possession in his favour.

Issue No.8 was raised by the Defendant, was later mentioned in Issue No. 17 as follows:

- (a) Is the Defendant the licensee of Pushpambikai Nadarasiah the predecessor in title of the subject matter?
- (b) If so, can the Plaintiff in this case get possession by ejecting the Defendant therefrom?

Upon the above Issues the following consequential Issue was raised on behalf of the Plaintiff as Issue No. 18.

- 18. Even if the Defendant was the licensee of the original owner, is the Plaintiff precluded from instituting this action?

The above Issues were answered by the learned District Judge as follows:

- | | |
|--------|--------------|
| 17 (a) | Yes |
| (b) | Not possible |
| 18. | Yes |

It must be borne in mind that the defendant states in para. (9) of the Answer that "he agreed with the owner of the land Pushpambikai to pay Rs. 500/- per month and had been running the business." This paragraph does not state on what basis he had agreed to pay Rs. 500/- per month. But definitely it is not on the basis of tenancy or license as there is no written document to prove his position. Even as a Licensee, the Defendant has admittedly paid this Rs. 500/- per month only for the business and not for the land.

It is in evidence that the Defendant and the previous owner of the land Pushpambikai and children entered into a sale agreement (P5) on 19.09.1990 and on the strength of this Sale Agreement he had entered into occupation of the land (page 2 of P5). The Defendant says in his further evidence on 20.05.1996, that he got the cinema business in writing from Pathmanathan in 1991. He also says that Pathmanathan wanted the Defendant to pay some money for the running of the business. This clearly shows that the Defendant's transaction about the business was with Pathmanathan and not with

Pushpambikai. Other than this, there is no evidence that the said Pathmanathan was a tenant or licensee of the previous owner Pushpambikai and others. On what basis Pathmanathan was in possession of the cinema theatre is not established. In the absence of any such evidence, the Defendant cannot say that he is a licensee.

The Defendant got the consent of Pathmanathan to run the cinema business, that is also in writing and paying some money. It appears therefore that the Defendant got Pathmanathan's approval in writing because the Film Corporation had given the right to exhibit their films to Pathmanathan and therefore without Pathmanathan's approval, the Defendant cannot get the film distribution right. This arrangement is only about the cinema business and not about the occupation of the land.

In this case, the basis of the occupation of the premises by the Defendant has not been established. The Defendant was neither a tenant nor a licensee. It is also not established that Pathmanathan was a tenant or licensee. As the Defendant says in his evidence he got a written approval in 1991 from Pathmanathan to run the cinema business after he entered into the sale agreement with Pushpambikai on 19.09.1990. After this date only, the Defendant had got into possession of the land. But when he defaulted to pay

the purchase price and buy the premises in suit, he has no right to be on the land. He undertook to handover peaceful possession if he defaults to buy. Hence, he cannot be heard to say that he is a licensee, but on the other hand, he is a trespasser against whom the Plaintiff has a right to institute this action.

It must be noted that two persons who were running the cinema theatre business in the building situated in the property in dispute had no ownership to the land on their names. They got into the business with the permission and consent of the original owner Kumaravelu Nadarasiah and therefore the Defendant who got the consent of Pathmanathan to re-start the cinema theatre business cannot claim undisputed possession against the vendors of the Plaintiff. One of the vendors Pushpambikai said in her evidence that she allowed the Defendant to build a lavatory only. There is no evidence that the theatre was built by the Defendant. Except for the improvements made by him, the Defendant has failed to establish that it was he who built the theatre.

On a perusal of the schedule in P1 (The Deed of Transfer) it is apparently clear that the vendors have sold the property to the Plaintiff, together with the building (Rani Cinema) standing thereon and also everything else standing thereon. According to the law of the country, when a land is sold, what is

standing thereon goes with the soil. Therefore, the Plaintiff is entitled not only to the soil but also to the things standing thereon.

The learned District Judge has misdirected himself in law in coming to the conclusion that the Plaintiff has not proved his title. The evidence led in this case, both oral and documentary clearly shows that the Plaintiff has established his title beyond doubt and that the Defendant has failed to prove his possession in terms of the law.

We therefore allow this appeal and set aside the Judgment of the lower court. We also enter judgment for Plaintiff as prayed for in paragraphs 1, 2, 4 and 5 in his Plaint with costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL