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

Rambukwelle Vipassi Thero,

Parilleyya Wana Aramaya,

Weragala, Narangoda.

Case No. CA 889/97(F) **1A PLAINTIFF-APPELLANT-PETITIONER**

D.C. Kegalle 2925/L Vs.

Rajamanthreege alias Acharige Appu Naide

Weragala.

2nd PLAINTIFF-APPELLANT-RESPONDENT

1A. Senadhirannehelage Sunil Thilekeratne

2A. N.A. Asilin Nona,

Both of Weragala.

DEFENDANTS-RESPONDENTS-RESPONDENTS

Before: Janak De Silva J.

Counsel: Chathura Galhena for 1A Plaintiff-Appellant-Petitioner

Athula Perera with Nayomi Kularatne for 2nd Plaintif-Appellant-Respondent

Sudarshani Coorey for 1A and 2A Defendants-Respondents-Respondents

Written Submissions tendered on: 1A Plaintiff-Appellant-Petitioner on 26th October 2017

1A and 2A Defendants-Respondents-Respondents on 27th October 2017

Argued on: 10th October 2017

Decided on: 14th November 2017

Janak De Silva J.

The original plaintiffs, Thalagune Seelarathna Thero and the 2nd plaintiff-appellant-respondent, Rajamanthreege alias Acharige Appu Naide (hereinafter referred to as "plaintiffs") filed the above action in the District Court of Kegalle and stated that the land more fully described in the 1st schedule to the plaint, called pansalewatta, was at one time owned by Parileyya Wana Aramaya whilst the land more fully described in the 2nd schedule to the plaint, called benabadalge watte hena, was at one time owned by the 2nd plaintiff-appellant-respondent. The plaintiffs claimed that in 1957 they exchanged the two lands described above as there was no roadway to parilleyya wana aramaya. They further claimed that in 1982 the original 2nd defendant, Gamaralalage Sumanapala, forcibly entered into possession of the land more fully described in the 1st schedule to the plaint. The plaintiffs, inter alia, sought a declaration that the 2nd plaintiff-appellant-respondent was the owner of the land more fully described in the 1st schedule to the plaint or in the alternative a declaration that the land more fully described in the 1st schedule was owned by Parileyya Wana Aramaya and that the 2nd plaintiff-appellant-respondent was entitled to possess it.

The original defendants filed answer and stated that they are unaware of a land called pansalewatta and that plan no. 85/7 prepared by C.K. Baddewela and filed in the case depicts the land known as kirithanawatte and not pansalewatta as claimed by the plaintiffs. They further stated that they had enjoyed possession of the said land for over 50 years and moved that the action of the plaintiffs be dismissed.

The learned District Judge after trial dismissed the action of the plaintiffs. The plaintiffs appealed. While the appeal was pending one of the original plaintiffs, Thalagune Seelarathna Thero passed away and was substituted by Rambukwelle Vipassi Thero, the 1A plaintiff-appellant-petitioner. He made an application dated 11th March 2016 to lead fresh evidence in terms of Section 773 of the Civil Procedure Code which was objected to by the defendants-respondents-respondents. This order relates to the said application.

The 1A plaintiff-appellant-petitioner sought to have three new documents admitted as fresh evidence. These were marked X1 to X3 with his application. When this matter was taken up for inquiry, counsel for 1A plaintiff-appellant-petitioner informed court that they are limiting their application to the two documents marked X2 and X3. X2 is a certified copy of plan 4169 prepared by the Surveyor General and X3 is a certified copy of the relevant tenement list of the said plan.

Section 773 of the Civil Procedure Code vests power in the Court of Appeal to, if need be, receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial. Article 139(2) of the Constitution grants a similar power to the Court of Appeal to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of First Instance touching the matters at issue in any original case, suit prosecution or action, as justice of the case may require.

These statutory and constitutional provisions permit fresh evidence to be admitted subsequent to trial as justice may require. However, this power must be exercised with great caution. The rights of the parties are determined by the evidence led before the trial judge which is tested by cross-examination. Such leading of evidence, oral and documentary, including from third parties and official witnesses, is facilitated by procedures set out in the Civil Procedure Code. A litigant must show due diligence by resorting to these procedures in obtaining evidence in support of his case. Parties expend vast resources, time and effort in litigating and therefore it is important that there is finality to litigation. This cannot be achieved if fresh evidence is permitted at the stage of appeal unimpeded. There are also concerns on the credibility of the fresh evidence and absence of it been tested under cross-examination.

Therefore, courts have developed certain conditions to be fulfilled prior to admitting fresh evidence. The Supreme Court has, in Oman *Ekanayake and others v. Ratranhamy*[1], quoted with approval the decision in *Ratwatte v. Bandara and another*[2] where the Supreme Court adopted the test enunciated by Denning L.J. in *Ladd v. Marshall*[3] in admitting fresh evidence at the stage of appeal. Three conditions have to be fulfilled. They are:

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive.
(3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

Reasonable Diligence

Whether the evidence in issue could have been obtained by reasonable diligence before the trial depends on the circumstances of each case. A party seeking to lead fresh evidence must satisfy court that the fresh evidence could not have been procured with reasonable diligence. A mere statement to that effect in the application is insufficient. Facts supporting efforts made with reasonable diligence to procure the evidence must be set out in the application.

There have been instances where deeds have been sought to be admitted as fresh evidence. In *Rev. Kiralagama Sumanatissa Thero v. Aluwihare*[4] the Court of Appeal refused an application to admit two deeds in appeal as it was not shown that this evidence could not have been obtained with reasonable diligence at the trial. However, in *Jandiris v. Deve Renta*[5] a deed that was not produced at the trial, its absence led the trial judge to question as to how T, a usufructuary mortgagee in 1848, could convey a dominium to M in 1855, was admitted at the stage of appeal. The plaintiff had searched the record in another District Court action and discovered the deed

[1] (2012) B.L.R. 19
[2] 70 N.L.R. 231
[3] (1954) 3 All E.R. 745
[4] (1985) 1 Sri.L.R. 19
[5] 33 N.L.R. 200

and applied for leave to produce it at the hearing of the appeal. But in *Jayasekera v. Appuhamy and others*[6] the Court of Appeal refused an application of the plaintiff to admit four deeds as fresh evidence as the plaintiff had failed to demonstrate and prove that he could not obtain the deeds relied by him as at the date of trial to be used at the trial, with reasonable diligence. In *Meegama Gurunnanselage Don Sirisena Wijeyakoon v. Indranee Margaret Wijeyakoon*[7] an attempt by the appellant to lead fresh evidence at the stage of appeal in the form of an affidavit of the notary who executed two deeds marked during the trial, which contained errors, was rejected by the Court of Appeal as his evidence could have been led at the trial if reasonable diligence was exercised by the appellant.

The two documents X2 and X3 are official documents and their existence may not, in the ordinary course of events, be known to private parties. Courts have allowed official documents to be admitted as fresh evidence where the party seeking its admission as evidence was unaware of its existence. In *Piyaratne Unanse v. Nandina*[8], an official document the existence of which was not known to a party during the trial was admitted in appeal. In *Endiris de Silva v. Arnolis*[9], the records of two village tribunal cases relevant to the subject-matter of the appeal and discovered after the appeal had been filed were permitted to be admitted. In *Ratwatte v. Bandara and another*[10] certain documents in the possession of a son of a former Basnayake Nilame was admitted as evidence at the stage of appeal on the application of the incumbent Basnayake Nilame in a case filed by a party against the Basnayake Nilame of the Ruhunu Kataragama Maha Devale seeking a declaration of title that he was the duly appointed kapurala of the devale. The Court held that as Basnayake Nilames are elected they may not be aware of the existence of the relevant documents in the possession of their predecessors or elsewhere.

[6] (2012) B.L.R. 291
[7] (1986) 2 C.A.L.R. 378
[8] 37 N.L.R. 109
[9] 33 C.L.W. 39
[10] 70 N.L.R. 231

The plaintiffs in their plaint dated 22nd August 1983, identified the land allegedly owned by Parileyya Wana Aramaya as lot 113 of final village plan 4169. Furthermore, during the trial they marked as එ්. 3, an extract of lot 113 of final village plan 4169. This extract had been issued on 23rd August 1988. Trial commenced on 23rd May 1990 and concluded on 30th August 1996. Judgment was delivered on 13th March 1997. Clearly the plaintiffs knew well in advance the existence of the plan 4169 now sought to be marked X2 as fresh evidence. The application made by the 1A plaintiff-appellant-petitioner to admit it as fresh evidence only states that "while the said appeal is pending before Your Lordships' Court the 1A Substituted Plaintiff-Appellant-Petitioner was able to obtain copies of certain vital documents pertaining to the identity of the corpus" and that "X1, X2 and X3 were not in possession at the time the trial proceeded before the District Court". The question is not whether they were in his possession at the time of the trial but whether these documents could have been obtained with reasonable diligence. I am of the view that the plaintiffs could have applied for and obtained a certified copy of the plan 4169 (X2) by due diligence before the trial as they knew of its existence. The same reasoning is valid for the tenement list marked as X3 as it is the tenement list for plan 4169. The application for fresh evidence fails the test of due diligence.

