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

Meragal Pedi Durayalage Daya,

Maradagolla Watta,

Giriulla.

Case No. 765/97(F) **DEFENDANT-APPELLANT**

D.C. Kuliyapitiya No. 11202/L Vs.

Munasinghe Arachchige Nishantha Pushpakumara,

Maradagolla Watta,

Giriulla.

PLAINTIFF-RESPONDENT

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Yasas De Silva for Defendant-Appellant

Palitha Subasinghe with Tharanga Edirisinghe for Plaintiff-Respondent

Written Submissions tendered on: Defendant-Appellant 23.05.2012 and 22.04.2014

Plaintiff-Respondent 21.05.2012, 30.08.2017 and 17.10.2017

Argued on: 11th September 2017

Decided on: 6th November 2017

Janak De Silva J.

The plaintiff-respondent (hereinafter referred to as "plaintiff") instituted the above action in the District Court of Kuliyapitiya and stated that on 29th April 1993 the land known as Maradagolla Watta more fully described in the schedule to the plaint was given to him as a grant under Section

19(4) of the Land Development Ordinance. He claimed that from 29th April 1993 the defendant-appellant (hereinafter referred to as "defendant"), who is the father of the plaintiff, is in unlawful and unjust occupation of the said land causing damages to the plaintiff. The plaintiff prayed for a declaration of title, ejectment of the defendant from the land and damages.

The defendant contested the title of the plaintiff and claimed that the plaintiff had obtained the grant by misrepresenting facts to government officials. He stated that the land more fully described in the schedule to the plaint was in his possession for more than ten years prior to the date of the plaint. He therefore claimed prescriptive title and prayed for a dismissal of the action.

The learned District Judge held that the corpus was at one-time state land to which a permit under the Land Development Ordinance had been issued in 1955 in the name of Meragal Pedige Johna, the father of the defendant. He states that ½ of the said land had been given to the plaintiff by way of a grant dated 29th April 1993 issued under section 19(4) of the Land Development Ordinance. The said grant was marked as පැ1 during the trial and the learned District Judge comes to a finding that the plaintiff has established title to the corpus on the strength of පැ1. He has considered the prescriptive title pleaded by the defendant and concludes that in view of the Supreme Court decision in *Abeysinghe v. Abeysinghe*[1] very strong evidence of exclusive possession was necessary to establish prescriptive title where a family member claims prescriptive title against other family members. The learned District Judge concludes that the defendant has failed to so. Accordingly, he gave judgment in favour of the plaintiff. Hence the present appeal to this court by the defendant.

The plaintiff asserts ownership to the land more fully described in the schedule to the plaint and contends that the defendant is in unlawful occupation of it. The plaintiff's claim to be restored to possession is based on his claim to ownership of the land in issue. Clearly the plaintiff's action is an *actio rei vindicatio*.

[1] 34 CLW 69

It is an established principle that ownership of the property claimed in a *rei vindicatio* action is a fundamental condition to its maintainability[2] and the burden is on the plaintiff to establish the title pleaded and relied on by him.[3] I will first consider this aspect.

The grant given to the plaintiff has been marked as පැ1 without any objection from the defendant. It conveys title of the corpus to the plaintiff. Yet the defendant sought to challenge its validity by issue no. 8 which reads as follows:

8. මෙම පැමිණිල්ලේ උපලේඛණයේ විස්තර කර ඇති ඉඩමේ පැමිණිලිකරු කිසිම පදිංචියක් නොමැතිව සිට රජයේ නිලධාරීන් නොමග යවා ප්‍රදානත්වයක් ලබාගෙන ඇද්ද?

The defendant relies on the evidence of the Land Officer from the Land Commissioner's Office, Kurunegala to support his stand. He only testified that the grant had been given to the plaintiff on the recommendation of the Assistant Government Agent but he is not aware whether the Divisional Secretary conducted an inquiry before doing so. He did not state that no inquiry was held. How can this evidence invalidate the said grant?

The grant පැ1 has been given under the hand of His Excellency the President. Illustration (d) to Section 114 of the Evidence Ordinance states that the Court may presume that judicial and official acts have been regularly performed. The presumption that official acts were regularly performed, particularly at the level of the head of the Executive and the head of the Judiciary, cannot lightly be disregarded.[4] While I reserve my opinion on whether the validity of a grant given under the hand of His Excellency the President in terms of Section 19(4) of the Land Development Ordinance can be impugned in the District Court in proceedings between the holder of the grant and another private party by way of an issue, I am of the opinion that there is no evidence in this case to establish that the grant has been obtained by misrepresenting facts to government officials.

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[2] Vide *De Silva v. Goonetilleke* (32 NLR 217), *Pathirana v. Jayasundera* (58 NLR 169), *Mansil v. Devaya* [(1985) 2 Sri.L.R. 46], *Latheef v. Mansoor* [(2010) 3 Sri.L.R. 333]

[3] *Dharmadasa v. Jayasena* (1997) 3 Sri.L.R. 327

[4] Fernando J. in *Edward Francis William Silva and three others v. Shirani Bandaranayake and three others* [(1997) 1 Sri.L.R. 92 at 96]

Therefore, the learned District Judge was correct in concluding that the plaintiff has paper title to the corpus.

