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

Pitchamuttu Murugiah
Danadin Estate, Metigahatenna.
PLAINTIFF

C.A. Case No.1086/2000 (F)
D.C. Badulla Case No. 395/91/L

-Vs-

1. W.M. Heen Menika
2. R.M. Muthubanda
3. R.M. Karunawathie
   All of Kumbukgahawatta, Metigahatenna.
   DEFENDANTS

AND

1. W.M. Heen Menika
2. R.M. Muthubanda
3. R.M. Karunawathie
   All of Kumbukgahawatta, Metigahatenna.
   DEFENDANT-APPELLANTS

-Vs-

Pitchamuttu Murugiah,
Danadin Estate, Metigahatenna.
PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Jeevani Perera for the Defendant-Appellants P. Peramunugama for the Plaintiff-Respondent
Decided on	:	01.06.2018

A.H.M.D. Nawaz, J.

This is a case which raises the question whether the Plaintiff-Respondent in this case (hereinafter sometimes referred to as "the Plaintiff') has established one of the requisites of a vindicatory action namely title to the land he claimed in his plaint dated 31.07.1991. The Plaintiff instituted this action in the District Court of *Badulla* against the 1st, 2nd and 3rd Defendant-Appellants (hereinafter referred to as "the Defendants") praying for, *inter alia*,

a) for an order that the Plaintiff is entitled to right of possession and ownership of the property set out in the Schedule to the Plaint;

b) for ejectment of the 1st, 2nd and 3rd Defendants, their servants, agents and all those who were holding under them;

c) for damages.

It was through an annual permit dated 24.11.1989 that the Plaintiff was permitted to occupy and develop a land morefully described in the schedule to the plaint-see **P1** marked at the trial (page 120 of the appeal brief). It is through this annual permit that the Plaintiff derived title to the subject-matter of this action.

If one peruses the permit of the Plaintiff which was marked as **P1** at the trial, **P1** had conveyed to the Plaintiff an extent of land in 2 Roods and 28 perches. This tallies with Lot B in Plan No. 8 1A, whose extent is depicted as 2 Roods and 28 perches in the said plan. It was the testimony of Surveyor Dissanayake that the boundaries of Lot B in Plan No. 8 1A tallies with the all four boundaries shown in his Plan bearing No. 430, which

was marked as **X** in the trial. The said surveyor further testified that what are shown as Lot 1 and 2 in his Plan bearing No. 430 constitute Lot B in Plan No. 8 1A, which the Plaintiff has claimed in this case. Though there is no doubt that the Plaintiff has established the boundaries of his land, the question is whether he has established his title.

The Counsel for the Defendant-Appellants submitted that the Plaintiff's case is premised on an annual permit which was renewable each year and it had been issued in November 1989 in terms of Section 2 of the State Lands Ordinance No. 6 of 1947. The permit, which was issued in 1989 and marked at the trial as **P1**, laid down the condition that it was valid only up to the end of 1989 unless and until it was renewed. In fact, it was the evidence of the Plaintiff that the permit had been extended till 31.12.1993 and since then the extension of the permit was not effected. The testimony of the Plaintiff quite clearly establishes that the permit was not extended beyond 31.12.1993-see the evidence of the Plaintiff under cross-examination on 24.04.1995.

As would appear this is a *rei vindicatio* action based on a permit issued by the State and there is no doubt that the dictum of Gratiaen, J. in ***D.P. Palisena v. K.K.D. Perera***[1] that a permit-holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser holds good in this case as well. This dictum was adopted with approval by Somawansa, J. (with Dissanayake, J. agreeing) in ***Bandaranayake v. Karunawathie***[2]. It was the submission of the Counsel for the Defendant-Appellants that as the Plaintiff had not extended the permit beyond 31.12.1993, he couldn't have had and maintained this action. In other words, when the plaint was filed on 31.07.1991, the argument was that the Plaintiff might have had title by virtue of the permit but during the pendency of the action the permit had expired. In fact, the trial itself concluded on 01.06.1999 and the judgment was pronounced on 06.11.2000. Long before the trial concluded in the District Court of *Badulla*, the permit

[1] 56 N.L.R 407 at 408
[2] (2003) 3 Sri L.R 295 at p 297

by virtue of which the Plaintiff had *dominium* over the subject-matter of the action had outlived its validity.

So this case raises the fundamental question. Provided that the Plaintiff had sufficient title to vindicate by virtue of his permit on 31.07.1991 (the date of the plaint), it would appear that he lost his title after 31.12.1993, long before the trial in the District Court ended. Could such a Plaintiff continue with his *rei vindicatio* action?

Rights of the parties must be determined as at the time of institution of action

The Counsel for the Plaintiff-Respondent has drawn the attention of this Court to the well-known principle that rights of the parties should be determined as at the date of the institution of action. In fact there is a long line of cases that have established this principle and I had occasion to allude to the catena of precedents in an appeal from the District Court of *Kandy* namely ***Upali Palitha Mahanama v. Wijayhenagedara Sumanawathie*** bearing No. CALA 203/2002 (CA minutes of 25.05.2018), which incidentally offered an opportunity to Court to create an exception to the long held principle. To my mind the general principle appears to have been enunciated in ***Silva v. Nona Hamine***[3] and articulated since then in a slew of cases such as ***Silva v. Fernando***[4]; ***Sherieff v. Marikkar***[5]; ***Eminona v. Mohideen***[6]; ***Lenorahamy v. Abraham***[7]; ***Kader Mohideen & Co. Ltd., v. Nagoor Gany***[8]; ***Sirisena v. Doreen de Silva and Others***[9]; ***HNB v. Silva***[10] and ***Jayaratne v. Jayaratne and Another***[11].

