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

C.A. Case No. 580/2000 (F)

D.C. Kalmunai Case No. 1819/L

Athambawa Meera Mohideen,
Poomarathadi Road,
Natpiddimunai-1,
Kalmunai.
Plaintiff

-Vs-

1. **Mohideen Bawa Umaru Lebbe** *alias* **Ibralebbe**
2. **Mohideen Bawa Kalender**
   Both of Peria Pallivaasal Road,
   Sammanthurai.
3. **Thambisaibo Abdul Rasool,**
   Central Road, Maruthamunai.

   Defendants

AND

In the matter of an Appeal under Section 754(1) of the Civil Procedure Code.

Athambawa Meera Mohideen (Deceased),
Poomarathadi Road,
Natpiddimunai-1,
Kalmunai.
Plaintiff-Appellant

-Vs-

1. Mohideen Bawa Umaru Lebbe *alias* Ibralebbe
2. Mohideen Bawa Kalender

   Both of Peria Pallivaasal Road,

   Sammanthurai.
3. Thambisaibo Abdul Rasool,

   Central Road, Maruthamunai.

   Defendant-Respondents

AND NOW BETWEEN

Meera Mohideen Lathifa Umma,

No. 61, Poomarathadi Road,

Natpiddimunai-1,

Kalmunai.

Substituted Plaintiff-Appellant

-Vs-

1. Mohideen Bawa Umaru Lebbe *alias* Ibralebbe
2. Mohideen Bawa Kalender (Deceased)

   Both of Peria Pallivaasal Road,

   Sammanthurai.
3. Thambisaibo Abdul Rasool,

   Central Road, Maruthamunai.

   Defendant-Respondents

An Application under Section 760A of the Civil Procedure Code and Rule No. 38 of the SC Rule to substitute the Legal Representative of the deceased 2nd Defendant-Respondent

NOW BETWEEN

Meera Mohideen Lathifa Umma,
No. 61, Poomarathadi Road,
Natpiddimunai-1,
Kalmunai.
Substituted Plaintiff-Appellant-Petitioner

-Vs-

1. **Mohideen Bawa Umaru Lebbe *alias* Ibralebbe**
Peria Pallivaasal Road,
Sammanthurai.
Defendant-Respondent

2a. **Mohamed Ismail Fathumma**
No. 114, Ampara 14th Lane,
Udanga 02,
Sammanthurai.
Substituted-Defendant-Respondent-Respondent

3. **Thambisaibo Abdul Rasool,**
Central Road, Maruthamunai.
Defendant-Respondents

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	U.M. Nizar with K.R.M.A Raheem for the Substituted Plaintiff-Appellant.
Written Submissions on:		28.08.2014 (For the Substituted Plaintiff-Appellant)
Argued on	:	04.08.2016
Decided on	:	14.12.2016

A.H.M.D. NAWAZ, J.

This appeal is preferred by the Plaintiff-Appellant (hereinafter referred to as "the Plaintiff") against the judgment of the District Court of Kalmunai dated 19.07.2000 entered in case No. 1819/L dismissing the plaintiff's action.

After the appeal was filed, the Appellant passed away and substitution thereto has been effected. The 1st, 2nd and 3rd Defendants-Respondents (hereinafter referred to as "the Defendants") were absent throughout and the effort by this Court to serve notices on them became futile and finally the case was fixed for argument in the absence of the Defendants.

On 04.08.2016, the case was taken up for argument. The Defendants were absent and unrepresented. The Counsel for the substituted Plaintiff made his oral submissions and has since filed written submission.

The deceased Plaintiff filed this action on 06.11.1985 against the 1st to the 3rd Defendants, claiming a declaration of title to the land described in the schedule to the plaint, an interim injunction against the Defendants preventing them from entering the said land and disturbing his possession and for costs. The Plaintiff has based his case on the ground that he is entitled to the said land by two deeds which are marked

as **P2** and **P3** and was placed in possession of the said land by the Fiscal on the decree entered in Case No. 1017/L.