There is one observation I wish to make on the written submissions dated 22nd April 2014 filed on behalf of the defendant. It refers to the case of *R.I.B. Jayaratne v. The Commissioner of Lands and Others*[5] and quotes the Supreme Court as having held "The impugned grant has been made by the President on the basis of incorrect entries that have been submitted by the relevant officers that there has been a mistake". A copy of the judgment was not attached to the written submissions. I have examined the judgement and it does not contain what the written submissions claims it to contain. All what the judgment states is:

> "Mr. Bandara for the Petitioner submits that the impugned grant has been made by the President on the basis of incorrect entries that have been submitted by relevant officials. That there has been a mistake."

The Supreme Court has not made any findings on this submission. Counsel must be careful in making submissions on positions not stated in a judgment.

This leaves the question of prescriptive title pleaded by the defendant. The defendant states that he was in possession of the corpus for more than 10 years prior to the date of the plaint.

The defendant is the father of the plaintiff. The father of the defendant is Johna a permit holder in terms of the Land Development Ordinance since 1955. The learned District Judge concluded that the defendant had not led sufficient evidence to support his claim of prescriptive title. The learned District Judge relied on the Supreme Court decision in *Abeysinghe v. Abeysinghe*[6] where it was held that very strong evidence of exclusive possession was necessary to establish prescriptive title where a family member claims prescriptive title against other family members. I see no reason to disagree with the findings of the learned District Judge on this issue.

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[5] S.C. (Spl) L.A. 150/2007; S.C. Minutes of 13.09.2007
[6] 34 C.L.W. 69

However, an issue on prescriptive title should never have been raised in the circumstances of the case. There is a fundamental question of law which does not appear to have been appreciated either by the parties or court.

The evidence is that Johna, the father of the defendant, was in possession of the corpus in terms of a permit issued under the Land Development Ordinance in 1955. Johna gave evidence during the trial and the permit issued to him was marked as එ7.2 in evidence. The defendant did not dispute the existence of එ7.2. In fact, the defendant admitted under cross examination that the land forming the subject matter of the action and the land referred to in the permit are the same. The grant marked එ7.1 is dated 29th April 1993 and the plaint is dated 2nd May 1995. The defendant claims undisturbed and uninterrupted possession ten years prior to the date of the plaint. It is clear therefore that the corpus was the subject matter of a permit issued under the Land Development Ordinance during the period the defendant claims prescriptive title, except for the period between 29th April 1993 and 2nd May 1995, during which time it was the subject matter of a grant.

Can any person claim prescriptive title to land alienated on a permit issued under the Land Development Ordinance?

Section 161 of the Land Development Ordinance reads as follows:

> "No person shall, by possession of any land alienated on a permit, acquire any prescriptive title thereto against any other person or against the State."

Section 161 as originally enacted in 1935 applied to land alienated both by way of a permit and grant. By Act No. 16 of 1969 the word "grant" was removed and thereby the prohibition against prescriptive title been acquired in relation to land given by way of a grant under the Land Development Ordinance was removed. The prohibition against prescriptive title been acquired in relation to land alienated on a permit was maintained. The word "permit" is defined in Section 2 of the Land Development Ordinance to mean "a permit for the occupation of State land issued under Chapter IV". The prohibition is employed using the word "no person". This term is very wide and covers both a permit holder as well as a third party. Therefore, a permit holder or any other person cannot set up prescriptive title against the State or any other person in relation to

land alienated on a permit for the occupation of state land issued under Chapter IV of the Land Development Ordinance. In view of the above statutory prohibition, I am of the opinion that the defendant could not have raised any issue on prescriptive title given the admitted facts. On this ground alone, the defendants claim of prescriptive title should have been rejected.

It is of concern that the learned District Judge has lost sight of the statutory prohibition against prescriptive title been acquired in relation to state land alienated on a permit issued under the Land Development Ordinance. Courts should be mindful of such statutory prohibitions and it is the duty of Court to *ex mero moto* give effect to them even where parties fail to raise issues on them and not abdicate its responsibility to the parties in the recording of issues.

The defendant further argued that the identity of the corpus has not been proved. His argument is based on the purported difference in extent between the extent in the schedule to the plaint and the permit marked පැ.2. This is not an issue that was raised during the trial. It involves a question of fact and should not be allowed to be raised in appeal for the first time. However, for the sake of completeness I wish to point out that the defendant had raised the following issue:

6. මෙම විත්තිකරු පැමිණිලිකරුට එරෙහිව, පැමිණිල්ලේ උපලේඛනයේ විස්තර කර ඇති ඉඩමේ පැමිණිල්ලේ දිනට අවුරුදු 10කට අධික කාලයක් අඛණ්ඩව බාධා රහිතව බුක්ති විඳීමෙන් ඔහුට කාල සීමා ආඥා පනත යටතේ අයිතිවාසිකම් ලබා ඇත්ද?

Hence there was no dispute in the mind of the defendant as to the identity of the corpus. He pleaded prescriptive title by reference to the land more fully described in the schedule to the plaint. In any event, there is a valid reason for the difference in extent of land referred to in the schedule to the plaint and the permit marked පැ.2. The evidence is that when the plaintiff was given the grant marked පැ.1, it was only for a portion of the land covered by the permit marked පැ.2, and that the balance portion of the land was given by another grant to the uncle of the plaintiff.

The learned District Judge also granted damages to the plaintiff as prayed for in the plaint. The defendant has failed to challenge the evidence of the plaintiff on this issue.

For the foregoing reasons I see no reason to interfere with the judgment of the learned District Judge dated 28th August 1997. I affirm the judgment and dismiss the appeal with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal