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

K.M.Navaratne Banda of Polgolla,

Kanadeniyawala.

Plaintiff-Appellant

Cases No: CA 824/97(F)

Vs.

DC Kurunegala Case No: 3500/L

1. Siriyawathie Mendis
2. S.A.Jayatileka (Deceased)

2A. Seelawathie Mendis (guardian)

2B. Chaminda Dayani Vidyaratne

2C. S.A.Samantilleke

2D. S.A.Ananda Jayatilleka (minor)

2E. S.A Mala Kanthi.Jayatilleke

(minor)

All of Keselhenawatte,Polgolla,

Kanadeniyawala.

Defendants-Respondents

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Dr. Sunil F.A. Coorey with Mallika Ranasinghe for Plaintiff-Appellant

W. Dayaratne P.C. with R. Jayawardena for 2A Defendant-Respondent

Written Submissions tendered on:

Plaintiff-Appellant on 21st September 2017; 2A Defendant-Respondent on 10th July 2012 and 15th January 2018

Argued on: 20th November 2017

Decided on: 9th February 2018

Janak De Silva J.

The Plaintiff-Appellant (Plaintiff) instituted the above action in the District Court of Kurunegala and claimed that he was the owner of the land more fully described in the schedule to the amended plaint. He claimed that the 1st and 2nd Defendants-Respondents (Defendants) were interfering with his rights and prayed for a declaration of title, ejectment of the Defendants from the corpus and for damages.

The Defendants denied the title of the Plaintiff and claimed prescriptive title to the corpus.

The learned District Judge of Kurunegala held that the Plaintiff had failed to establish his title to the corpus and dismissed the action with costs. Hence the present appeal to this Court by the Plaintiff.

The Plaintiff claimed that the corpus was at one time owned by the State and that in 1947 the corpus was settled to one John Mendis in terms of the Land Settlement Ordinance. He further stated that upon the death of John Mendis his rights were inherited by his children Trixie Mendis, Helsin Mendis, Malini Mendis Ratnapala and Douglas Mendis. The Plaintiff asserted that Trixie Mendis, Helsin Mendis and Malini Mendis Ratnapala had transferred their interest in the corpus to Anulawathie Mendis, wife of Douglas Mendis, by deed of gift no. 15300 (පැ.4) dated 16.01.1986. He stated that upon the death of Douglas Mendis, Anulawathie Mendis and their son Laknatha Shantha Mendis inherited his interest and became sole owners of the corpus and that they transferred that interest to the Plaintiff by deed of transfer no. 52345 (පැ.5) dated 16.02.1987.

It is an established principle that ownership of the property claimed in a *rei vindicatio* action is a fundamental condition to its maintainability[1] and the burden is on the plaintiff to establish the title pleaded and relied on by him.[2]

The case of the Plaintiff is that John Mendis had only four children, namely Trixie Mendis, Helsin Mendis, Malini Mendis Ratnapala and Douglas Mendis and that upon the death of John Mendis his rights were inherited by the four children. The learned District Judge held that the Plaintiff cannot succeed as he has failed to lead evidence to establish that the donors of deed of gift no. 15300 (එ7.4) dated 16.01.1986 were children of John Mendis. I am unable to agree with this part of the judgement of the learned District Judge.

It is true that the burden of proving that matter was on the Plaintiff and that he had failed to lead evidence of it through his witnesses. But it appears that the learned District Judge has failed to appreciate the distinction between what is referred to as "legal burden" and "evidential burden" in English law. Legal burden is where the law puts on a party the burden of proving a fact in issue as a condition of giving him judgment.[3] Evidential burden is the burden of adducing or introducing evidence as to a fact relied on. This does not involve the actual proof of a fact but the introduction of evidence as to a fact.[4] The term "burden of proof", in our law, unlike English law, means the legal burden and not the evidential burden and the term is used only in one sense. But both concepts are relevant to our law and a party may have to accept the burden in both senses in order to succeed, unless the evidence led by the other side might prove what a party has to prove.[5] In this case, Seelawathie Mendis, the daughter of 1st Defendant, was called on behalf of the Defendants, and she admitted that Trixie Mendis and Douglas Mendis were children of John Mendis while Malini Mendis Ratnapala was the daughter of Silva Mendis, another child of John Mendis.

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

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

[3] Coomaraswamy E.R.S.R.; *The Law of Evidence (with special reference to the Law of Sri Lanka)*; Vol. II (Book 1), 248

[4] Ibid. page 246

[5] Coomaraswamy E.R.S.R.; *The Law of Evidence (with special reference to the Law of Sri Lanka)*; Vol. II (Book 1),249

However, as correctly held by the learned District Judge there are other grounds as to why the action of the Plaintiff must fail.

The Plaintiff claimed that John Mendis had only four children, namely Trixie Mendis, Helsin Mendis, Malini Mendis Ratnapala and Douglas Mendis and that upon his death his rights were inherited by the four children. But the evidence establishes that he in fact had seven (7) children. Furthermore, Anulawathie Mendis admitted during her cross examination that John Mendis had left a last will but that it was not proved in a court of law. In these circumstances, the learned District Judge held that no action can be maintained in relation to the property of John Mendis without first obtaining a probate for the said property after proving the last will.

