

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

A.B. Richard Silva

Temple Road

Bandarawela

C.A. No: 208/99(F)

D.C. Bandarawela

Case No: L/199

Defendant-Appellant (Deceased)

A.B. Colin Silva

Temple Road

Bandarawela

Substituted Defendant-Appellant

Vs.

J.M. Kulatilaka

Temple Road

Bandarawela

Plaintiff-Respondent (Deceased)

1. Weerasekara Mudiyansele
Padma Weerasekara
2. Kapila Jayasinghe
3. Pavithra Jayasinghe
4. Mangala Priyangani Jayasinghe
5. Mangala Priyantha Jayasinghe

All of

C/o Weerasekara Mudiyansele

Padma Weerasekara

Temple Road Bandarawela.

Substituted Plaintiff-Respondents

BEFORE : M.M.A. GAFFOOR J AND
S. DEVIKA DE L. TENNEKOON J

COUNSEL : K. Asoka Fernando with L.U. Mallikarachchi and
N.A.R.R. Siriwardena instructed by Mohan
Ratwatte for the Substituted Defendant-Appellant

Gamini Marapana PC with Navin Marapana and
Nishanthi Mendis for the Substituted Plaintiff-
Respondents

ARGUED ON : 22.02.2017

WRITTEN SUBMISSIONS

TENDERED ON : 31.05.2017 (Substituted Defendant-Appellant)
01.06.2017 (Substituted Plaintiff-Respondents)

DECIDED ON : 31.10.2017

M.M.A. GAFFOOR J

The defendant-appellant had lodged the instant appeal and challenged the legality of the judgment dated 26.02.1999.

As per judgment stated above the learned District Judge entered a judgment in favour of the plaintiff and decreed accordingly.

The plaintiff-respondent instituted action in the District Court of Bandarawela in the case bearing No.199/L to eject the defendant from the land described morefully in the schedule thereto.

It was the position of the plaintiff that the Ceylon Railway Department had leased the subject land described in the schedule; which is morefully depicted in Plan bearing No.8324 made by the Railway Surveyor S.R.A. Jayasinghe containing in extent A-0 – R-0 P-6. As per documents marked P5, P6 and P7, it is evident that the Railway Department had renewed the Lease Agreement time to time.

It is alleged by the plaintiff that the defendant had forcibly entered the subject land and had started to remove the earth to construct a building. In addition the earth that was removed from the said land was dumped on the adjoining land which belongs to the plaintiff.

In the aforesaid circumstances the plaintiff moved for injunctive relief, by way of an interim injunction to restrain the defendant from proceeding with the construction. It is seen from the proceedings an interim injunction was issued at the very first instant itself. Therefore it is alleged by the defendant the said procedure was obnoxious to the provisions of the Civil Procedure Code namely, Section 664 (1). But it is worthy to mention that said procedure was allowed prior to the Civil Procedure Code Amendment Act No.79 of 1988. The said impugned order has been made on 16.11.1978, and I see no merit in the above contention of the defendant.

Therefore the plaintiff has moved Court to recognize and confirm this right to possess the said land and an ejectment of the defendant from the land in issue.

In response to the above claim of the plaintiff, the defendant by way of his answer had taken up the position that the plaintiff cannot maintain the above action as there was a settlement between the defendant and the plaintiff. Further, it is said that by the above settlement the dispute was settled and concluded.

As the above issue was raised by the defendant the learned District Judge by his order dated 25.03.1991 had overruled the defendant's objection and fixed the case for trial. Therefore, the learned trial Judge was of the view that both parties did not intend to give effect to the so called settlement.

According to the above settlement the parties had agreed to issue a commission to the Railway Surveyor and accordingly same had been issued along with the Plan L 8324 dated 04.05.1968 as referred to the plaint, and Plan BP 0254 which depicts the land claimed by the defendant.

As per commission the Railway Surveyor made the Plan No. BP 0884 and the Report dated 07.05.1979 which are marked as Y and Y1.