The Plaintiff states in his plaint that in respect of the said land he filed Case No. 1017/L against seven other persons in the District Court of Kalmunai and got judgment in his favour in 1985 and possession was given to him in that case by the Fiscal and since then he has been in possession of the said land. He has sought an interim injunction preventing the Defendants from entering the said land and the Court has issued an enjoining order on 18.12.1985 against the Defendants.

The Plaintiff further states that the land in dispute is called Vannichchi Vaikal and depicted as Lots 2,5,6,7,8,12,13 and 14 in Plan No. S/57 prepared by K. Ratnarajah, Licensed Surveyor, and marked as P1 in Case No. 1017/L.

In the present case, the Defendants have filed a joint answer denying the averments in the plaint and stating that the decree entered in Case No. 1017/L is not valid as some of the Defendants in that case had died during the pendency of the case and no steps were taken for substitution and no decree was served on the Defendants and therefore the decree was incapable of execution and writ could not have gone.

The Defendants further state in paragraph 3 of their answer that the 1st and 2nd Defendants, along with their nephew Mohamed Aliyar Malikeen, are in possession of an extent of 6 acres of the land called Vannichchi Vaikal from 1982 as their own and the 3rd Defendant is in possession of Lot 10 shown in Plan No. S /57 which is in extent 2 acres and lies on the east of the land in dispute.

It appears from the averments that the Defendants, though they deny the plaintiff's claim to the whole land and dispute the identity of the land claimed by him, yet, admit that the Plaintiff, even if his paper title is established, is entitled to some undivided shares of the land. This admission shows that the Plaintiff is also entitled to some portion of the land in dispute between the parties. But this important admission is not recorded at the trial.

White the Plaintiff raised issues Nos. 1 to 13 and consequential issues Nos. 18 to 20, the Defendants raised Issues Nos. 14 to 17. For the purpose of this appeal I have selected certain important issues raised by both parties as relevant to their title and possession and I have set them down as follows:

The plaintiff's main issues go as follows:-

1. Is the Plaintiff entitled to the land described in the schedule to the plaint as averred in paragraph 2 of the plaint?
2. Did some persons in 1973, while the Plaintiff was possessing the land, disturb his possession?
3. Due to that reason has the Plaintiff filed Case No. 1017/L against those persons in this Court?
8. Did the Court enter judgment in favour of the Plaintiff in the said case No. 1017/L?
9. According to that judgment, did the Fiscal Officer of the Court give possession of the land to the Plaintiff?
11. Did the defendants knowing all these and without any right forcibly take possession of the land by ousting the plaintiff therefrom?

The defendants' issues Nos. 14 to 17 are as follows

14. Is the Plaintiff entitled to an undivided land in terms of the deeds mentioned in issue No.1?
15. While the Case No. 1017/L was pending in the District Court of Kalmunai, did the 2nd and 3rd Defendants in that case pass away?
16. Were any steps taken in respect of the 2nd and 3rd Defendants?
17. If issues No. 15, 16, and 17 are answered in the affirmative, is the judgment entered in Case No. 1017/L valid?

It is interesting to note as to how the above issues have been answered by the Trial Judge. The answers are as follows:-

1. Not proved
2. Not proved
3. **Plaintiff has filed Case No. 1017/L in respect of about 6 acres of land.**
8. **Yes**
9. **Plaintiff was given possession for nearly 6 acres.**
11. **Plaintiff was ejected from the land in extent of 6 acres by the defendants.**
14. **Yes**
15. does not arise
16. Does not arise
17. Does not arise.

Having answered the above issues, the learned Trial Judge had raised some doubt as to the title and possession of the Plaintiff, namely,

(1) According to the evidence led in the case and the evidence of Surveyor Ratnarajah, there is no clear evidence as to which Lots the Plaintiff was placed in possession by the Fiscal in Case No. 1017/L. As such the Plaintiff has failed to prove that he was in possession of the land described in the schedule to the plaint and that he was ejected therefrom.

(2)The Plaintiff neither proved that he has title to the said land nor did he establish that he was evicted from the land.