Important Influence

An application to lead fresh evidence at the stage of appeal must explain how the new evidence will have an important influence on the result of the case. In *Beatrice Dep v. Lalani Meemaduwa*[11] an application to lead as fresh evidence some deeds and documents was rejected as they did not touch the matters at issue on which the judgment was delivered in the trial court.

[11] (1997) 3 Sri.L.R. 379

The application of the 1A plaintiff-appellant-petitioner claims that X2 and X3 are "vital documents pertaining to the identity of the corpus". Presumably it is so pleaded as the learned District Judge, in answering the issues, appears to have concluded that the land depicted in plan no. 85/7 prepared by C.K. Baddewela and filed in the case depicts the land known as kirithanawatte and not pansalewatta as claimed in the plaint. The tenement list marked X3 identifies lot 113 of plan 4169 as pansalewatta. To this extent X2 and X3 may have an important influence in the case.

The plaint was filed on the basis that pansalewatta was the property of parilleyya wana aramaya. The plaintiffs prayed in the alternative for a declaration that the land more fully described in the 1st schedule to the plaint was owned by Parileyya Wana Aramaya and that the 2nd plaintiff-appellant-respondent was entitled to possess it. Clearly their case is that pansalewatta was the property of parilleyya wana aramaya. The Supreme Court has held that a temple is an institution, *sui generis* which is capable of receiving and holding property that has attributes of a corporation for the purpose of acquiring and holding property.[12] However, X2 shows the claimant of lot 113 of plan 4169 to be the incumbent of Lenagala Vihare which according to the evidence appears to be distinct to parilleyya wana aramaya. Therefore, X2 may have an important influence on the question of title in that context. s

For the foregoing reasons, I am of the view that documents X2 and X3 would probably have an important influence on the result of the case.

Credible

Courts would have less hesitation in admitting fresh evidence consisting of a judicial record or a deed or similar evidence which came into existence long before the dispute arose and the chances of fabrication are extremely remote.[13] Both X2 and X3 are certified copies of documents prepared by the Surveyor General long before the dispute arose between the parties. Section 7 of the Land Surveys Ordinance states that any plan or survey purporting to be a true copy of one purporting to be signed as aforesaid shall, provided the said copy purport to be signed and

[12] *Kosgoda Pangnaseela v. Gamage Pavisthinahamy* [(1986) 3 C.A.L.R. 48], *Omare Dhammapala Thero v. Rajapakshage Peiris* [(2004) 1 Sri.L.R. 1]
[13] *Endris De Silva and another v. Arnolis* (33 C.L.W. 39)

authenticated by the Surveyor-General or officer acting on his behalf as a true copy of the original, be received in evidence in all cases and for all purposes instead of the original, and may (without proof that the original is not procurable) be taken as prima facie evidence of the truth of the facts exhibited therein as fully as that original may be under this Ordinance ; and it shall not be necessary to prove that the said copy was in fact signed or authenticated by the Surveyor-General or officer acting on his behalf, nor that it is a true copy, nor that the facts established therein are accurate, until evidence to the contrary shall have first been given. Therefore, the evidence sought to be adduced as fresh evidence, is credible.

An application to lead fresh evidence in terms of Section 773 of the Civil Procedure Code must satisfy all three conditions discussed above. But the application made by the 1A plaintiff-appellant-petitioner dated 11th March 2016 to lead fresh evidence in terms of Section 773 of the Civil Procedure Code satisfies only two conditions of the test enunciated by our courts. The 1A plaintiff-appellant-petitioner has failed to establish that X2 and X3 could not have been obtained with reasonable diligence for use at the trial. In fact, the circumstances show that they could have been obtained with reasonable diligence to be used at the trial.

For the foregoing reasons, the application of the 1A plaintiff-appellant-petitioner dated 11th March 2016 to lead fresh evidence in terms of Section 773 of the Civil Procedure Code is refused.

I make no order as to costs of this application.

The appeal will now be listed for argument in due course.

Judge of the Court of Appeal