It is confirmed from the said Plain that Lot NO.2 and 3 comprises the land belonging to the plaintiff as per Plan No. L 8324 dated

04.05.1968. It is clear from the Surveyor's Report that the Lot 2 depicted in Plan No.0884 is a part of the plaintiff's land. Therefore, as a matter of settlement the Surveyor has suggested to allocate Lot No.4 to the plaintiff which was rejected by the plaintiff. Therefore, it is abundantly clear that there had never been a settlement, but had explored a possibility of such a course. Therefore, it is crystal clear that the defendant had encroached upon the land in issue which belongs to the plaintiff. Hence it is apparent that there had not been a settlement proper and the defendant is not entitled to make such a claim and be successful in the battle. As such I see no merits in the contention of the defendant and same should stand rejected.

The Court issued a commission to Surveyor Mohamed Ismail and consequently Plan No.3885 marked X and the Report marked X1 was tendered to Court.

It is important to note as per Report marked X1, the defendant had not produced his Plan to the Surveyor. It was the observation of the Surveyor that Lot 2 in Plan NO. L 8324 belongs to the plaintiff and was leased out by the Railway Department and Lots 2 and 3 in Plan Y clearly falls within Lot 2 in Plan No. L 8324 and same is now depicted as Lots 2A and 2B in Plan No. 3885. Further, it is clear from the said Plan No. 3885 Lot 1B is a private land belonging to the plaintiff.

According to the Plan marked X the building of the defendant stands on the Lot 2B which is a portion of the Lot 2 in Plan P3 and obviously on the land belonging to the plaintiff.

Further, this Court will take cognizance of the fact, that as per Plan marked X the alleged building of the defendant apparently stands on Lot 1B which is a private land of the plaintiff. Therefore, it is a well established fact that the defendant had built the building concerned on the land belonging to the plaintiff, despite the opposition and while the interim injunction was in force.

It was the categorical position of the plaintiff that the defendant construct an illegal construction, while the interim injunction was in force; and the plaintiff has made a complaint to the police on 11.04.1979 regarding the same.

It is salient to note that the defendant did not adduce any evidence at the trial. The Surveyor of the Railway Department gave evidence, which in fact strengthened the case of the plaintiff.

In the course of his testimony to Court he admitted that as per Plan X the defendant's building had encroached on the plaintiff's private land. It also transpired that the Plan marked P3 was prepared by him in 1969 and had also admitted that Lot 2B in Plan X is a portion that was leased to the plaintiff.

At this stage this Court will take serious note of the fact, that although the defendant's version was that the Railway Department had leased out the land in issue to him no document has been tendered to prove the same and as such the defendant has failed to establish the said position, to the satisfaction of Court.

It is abundantly clear that the learned District Judge has analyzed the above facts in the correct perspective, as such I see no reason to interfere to make a different determination.

The learned District Judge has also considered the fact, that the defendant has cut the earth and dumped to the plaintiff's private land on the strength of the evidence of the Surveyor who produced the documents marked X and X1.

The learned District Judge has also considered the fact that an illegal construction by the defendant is within the land in issue as per testimony of the two Surveyors.

The defendant had raised issues at the trial to the effect that the plaintiff has not, by way of a plan shown the area that was encroached by the defendant. In answering those issues, pertaining to the above, the learned District Judge had formed the view at the time the plaintiff was giving evidence, the said portion of land allegedly encroached by the defendant was established by the aforesaid plans.

In the said background this Court see no reason to uphold the argument of the defendant.

For the reasons as stated above this Court comes to the irresistible conclusion, that the impugned judgment is well considered of overwhelming evidence of the plaintiff.

Accordingly, we dismiss the appeal.

Appeal is dismissed subject to a cost of Rs.10,000/-.

JUDGE OF THE COURT OF APPEAL

S. DEVIKA DE L. TENNEKOON J

I agree.

JUDGE OF THE COURT OF APPEAL