These two doubts are contrary to the answers given by the learned Trial Judge. But based on these doubts, he entered judgment against the Plaintiff dismissing his action with costs. The Plaintiff has preferred this appeal from this judgment.

When considering the answers given by the Trial Judge for the particular issues mentioned above, it is clear that the Judge has misdirected himself in entering the judgment against the Plaintiff in this case. The answers to issues Nos. 3, 8, 9, 11 and 14

clearly establish the fact the Plaintiff is not only entitled to 6 acres of the land but was also in possession thereof on the basis of deeds as well as by virtue of delivery of possession by the Fiscal in Case No. 1017/L.

Identity of the Land

The Plaintiff in his plaint claims title to the paddy field called **Vannichchi Vaikal**, bearing **Lot No. 4972 depicted in Plan No. 1662250** situated in Sorikalmunai Kandam, Sammanthurai Pattu, which land is depicted as Lots 2, 5, 6, 7, 8, 12, 13 and 14 in Plan No. S/57 dated 30.11.1981 prepared by K. Ratnarajah, Licensed Surveyor. The Plaintiff has described this land in the schedule to the plaint and given the boundaries as well. This Plan had been prepared for the purpose of the earlier Case No. 1017/L and is marked as **P1** and its Report as **P2** in the present case. According to the plaint, the plaintiff's land is in extent of **8 Acres 1 Rood and 33 perches, which is depicted as** Lots 2, 5, 6, 7, 8, 12, 13 and 14 in Surveyor Ratnarajah's Plan No. S/57. When these 8 lots are added together, the total comes to 10A. 0R. 6P. This extent differs from the extent claimed by the Plaintiff.

In his plan, Surveyor Ratnarajah says, "*14 Allotments of land called Vannichchi Vaikal bearing Lot 4972 (T.P.162250), 3973, 4974 & 4975 in P.P.1678, Lots 87492 (T.P.201225), 87493 & 87494 in P.P.2841 situated at Sorikalmunai in Sammanthurai Pattu*". But the Plaintiff has given only one **Lot No. 4972 in Plan No. 1662250,** and other Lots referred to by the surveyor are not mentioned in the schedule to the plaint. According to the surveyor, the land called Vannichichi Vaikal appears to be a larger land of which the Plaintiff and the Defendants in the said Case No. 1017/L had claimed rights to some divided portions. Although they cultivate divided portions, but these are all undivided lots. The Defendants in the present case and some third parties also cultivate certain portions of the land Vannichchi Vaikal, but how do these persons cultivate divided portions is not explained in the evidence led in the case. Maybe on amicable understanding they must have divided the lots.

According to the surveyor, Lot 10 has been cultivated by Abdul Rasool, who is the 3rd Defendant in the present case, but he was not a party to the Case No.1017/L, and Lot 10 is not a portion of the land in dispute and therefore the 3rd Defendant should not have been joined as a Defendant in the present case. (*See* the Report of the Surveyor marked **P2**). This position is admitted by the Defendants. The Defendants in paragraphs 13 and 14 of their answer state that the 1st and 2nd Defendants along with one Mohamed Aliyar Malikeen are in possession of an extent of 6 acres of the land called Vannichchi Vaikal from 1982 and the 3rd Defendant is in possession of Lot 10 in Plan No. S/57, which lies on the east of the land in dispute.

In this regard, it is clear that the Defendants have failed to take two important procedural steps. (1) when they say that the 1st and 2nd Defendant along with one Mohamed Aliyar Malikeen are in possession of an extent of 6 acres of the land called Vannichchi Vaikal from 1982, they should have moved Court to add the said Mohamed Aliyar Malikeen as a Defendant to this case, which the Defendant have failed to do. (2) If the 3rd Defendant Abdul Rasool is cultivating a portion of Vannichchi Vaikal on the east of the land in dispute and which does not form a part of the land in dispute, the Defendants should have moved Court to discharge the 3rd Defendant from the proceedings of this case, as there is a misjoinder of Defendants. But the Defendants have failed to take these steps in this case.

Plaintiff's Land is an Undivided Lot

Upon a perusal of the schedules A and B in the Plaint filed in Case No. 1017/L which is filed of record in this case (*See* page 210 of Appeal Brief), it is very clear that the lands described therein are undivided lots, which are the same lands mentioned in the Commission issued to the Surveyor Ratnarajah. (*See* page 212). The Surveyor says that the extent that should be given to the Plaintiff is 9/10 shares of the land in schedule A, and an undivided half share of the land in extent 8 acres described in schedule B. Adding both these, the total extent that should be given to the Plaintiff is 6 acres 23 perches. As the Fiscal says, the Plaintiff was given possession of 6 acre on the writ

issued in Case No. 1017/L. This is clearly stated by the Fiscal Officer Fernando in his evidence.

The two lands described in the two schedules in the earlier Case No. 1017/L have been amalgamated into one land in the present case but the extent of the land is the same. However, the Plaintiff has deliberately omitted the word **"undivided"** in describing the land in the schedule to the plaint in the present case. This is to give an impression that the plaintiff's land is a divided lot. That is the position he maintained in his evidence. But actually the Plaintiff and the Defendants had been possessing their respective lands as divided lots on the ground without proper partitioning by a decree of Court or by a partition deed.

Surveyor Ratnarajah states that *"the defendants who were present at the time of survey showed their separate lands. The plaintiff showed the land claimed by him. I superimposed the Plan of the Surveyor-General with my plan and shown Lots 1 to 14 in my plan as the land in dispute. Whilst the defendants said they are cultivating their land by divided deeds the plaintiff said that he cultivates the entirety. The defendants showed their respective lots and hence I was able to identify the land in dispute."* This evidence clearly shows that Defendants had also been cultivating some portions of the same land.

Surveyor Ratnarajah in his report states that *"the plaintiff pointed out the entire extent as the land originally cleared by him but now he claims the extent depicted as Lots 3, 4, 5, 6 and an undivided 4 acres of the balance land on Deeds Nos. 12736 of 16.10.57 attested by S. Gnanamuttu N.P., and deed 28207 of 1.7.65 attested by P.V. Kandiah N.P."* Here too there is a discrepancy. The Plaintiff had earlier claimed Lots 3, 4, 5, 6 and another undivided 4 acres, but in his plaint he claims Lots 2, 5, 6, 7, 8, 12, 13 and 14. This discrepancy creates a doubt as to which land that was given by the Fiscal to the Plaintiff in Case No. 1017/L. The Fiscal Officer says that he did not measure the land nor was surveyor Ratnarajah present when possession was given to the Plaintiff. However, the fact remains that the Fiscal has

placed him in possession of an extent of 6 acres of land. This fact is established by the evidence given by the Fiscal Officer Fernando.

Fiscal's Report in Case No.1017/L

The Fiscal's Report after the execution of the writ in Case No. 1017/L has been marked as **P4** and filed of record in this case. The writ had been executed by Soosai Antony Fernando, who had been the Registrar of the District Court of Kalmunai during the period of 1984 to 1986. He says in his evidence that on the basis of the office of Registrar of the Court, he also functioned as the Fiscal Officer and he had handed over possession of the land in extent of 6 acres to the Plaintiff. Under cross-examination the Fiscal Officer clearly says that, "*if the plaintiff says that he was given possession of 10 acres, it is wrong. The land that was given was identified by the plaintiff and agreed to by the C.O. as to its extent of 6 acres. The land that was given was an undivided land. The writ did not state the extent of acres and we do not measure the land and give possession*". This evidence is very clear that the Plaintiff was given not 10 acres but 6 acres of paddy land which had been identified by the Plaintiff himself and accepted as correct by the Cultivation Officer.