Mr. Peramunagama the Counsel for the Plaintiff-Respondent submitted that at the time the plaint was filed in this case on 31.07.1991, the Plaintiff had title and therefore he could have and maintain this action up to the end.

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[3] 10 N.L.R 44
[4] 15 N.L.R 499 (PC)
[5] 27 N.L.R 349 at 350
[6] 32 N.L.R 145 at 147
[7] 43 N.L.R 68 at 69
[8] 60 N.L.R 16 at 19
[9] (1998) 3 Sri.LR 197
[10] (1999) 3 Sri.LR 113
[11] (2002) 3 Sri.LR 331

I am afraid I cannot help but disagree with this submission. Not only must the Plaintiff have title at the time the *rei vindicatio* is instituted, but he must retain title throughout the course of the action.

Voet states the principle thus: "If he who brought the action was the *dominus* at the time of the institution of the suit, but *lite pendente* has lost the *dominium*, reason dictates that the defendant should be absolved both because the suit has then fallen into that case from which an action could not have a beginning and in which it could not continue, and because the interest of the plaintiff in the subject of the suit has ceased to exist, and in short because the right of *dominium* has been removed and become extinct, which was the only foundation of this real action".[12]

In an appeal from the District Court of *Balapitiya* ***Silva v. Jayawardena***[13], Keuneman, J. (with Soertsz, J. agreeing) stated that where, after the institution of an action for declaration of title to five blocks of land, the Plaintiff transferred three blocks, no decree for title can be entered in respect of the blocks sold. This establishes another exception to the rule-rights of the parties must be decided as at the time of the institution of action. The exception is that that if a party loses title during the pendency of a *rei vindicatio* action, he cannot secure and enjoy the fruits of a judgment in respect of the subject-matter. Owing to the defeasance of title *pendente lite*, no judgment can be pronounced in favour of the Plaintiff.

Keuneman, J. said: "It is clear that the action contemplated by Voet was the action *rei vindicatio*, and I think it follows that all rights *in rem* against the property are lost, when the *dominium* has been transferred pending the action to another person".[14]

Elisahamy v. Punchi Banda[15] was a case where, during the pendency of an action for declaration of title, ejectment and damages consequent on trespass and the wrongful removal of plumbago from the land in dispute, the Plaintiff sold the land to a third

[12] Voet 6.1.4
[13] 43 N.L.R 551
[14] At p. 552
[15] (1911) 14 N.L.R. 113

party. Hutchinson C.J. and Middleton J. (with Grenier J. dissenting) were of opinion that the Plaintiff could not obtain a decree for declaration of title and ejectment. However, the Plaintiff was allowed to maintain his claim for damages which had accrued prior to the transfer of title.

In ***Fernando v. Appuhamy***[16] the Plaintiff purchased a land subject to a lease in favour of the Defendant and then sold it to L. As the Defendant did not in due time deliver possession, the Plaintiff brought an action for declaration of title, ejectment and damages, alleging that L would not pay under the contract of sale until possession was delivered. Ennis A.C.J. (with de Sampayo J. agreeing) held that after the sale to L the Plaintiff could not maintain the action for declaration of title, but that he was competent to maintain the action for ejectment and damages.

In ***de Silva v. Goonetileke***[17] an action *rei vindicatio* was instituted in respect of property which had vested for non-payment of taxes in the Municipal Council. A Bench of four Judges comprising Macdonell C.J. and Garvin, Dalton and Akbar JJ. held that the Plaintiff could not maintain the vindicatory action, even though Plaintiff could not maintain the vindicatory action, even though the Municipal Council, on being added as a party, expressed its willingness to transfer the property to the party declared entitled to it by the Court.

In ***Silva v. Hendrick Appu***[18] Lawrie A.C.J. regarded as an established rule of law that: "When a plaintiff comes into Court praying for a declaration of title, he must possess at that time the title which he asks the Court to declare to be his". In ***Ahamadullevve Kaddubawa v. Sanmugam***[19] Gratiaen J. (with Gunasekere J. agreeing) declared: "The plaintiff's claim fails because he had no title to the property at the time when the action commenced, and the subsequent title which is alleged to have come into existence after that date cannot avail him in these proceedings".[20]

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[16] (1921) 23 N.L.R. 476.
[17] (1931) 32 N.L.R. 217.
[18] (1895) 1 N.L.R. 13.
[19] (1953) 54 N.L.R. 467.
[20] At p. 496.

Thus the decided cases in Sri Lanka are unequivocal in their effect that title, present in the Plaintiff at the commencement of the vindicatory action, should remain in him until its termination.

In the appeal before me, the loss of title during the pendency of the action vitiates the action of the Plaintiff since 1993 and the learned Additional District Judge of *Badulla* could not have pronounced his judgment dated 06.11.2000 as the Plaintiff had not established his title to the land that he sought vindication for. It is apposite to recall the words of Heart, J. in ***Wanigaratne v. Juwanis Appuhmy***[21] wherein His Lordship succinctly described the burden of proof in a vindicatory action:-

> *"In an action rei vindicatio the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established."*

In the circumstances I would proceed to set aside the judgment dated 06.11.2000 and allow the appeal of the Defendant-Appellants.

JUDGE OF THE COURT OF APPEAL

[21] 65 N.L.R 167