The Plaintiff sought to overcome this difficulty by claiming that the subject matter of the action was not disposed of by the last will of John Mendis and therefore the corpus devolved on the intestate heirs of John Mendis. But only Trixie Mendis, Helsin Mendis and Malini Mendis Ratnapala had signed deed of gift no. 15300 (එ4) dated 16.01.1986. In order for the Plaintiff to have obtained sole and exclusive title to the corpus the said deed of gift should then have been signed by all the intestate heirs of John Mendis which is not the case.

Here again the Plaintiff made a valiant but vain effort to overcome this complication by arguing that he can still maintain a *rei vindicatio* action at least as a co-owner. The case of the Plaintiff as pleaded in the amended plaint was that he was the sole and exclusive owner of the entire corpus. Hence, he cannot succeed by merely adducing evidence of title to an undivided share. In *Hariette v. Pathmasiri*[6] the plaintiff produced title deeds to undivided shares in the land. But the Supreme Court held that her action being one for declaration of title to the entirety she cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession. Therefore, I reject the argument made by the Plaintiff that he can still maintain a *rei vindicatio* action at least as a co-owner of the corpus.

[6] (1996) 1 Sri.L.R.358

As this is a *rei vindicatio* action the Plaintiff must prove on a balance of probabilities, not only his ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment.[7]

The schedule to the amended plaint described the extent of the corpus as A.5 R.2 P. 14. The schedule to the deed of gift no. 15300 (පැ.4) dated 16.01.1986, by which Trixie Mendis, Helsin Mendis and Malini Mendis Ratnapala had transferred their interest in the land referred to therein to Anulawathie Mendis, wife of Douglas Mendis, described the extent of the said land as seven amunams in paddy sowing extent which amounts to about 15 ½ acres or more. Hence there is a great disparity between the lands covered in the deed of gift no. 15300 (පැ.4) and the corpus in this action. I have previously in *Gunapala et al v. Geetha Kumari et al*[8] quoted with approval the decision in *Ratnayake and others v. Kumarihamy and others*[9] where Weerasuriya J. held that the customary Sinhala system of land measure computed according to the extent of land required to sow with paddy or kurakkan vary due to the interaction of several factors and that in the circumstances it is difficult to correlate sowing extent accurately by reference to surface areas.[10] However, in this case even if allowance is given to this variability, the difference of nearly twelve acres is too significant to disregard.

That aspect attains greater importance as the land settlement order (පැ.1) does not set out the metes and bounds of the land to which it relates. The metes and bounds of the said land is set out in the sketch marked පැ.2. However, as the learned District Judge correctly observes these boundaries do not match the boundaries of the corpus set out in plan no. 500 (පැ.6) prepared by R. Ratnayake, Licensed Surveyor and Court Commissioner. This finding is further validated when one considers the prior registration numbers on පැ.1, පැ.4 and පැ.5.

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[7] *Latheef v. Mansoor* (2010) 2 Sri.L.R. 333
[8] CA 1421/99(F), C.A. Minutes of 09.10.2017
[9] (2002) 1 Sri.L.R. 65
[10] Ibid. at page 68

The land settlement order (පැ.1) has been registered in Volume 547 Folio 265. The deed of gift no. 15300 (පැ.4) dated 16.01.1986 by which Trixie Mendis, Helsin Mendis and Malini Mendis Ratnapala had transferred their interest in the corpus to Anulawathie Mendis, wife of Douglas Mendis, contains prior registration no. A 174/175. It is also pertinent that according to the endorsement dated 03.02,1986 on පැ.4, it has been registered in A1094/103. Furthermore, පැ.4 contains an endorsement by the notary who attested the deed of transfer no. 52345 (පැ.5) that the rights in පැ.4 have been transferred by පැ.5 which is the deed by which the Plaintiff claims title to the corpus. Then, පැ.5 should have carried the prior registration no. A1094/103. But the prior registration no. in පැ.5 is A547/265 which is the number given in පැ.1.

In this context the provisions in section 14(1) of the Registration of Documents Ordinance No. 23 of 1927 as amended becomes relevant. It states that every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated and in or in continuation of the folio which the first registered instrument affecting the same land is registered. The proviso thereto allows the Registrar, if he thinks fit, to enter an instrument in a new folio, cross references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or part thereof. In *Chelliah Pillai v. Devadason et al*[11]it was held that where a deed is registered in the wrong folio but there are cross-references sufficient to facilitate references to all existing alienations and encumbrances affecting the land, the new folio must be regarded as a right folio from the time the cross-references are made. But there are no such cross-references in this case so as to establish that the land covered by පැ.1, පැ.4 and පැ.5 is one and the same land.

Therefore, I am of the view that the learned District Judge was correct in concluding that the Plaintiff has failed to establish the identity of the corpus.

[11] 39 N.L.R. 68

The Plaintiff submitted that without proving prescriptive title to the corpus, the Defendants are not entitled to any title derived from the said land. The learned District Judge has taken the view that he need not answer the issues raised on behalf of the Defendants as he has held that the Plaintiff has failed to prove his 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 more.[12]

Therefore, I am of the view that the learned District Judge was correct in dismissing the action of the Plaintiff.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Kurunegala dated 30th September 1997.

Accordingly, this appeal is dismissed with costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal

[12] *Latheef v. Mansoor* (2010) 2 Sri.L.R. 333