Therefore, the Plaintiff cannot claim right to more than 6 acres, because he was given possession by the Writ Officer only in respect of 6 acres. This position is also supported by the plaintiff's witness Sulaimalebbe Yoousuflebbe, who says that in 1973 he functioned as the Secretary of the Cultivation Committee which maintains the Paddy Land Register. The Plaintiff has entered his name in the Paddy Land Register (PLR) in respect of 6 acres and claimed drought relief also for 6 acres.

When the Fiscal executed the writ and placed the Plaintiff in possession, the Defendants were not present. It must be borne in mind that the subject matter is a paddy land and no one lives on it except during the cultivation seasons. Since the Fiscal had gone there to execute the writ on 14.09.1985, which may be off season, the absence of the Defendants can be understood. Therefore, the Plaintiff might have been given possession by the Fiscal of the land as pointed out by the Plaintiff and confirmed by the Cultivation Officer. But one thing is clear that the Fiscal had given

possession without measuring the extent and proper identification of the lots mentioned in Plan No. S/57 **(P1)** as the lands described in the Writ.

The plaintiff's position is that, *"he was placed in possession by the Fiscal in respect of 10 acres of land and the defendants are cultivating 16 ½ acres. Of the 10 acres given to me the 3rd defendant and another are cultivating 5 acres and balance lands are cultivated by the 1st and 2nd defendants"*. This position is totally wrong. There is no supporting evidence that the Plaintiff was given possession of 10 acres by the Fiscal.

Plaintiff's Title and Defendants' Possession

The Plaintiff is basing his title to the land in dispute primarily on two deeds bearing Nos. 28207 and 12736 marked as **P2** and **P3** respectively. These two deeds give him title to an extent of little over 6 acres. Although the Plaintiff says that he cleared 3 ½ acres of jungle land and was cultivating that portion also along with the 6 acres, there is no independent evidence to support this story.

It appears from the evidence led in this case that the Plaintiff has been in possession of some portion of the land called Vannichchi Vaikal, but the extent of which is not clearly ascertained. It may be 6 acres or more but the deeds and the Fiscal's evidence establish that he is entitled to 6 acres. The plaintiff's witness Sulaimalebbe Yoosuflebbe, says that, *"originally the land was a barren land and it was the plaintiff who first came to cultivate it and no one came before him and I do not know who is now cultivating his land, and after 1973 I do not know how long he cultivated this land"*. This evidence is not contradicted. It has therefore been established that the Plaintiff had been cultivating an extent of 6 acres since 1973, and he has entered his name in the Paddy Land Register (PLR) for 6 acres and he had claimed compensation for crop failure due to drought for 6 acres, which is supported by a document dated 24.11.1973 **(P8)**. If the Plaintiff has cultivated 10 acres why did he enter his name in the PLR only for 6 acres? I am of the view that the Plaintiff has title only for 6 acres and nothing more, and he has proved his title only for 6 acres.

When one Velu Umapathy from the Kalmunai Land Registry gave evidence, the plaintiff's two title deeds were produced and marked as **P2** and **P3** through him. These two deeds were admitted without any objection from the Defendants. At the end of a very short examination-in-chief of this witness, the Defendant's Counsel stated "no cross-examination".

In this case, the Plaintiff has asked for a declaration of title to the land mainly on the two deeds marked **P2** and **P3**. These two title deeds have been admitted without any objection from the Defendants and therefore the Plaintiff has proved his title to the land in extent of about 6 acres.

It is settled law that when title to an immovable property is proved, there is a presumption as to possession. In the case of ***Leisa and Another v. Simon and Another*** 2002 (1) Sri L.R. 148, it was held *inter alia:-*

1. The contest is between the right of dominium of the plaintiffs and the declaration of the adverse possession amounting to prescription by the defendants.
2. The moment title is proved, the right to possess it is presumed.
3. ....
4. .....
5. For the Court to have come to its decision as to whether the plaintiff had dominium, the proving of paper title is sufficient.
6. .....
7. Once paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them.

In view of this decision, it is the responsibility of the defendants to prove that they have been in possession of the land for a long prescriptive period, which the Defendants have failed to establish.

