

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

S.A.W. Premadasa,
Yaya 297, Thibolkattiya,
Kolambageara

DEFENDANT-APPELLANT

Case No. 597/97(F)

D.C. Embilipitiya No. 3555/L

Vs.

M.K. Raththaranhamy
No. 97, Thibolkattiya,
Kolambageara

PLAINTIFF-RESPONDENT

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Faiz Musthapha P.C. with Hemasiri Withanachchi for Defendant-Appellant

Anuruddha Dharmaratne for Plaintiff-Respondent

Written Submissions tendered on: Defendant-Appellant on 18th May 2012 and 25th August 2017

Plaintiff-Respondent on 21st May 2012 and 30th August 2017

Argued on: 31st July 2017

Decided on: 18th September 2017

Janak De Silva J.

The plaintiff instituted action in the District Court of Embilipitiya and claimed that the land fully described in Schedule A of the amended plaint was given to him on a permit on 19.01.1985. The plaintiff stated that on or about 04.06.1989 the defendant had evicted him from a portion of the said land, fully described in Schedule B thereto, and was obstructing to his title and possession

thereto. The plaintiff prayed for a declaration of title, ejectment of the defendant from part of the land claimed by the plaintiff and for damages.

The defendant denied title of the plaintiff and claimed that the land fully described in the Schedule of the amended answer was given to him on a permit by the State which antedated the permit given to the plaintiff. The defendant counterclaimed for a declaration of title to the said land.

After trial, the learned District Judge held that the permit issued to the defendant was not a valid permit as it has not been extended after 31st December 1983 and that the defendant is not entitled to a declaration of title based on it. He further held that a declaration of title cannot be obtained to land received from the State on an annual permit. However, the learned District Judge states that the permit issued to the plaintiff is of a permanent nature although it is referred to as an annual permit and therefore held that the plaintiff is entitled to a declaration of title to the corpus. Accordingly, by judgment dated 28.05.1997, delivered on 11.06.1997, he granted the relief claimed by the plaintiff and dismissed the counterclaim of the defendant. Hence the present appeal to this court by the defendant.

Although parties inter alia made submissions on the identity of the two lands and the findings of the learned District Judge on this issue, I am of the view that it is unnecessary to go into those matters as this appeal can be disposed of on a more fundamental issue. It arises from the fact that both parties seek declaration of title to lands given in terms of permits issued under the State Lands Ordinance.

The fundamental issue is whether a declaration of title can be claimed by a person to state land given to him in terms of a permit issued under the State Lands Ordinance. The plaintiff relied on the decisions in *Palisena v. Perera*¹ and *Bandaranayake v. Karunawathie*² to support the proposition that a holder of a permit under the Land Development Ordinance can maintain a *rei vindicatio* action against a trespasser. The defendant also relied on the decision in *Palisena v.*

¹ 56 NLR 407

² (2003) 3 Sri.L.R. 295

*Perera*³ to support his counterclaim for a declaration of title. The questions that arise for consideration are whether the plaintiff's action is a *rei vindicatio* action and whether *Palisena v. Perera*⁴ and *Bandaranayake v. Karunawathie*⁵ are authority to maintain an action for declaration of title to state land given to a person in terms of a permit issued under the State Lands Ordinance.

From the right of ownership springs the vindication of a thing, that is to say, an action *in rem* by which we sue for a thing which is ours but in possession of another⁶. Marsoof J. in *Latheef v. Mansoor*⁷ sought to explain the origins of the *actio rei vindicatio* and its contemporary expression as follows:

“Clearly, the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei*), which had its origins in Roman Law. The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property, as opposed to a mere action *in personam*, founded on a contract or other obligation and directed against the defendant or defendants personally, wherein it is sought to enforce a mere personal right (*in personam*). The *vindicatio* form of action had its origin in the *legis actio* procedure which symbolized the claiming of a corporeal thing (*res*) as property by laying the hand on it, and by using solemn words, together with the touching of the thing with the spear or wand, showing how distinctly the early Romans had conceived the idea of individual ownership of property. As Johannes Voet explains in his *Commentary on the Pandects* (6.1.1) “to vindicate is typically to claim for oneself a right in *re*. All actions *in rem* are called vindications, as opposed to personal actions or conductions.””