In the present case, the Defendants have not only admitted that the Plaintiff also has right to a portion of the land in dispute, but also not objected to his two title deeds- see Issue No. 14 raised by the Defendants. This issue reads: *"Is the plaintiff entitled to an undivided land in terms of the deeds mentioned in issue No. 1?"*, and the learned District Judge has answered the issue in the affirmative. It is therefore undoubtedly admitted that the Plaintiff has a right to certain portion of the land called Vannichchi Vaikal.

In an action for declaration of title to 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 v. Jayasinghe Udenis De Silva*** 52 N.L.R. 289.

One salient statement in the answer of the Defendant must also be noted. In paragraph 13 of their answer, the Defendants state, *"the 1st and 2nd defendants along with their nephew Mohamed Aliyar Malikeen are in possession of an extent of 6 acres of paddy field called Vannichchi Vaikal from 1982, and have been in possession of the same as their own"*. How they came to possess these 6 acres or who was their predecessor who had possessed these 6 acres has not been explained. In the light of the above, it is very important that the Defendants must discharge the burden of proof of their possession. They state that they have been in possession of the land in extent 6 acres since 1982. But the Plaintiff has filed this action on 06.11.1985. It clearly establishes the fact that the Defendants have no right to this land and their possession is unlawful.

In the present case it is abundantly clear that the Plaintiff has established his title traceable to the said two deeds and on the strength of the Fiscal's delivery of possession. The Fiscal's report **P4** says that the Plaintiff was given possession by Fiscal to an extent of 6 acres on 14.09.1985. The learned District Judge has misconceived the law and the facts elicited in evidence in this case. Though the Judge accepted the position that the Plaintiff was given possession by the Fiscal in respect

of 6 acres, and the two deeds **P2** and **P3** were admitted in evidence without any objection, he has failed to accept the position that the Plaintiff has proved his title to this extent of 6 acres by the deeds marked as **P2** and **P3**.

I do not want to make any comment on the decree entered in the said Case No. 1017/L as it was entered many years ago, other than stating, that according to the answer filed in this case, the decree had been entered without taking any steps for the parties who passed away during the pendency of the case, and if that be so, its validity is in doubt. However, no appeal has been preferred against that decree, nor was any resistance shown to the Fiscal when he went to hand over possession to the Plaintiff on the defective decree.

Even if the Fiscal had executed a defective writ on an invalid decree, the Defendants had legal redress in terms of the law to go against the decree and the writ. But having failed to take any steps under the law, they have no right to take forcible possession of the plaintiff's land in defiance of the judgment entered in Case No. 1017/L.

A Court may enter a judgment which may be correct or wrong but if it is wrong, until the wrong judgment is challenged and corrected in the higher forum, the judgment is valid however much it is wrong. The Plaintiff had instituted the Case No. 1017/L on 27.11.1974 and the Court entered judgment on 13.06.1985. If the Defendants state that *"the 1st and 2nd defendants, along with one Mohamed Aliyar Malikeen are in possession of an extent of 6 acres of the land called Vannichchi Vaikal from 1982"* in paragraphs 13 of their answer, this clearly shows that the Defendants, whilst the case was pending in Court had taken advantage of the non-cultivation of the land and entered into forcible possession. This act of the Defendants is unlawful.

The plaintiff's title to the land in dispute is clearly proved by the Deeds marked **P2** and **P3** and his long possession is also proved by the evidence of Sulaimalebbe Yoosuflebbe, who was working in the Cultivation Committee as Secretary. This witness states that since 1973, the Plaintiff had been cultivating this land.

As mentioned above, it is also satisfactorily established, by the admissions of the Defendants and the affirmative answers to the above issues by the Trial Judge, that the Plaintiff has title to an extent of 6 acres of land on the strength of the deeds marked **P2** and **P3** and on the handing over of Fiscal's possession in Case No. 1017/L.

For the reasons stated above, I set aside the judgment entered in this case and enter judgment for the Plaintiff that he is entitled to 6 acres of the land called Vannichchi Vaikal. I award no costs.

JUDGE OF THE COURT OF APPEAL