³ 56 NLR 407

⁴ *Ibid.*

⁵ (2003) 3 Sri.L.R. 295

⁶ Voet 6.1.2

⁷ (2010) 2 Sri.L.R. 333 at 350

The plaintiff has asserted ownership to the land fully described in Schedule A to the amended plaint and contends that the defendant is in unlawful occupation of part of it more fully described in Schedule B thereto. The plaintiff's claim to be restored to possession is based on his claim to ownership of the land in issue. This clearly indicates that the plaintiff's action is an *actio rei vindicatio*. It is not a possessory action as provided for in Section 4 of the Prescription Ordinance.

The plaintiff has further prayed for a declaration of title to the land described in Schedule A of the amended plaint. This does not change the character of the plaintiff's action from a *rei vindicatio* action. A decree for declaration of title may, of course, be obtained by way of additional relief in a *rei vindicatio* action proper⁸. In any event the affinity between the action for declaration of title and an action *rei vindicatio* has been considered in several landmark decisions in Sri Lanka and South Africa, which seem to suggest that they are both essentially actions for the assertion of ownership, and that the differences that have been noted in decisions such as *Le Mesurier v. Attorney General* are differences without any real distinction⁹.

The next question is whether the decisions in *Palisena v. Perera*¹⁰ and *Bandaranayake v. Karunawathie*¹¹ supports the case of the plaintiff to maintain an action for declaration of title to the land given to him under a permit issued in terms of the State Lands Ordinance.

The permit granted to the plaintiff in this case was marked during the trial as "P1". It has been issued under the State Lands Ordinance permitting the permit holder to occupy the relevant state land. It does not transfer title of the State to the permit holder. The learned District Judge has erred in finding that the permit issued to the plaintiff is of a permanent nature although it is referred to as an annual permit. The provisions in clauses 6, 8, 10, 11 and 12 of "P1" clearly establishes that no title was transferred.

⁸ Gratiaen, J. in *Pathirana v. Jayasundera* 58 N.L.R. 169 at 173

⁹ Marsoof J. in *Latheef v. Mansoor* (2010) 2 Sri.L.R. 333 at 349

¹⁰ 56 NLR 407

¹¹ (2003) 3 Sri.L.R. 295

In a long line of cases Sri Lankan courts have consistently held that ownership of the property claimed in a *rei vindicatio* action is a fundamental condition to its maintainability.

As Macdonell C.J. stated in *De Silva v. Goonetilleke*¹²:

“To bring the action *rei vindicatio* plaintiff must have ownership actually vested in him”. (Nathan p. 362, s. 593.)...The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.”

In *Pathirana v. Jayasundera*¹³ Gratiaen J. stated the principle as follows:

“In a *rei vindicatio* action proper the owner of immovable property is entitled, on proof of title, to a decree in his favour for the recovery of the property and for ejection of the person in wrongful occupation. “The plaintiff’s ownership of the thing is of the very essence of the action.” *Maasdorp’s Institutes* (7th Ed.) Vol. 2, 96”

In *Mansil v. Devaya*¹⁴ G.P.S. De Silva J. stated thus:

“In a *rei vindication* action, ..., ownership is of the essence of the action; the action is founded on ownership.”

In *Latheef v. Mansoor*¹⁵ Marsoof J. held that:

“An important feature of the *actio rei vindicatio* is that it has to necessarily fail if the plaintiff cannot clearly establish his title”

In view of these unequivocal pronouncements it is clear that the plaintiff cannot maintain the action as he has no title to the corpus. I will now consider the two authorities relied on by the plaintiff in support of his action.

¹² 32 N.L.R. 217 at 219

¹³ 58 N.L.R. 169 at 172

¹⁴ (1985) 2 Sri.L.R.46 at 51

¹⁵ (2010) 3 Sri.L.R. 333 at 352

The plaintiff in *Palisena v. Perera*¹⁶ was a permit holder under the Land Development Ordinance. He sued the defendant, whom he alleged to be a trespasser, for ejectment and consequential relief. Gratiaen J. characterized the action as “a *vindictory action* in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser.”¹⁷ There is no indication that the plaintiff in that case sought a declaration of title as the plaintiff in this case seeks to do. I am therefore of the view that the *ratio decidendi* in *Palisena v. Perera*¹⁸ does not enable the plaintiff in this case to maintain an action for declaration of title to the land given to him under a permit issued in terms of the State Lands Ordinance. In any event, the Court of Appeal in *Attanayake v. Aladin*¹⁹ considered the decision in *Palisena v. Perera*²⁰ and Weerasekera J. stated that:

“clearly therefore what was decided by Gratiaen J. was that in a vindictory action the relief of ejectment would only be the consequent to a declaration or vindication of the right to possess.”²¹

The other case cited by the plaintiff is *Bandaranayake v. Karunawathie*²² where the plaintiff sought a declaration that she is the lawful permit-holder to the land described in the schedule to the plaint, ejectment of the defendant and all under him from the said land and restoration of possession thereof and damages. Here again there was no declaration of title sought to the land given under a permit issued under the Land Development Ordinance. Instead the plaintiff only sought a declaration that she is the lawful permit-holder to the land described in the schedule to the plaint. I am therefore of the view that the *ratio decidendi* in *Bandaranayake v. Karunawathie*²³ does not permit the plaintiff in this case to maintain an action for declaration of title to the land given to him under a permit issued in terms of the State Lands Ordinance. In any event, it does not appear that the Court appraised the decision in *Attanayake v. Aladin*²⁴ and the

¹⁶ 56 NLR 407

¹⁷ *Ibid.* p. 408

¹⁸ 56 NLR 407

¹⁹ (1997) 3 Sri.L.R.386

²⁰ 56 NLR 407

²¹ (1997) 3 Sri.L.R.386 at 389

²² (2003) 3 Sri.L.R. 295

²³ *Ibid.*

²⁴ (1997) 3 Sri.L.R.386

long line of cases requiring ownership of the property in a *rei vindicatio* action as a fundamental condition to its maintainability.

In a *rei vindicatio* action the burden is on the plaintiff to establish the title pleaded and relied on by him. In *Dharmadasa v. Jayasena*²⁵ the grant relied on by the plaintiff was held to be invalid and it was held by the Supreme Court that therefore the plaintiff had failed to establish title. In a *rei vindicatio* action it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated, the action ought to be dismissed without more²⁶. As observed earlier the permit issued to the plaintiff does not convey any title to the plaintiff. The learned District Judge erred in holding that the plaintiff is entitled to a declaration of title to the corpus. Therefore, the judgment of the learned District Judge in granting the plaintiff a declaration of title must be set aside.

The learned District Judge has found that the defendant is occupying part of the land given to the plaintiff in terms of permit marked "P1". The only remaining question is whether the plaintiff is entitled to an ejectment of the defendant from the said portion of land though not entitled to a declaration of title. As I have stated earlier the plaintiff's action is not a possessory action. He seeks to eject the defendant on the strength of the declaration of title he has sought in the action. He is not entitled to it for the reasons explained above. In the circumstances he is not entitled to an ejectment of the defendant for if such an order is made it will convert a *rei vindicatio* action into a possessory action. Furthermore in *Attanayake v. Aladin*²⁷ Weerasekera J. further held that:

"In this case the plaintiff-appellant whilst only stating that he came to possess on the permit under the Land Development Ordinance did not seek a declaration from Court that he was entitled to possess the land in dispute on the alleged yearly permit issued under the Land Development Ordinance. The consequential relief of the ejectment of the alleged trespasser cannot therefore arise."²⁸

²⁵ (1997) 3 Sri.L.R. 327

²⁶ *Latheef v. Mansoor* (2010) 2 Sri.L.R. 333

²⁷ (1997) 3 Sri.L.R. 386

²⁸ *Ibid.* at 389

For the reasons aforesaid I allow this appeal and set aside the judgment of the learned District Judge of Embilipitiya dated 28.05.1997. I make further order dismissing the action of the plaintiff.

The defendant counterclaimed title to the portion of land occupied by him on the basis of a permit issued to him under the State Lands Ordinance. Clause 1 of the permit clearly states that it will end on 31st December 1983. There is no evidence that it was extended thereafter. Assuming it was, it is yet on the same status as the plaintiff's permit. The provisions in clauses 6, 8, 10, 11 and 12 of "V1" clearly establishes that no title was transferred. Accordingly, for the reasons set out above I dismiss the counterclaim of the defendant.

I make no order as to costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal