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

Ranabahu Mudiyanselage Ranjith Jayatissa,
Metiyangama,
Karambe, Maho.

**Substituted Defendant-Appellant**

**Court of Appeal Case No. 891/97(F)**

**D.C. Maho Case No. 3314/L**

**Vs.**

Ranabahu Mudiyanselage Senarath Bandara
Ranabahu,
Metiyangama,
Karambe, Maho.

**Substituted Plaintiff-Respondent**

**Before:** M.M.A. Gaffor J.

Janak De Silva J.

**Counsel:**

S.K. Dahanayake for Substituted Defendant-Appellant

W. Kulatunga with S. Hassan for Substituted Plaintiff-Respondent

**Written Submissions tendered on:**

Substituted Defendant-Appellant on 14th December 2017

Substituted Plaintiff-Respondent on 15th December 2017

**Argued on:** 26th October 2017

**Decided on:** 29th June 2018

**Janak De Silva J.**

The above action was filed by the two plaintiffs, Ranabahu Mudiyanselage Dingiri Banda and Herath Mudiyanselage Ukku Amma (Plaintiffs). They claimed that the land more fully described in schedule A and schedule B to the plaint were owned and possessed (අයිතිව බුක්ති විඳගෙන) by them on two permits granted in 1963 and 1970 respectively under the Land Development Ordinance (Ordinance). They claimed that the said two lands were contiguous lands and possessed by them as one land for over 25 years. It was claimed that the defendant, Ranabahu Mudiyanselage Sirimalhamy (Defendant), sought to unlawfully disturb the possession of the Plaintiffs and that he was continuing to do so although the Plaintiffs sought to prevent such disturbance of possession through government officials.

The Plaintiffs sought the following reliefs from Court in the amended plaint dated 5th July 1993:

(අ) ඉහත සඳහන් ඉඩම මෙම නඩුවේ පැමිණිලිකරුවන්ට අයිති බවට සහ මෙම ඉඩම බුක්ති විඳීමේ අයිතිවාසිකම් ඇති බවට තීන්දු ප්‍රකාශයක්ද,

(ආ) පැමිණිලිකරුවන්ට අයිති මෙකී පහත උපලේඛණයේ විස්තර කරන ඉඩමෙන් විත්තිකරු සහ ඔහු යටතේ සිටින සේවකයින් නියෝජිතයින් බලහත්කාරයෙන් සහ නීති විරෝදි ලෙස ඇතුල්වීම වලක්වාලීමට ඔවුන්ට විරුද්ධව අතුරු තහනම් නියෝගයක් සහ වාරණ නියෝගයක් නිකුත් කරන ලෙසටද,

(ඇ) විත්තිකරුවන් සහ ඔවුන් යටතේ සිටින සියල්ලන්ටමද මෙහි පහත උපලේඛණයේ විස්තර කරන ඉඩමට ඇතුල්වීමට කිසිම අයිතිවාසිකමක් නොමැති බවට තීන්දු ප්‍රකාශයක්ද

The position of the Defendant was that he was not occupying any land belonging to the Plaintiffs but was in possession of the land more fully described in the schedule to the answer by virtue of a permit issued in 1980 under the Ordinance. He made a cross claim for a declaration of title to the said land and dismissal of the action filed by the Plaintiffs.

Although the action of the Plaintiffs was originally formulated on the basis that they continued to have possession of the land in dispute, by the time the issues were raised and accepted by Court it was changed to a situation where they had been dispossessed and an issue raised as to whether they should be restored to possession.

The learned District Judge concluded that the land claimed by the Plaintiffs and the Defendant were identical. He further held that the Plaintiffs were entitled to the relief claimed, including restoration to possession, as the permits issued to them were prior in time to the permit issued to the Defendant and as such the permit issued to the Defendant was not valid. Hence this appeal by the Defendant.

There is no dispute that the two permits issued to the Plaintiffs were issued in 1963 and 1970 whereas the Defendant was issued a permit in 1980. This was done without lawfully cancelling the two permits issued to the Plaintiffs. In *Wimala Herath (Deceased) Sarathchandra Rajapaksha and others v. Kamalawathie and another* [(2013) 2 Sri.L.R. 60] there were two permits issued under the Ordinance in relation to the same state land and the Supreme Court held that it is only after cancellation of the first permit on lawful grounds that the land could be divided and separate permits be issued for the divided portions. Accordingly, the finding of the learned District Judge that the permit issued to the Defendant is invalid must be upheld.

However, whether the Plaintiffs are entitled to a declaration that they are the owners of the land possessed by them by virtue of permits issued under the Ordinance is a different question altogether, the answer to which must be found independent of the validity of the permit issued to the Defendant.

***Permit issued under the State Lands Ordinance***

In *Premadasa v. Raththaranhamy* [C.A. 597/97(F); C.A.M. 18.09.2017] we were called upon to consider a similar question in relation to a permit issued under the State Lands Ordinance. We took the view that a permit holder under the State Lands Ordinance cannot maintain an action for declaration of ownership to the state land given to him under the permit. There was no appeal against the said judgement.

***Concept of Ownership***

The Plaintiffs sought and obtained a declaration that they are the owners of the land in dispute. In this context it is important to ascertain the exact connotation of the notion of ownership in Roman-Dutch law. There are divergent views on this issue.

The term ownership when used in its strictly legal term applies only to corporeal things and is corresponding to the term *dominium* in Roman law. *Willie's Principles of South African Law* [Hutchinson, Van Heerden and Der Merwe (eds), 8th Ed. Third Impression, page 270] explains that ownership is a composite right consisting of a conglomeration of abilities and states that the composite right of an absolute owner of a thing consists of right (i) to possess it (ii) to use and enjoy it (iii) to destroy it and (iv) to alienate it.

Maarsdorp [*The Institutes of Cape Law*, Book II at p.31 (1903)] states that the rights of ownership "..... are comprised under three heads, namely, (i) the right of possession, ownership having indeed been defined by some as consisting in the rights to recover lost possession; (2) the right of usufruct, that is the right of use and enjoyment; and (3) the right to disposition."

Lee [Introduction to Roman-Dutch Law at p.111] states that, "Dominium or Ownership is the relation protected by law in which a man stands to a material thing which he is able to: (a) possess, (b) use and enjoy, (c) alienate."

Van Der Linden [Institutes of Holland, Third Edition, (1897) pp. 45- 46] refers to six consequences of ownership which are (a) the right to enjoy the fruits of the thing owned (b) the right of making proper use of the thing owned as the owner pleases (c) the right of altering the form and shape of the thing owned (d) the right of entirely destroying the thing owned (e) the right of preventing others making use of the thing owned (f) the right of alienating the thing owned or transferring a right in the thing owned to a third party.

***Legal requisites to obtain a declaration of ownership***

Given the divergent views as to the different rights that make up the concept of ownership, it is important to ascertain what are the rights that a person should enjoy over a corporeal thing to be declared as its owner. Whether the Plaintiffs are entitled to the declaration of ownership they have sought and obtained must be considered by applying the principles of Roman-Dutch law as our common law as the **Plaintiffs have sought a declaration that they are the owner of the corpus and not a declaration that they are the owners of the corpus within the meaning of the Ordinance.**

Maarsdorp (supra) provides an answer to this question by reference to the rights of possession, enjoyment and disposition and states as follows:

> "these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time. Thus, though there need not be actual use and enjoyment present in every case, the right of alienation, coupled with the legal means of effecting such alienation, is at all times necessary in order to constitute valid ownership: and perhaps a more correct definition of ownership would be that it is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating the same and coupled with the right to claim the possession and enjoyment thereof."

Professor Max Radin, an authority on Roman Law, in *Fundamental Concepts of the Roman Law* [California Law Review Vol, 13 Issue 3 page 212] states that "...especially the power of transfer, are legally and popularly associated with the idea of dominium as fundamental parts of it."

The Privy Council in *Attorney General v. Herath (*62 N.L.R. 145) adopted part of Maarsdorp's formulation and held that the rights of an owner under the general law of Ceylon are comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right to alienate and that **these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time.** (emphasis added)

The Supreme Court in *Jinawathie et al v. Emalin Perera* [(1986) 2 Sri.L.R. 121] adopted a similar approach by defining ownership with reference to the rights a person holds over a thing. Ranasinghe J. (as he was then) stated thus:

> "Ownership is the right which a person has in a thing to possess it, to use it and take the fruits, to destroy it, and to alienate it. These rights have been described by the text writers as: jus utendi, jus fruendi, and jus utendi-Grotius 2.3.9, Voet 6. 1. 1. Wille, in his book on the Principles of South African Law (3rd Ed.) discusses at page 190 the "Legal Effects of Ownership" as follows:

"The absolute owner of a thing has the following rights in the thing:

(1) to possess it;

(2) to use and enjoy it; and

(3) to destroy it; and

(4) to alienate it";"

Recently, in *Lamabadusuriya v. Abeygunawardena* [S.C. Appeal 169/2011, S.C.M. 06.04.2018] the Supreme Court was called upon to examine the meaning of the word "owner" in section 2(4)(c) of the Rent Act and Prasanna Jayawardena J. after an exhaustive analysis held that the term "owner" may, in appropriate circumstances, be applied to describe a person who does not possess the entire array of the classical rights of ownership recognized in Roman-Dutch Law. He held that the word "owner" in section 2 (4) (c) of the Rent Act can be reasonably regarded as including a life interest holder who occupied the property on 01st January 1980. However, Prasanna Jayawardena J. did not disapprove of *Jinawathie et al v. Emalin Perera* (supra) but instead drew a distinction by holding that the said decision related to an action in the nature of a *rei vindicatio* where the plaintiff could maintain the action only if he had title to the land whereas in *Lamabadusuriya v. Abeygunawardena* (supra) they had to determine the meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act. This is clear when he states that:

> "it seems to me that, the observations made in of *Jinawathie v. Emalin Perera* (supra) with regard to the attributes of Ownership required to maintain a *rei vindicatio* should not be applied "lock, stock and barrel", to determine the meaning of the word *"owner"* used in section 2 (4) (c) of the Rent Act" (page 13).

However, in the instant case, the Plaintiffs are not seeking a declaration that they are the "owners" of the corpus within the meaning of the Ordinance so that we are not called upon to examine whether the classical Roman-Dutch law concept of ownership must be considered changed for the purposes of the Ordinance.

Indeed, if the Plaintiffs had sought a declaration that they are the owners of the corpus in dispute for the purposes of the Ordinance or within the meaning of the Ordinance, that declaration can be readily given in view of the Land Development Ordinance (Amendment) Act No. 27 of 1981 which changed the definition of "owner" to read "**in this Ordinance** unless the context otherwise requires "owner" includes a permit-holder who has paid all sums which he is required to pay under subsection (2) of section 19 and has complied with all the other conditions specified in the permit." (emphasis added). Even in such a case, the permit holder has no absolute right over state land and the rights of a permit holder is strictly contingent upon the permit holder adhering to the conditions under which such a permit is granted [*W.M. Chandra Kumari Palamakumbura v. P.A. Hema Damayanthie and others* (2016) B.L.R. 171].

Instead, they sought a declaration that they are the owners of the land in dispute which issue must be considered in terms of the Roman-Dutch law. In determining this issue, I am of the view that the principle stated in *Attorney General v. Herath* (supra) and *Jinawathie et al v. Emalin Perera* (supra) must be applied and the Plaintiffs should possess the rights referred to therein, although they need not all be present in an equal degree at one and the same time, to be entitled to a declaration that they are the owners of the lands more fully described in the schedules to the plaint.

***Entitlement of the Plaintiffs for a declaration that they are the owners of the corpus***

The permits issued to the Plaintiffs were marked as "P.5"and "P.6" during the trial and is found at pages 97 and 101 of the appeal brief. These are permits issued under the Ordinance. The Plaintiffs have not been granted any right of alienation to either of the two lots of state land. The rights to possession and use and enjoyment are also subject to certain limitations. In the aforesaid circumstances, I have no hesitation in concluding that the Plaintiffs are not entitled to a declaration that they are the owners of the state lands the possession of which have been given to them on permits issued under the Ordinance.

In fact, in *S.M.Ratnawathi Manike v. Moonafiya and others* [S.C. Appeal 154/2015; S.C.M. 10.11.2017] Sisira De Abrew J. (with Priyantha Jayawardena J. and H.N.J. Perera J. agreeing) held that "A Grant issued in terms of Section 19(4) of the Land Development Ordinance has to be considered as a deed conveying the title to the grantee by the State. But the same status cannot be given in respect of a permit issued in terms of Section 19(2) of the Land Development Ordinance."

In this regard I must refer certain decisions which touch on the issue of a declaration of ownership to state land for which a permit has been issued in terms of Ordinance.

The head note in *Seenithamby v. Ahamadulebbe* (74 N.L.R. 222) reads:

> "in this action for declaration of title to two allotments of Crown land, the plaintiff relied for his title on a permit dated 7th September 1954 issued to him by the Gal Oya Development Board. The defendant relied on a permit dated 24th June 1960 issued to him for the same allotments, also by the Gal Oya Development Board. *Held*, that strict proof of the due cancellation of the permit issued to the plaintiff was necessary before his title could be defeated."

This gives the mistaken impression that the Supreme Court concluded either expressly or impliedly that a permit holder under the Ordinance can obtain a declaration of ownership to the state land. However, in fact what was held by H.N.G. Fernando C.J. was that:

> "the plaintiff has to be declared **entitled to possession** of two allotments of Crown land". (supra. page 223) (emphasis added)

Therefore, in my view, this decision is not authority for granting a declaration of ownership in favour of a permit holder under the Ordinance.

In *Jayalath v. Karunatilaka* [(2013) 1 Sri.L.R. 337] the trial judge granted the plaintiff a declaration of title to a state land given to him under a permit and in appeal Perera H.N.J. sitting alone was of the view that there were no reasons to interfere with that judgement. To the extent that the said judgement can be read as authority for granting a declaration of ownership to state land given under a permit issued under the Ordinance, we overrule that part of the judgement with the greatest respect to his Lordship Perera J. for the reasons adverted to earlier.

In *Bandaranayake v. Karunawathie* [(2003) 3 Sri.L.R. 295] the plaintiff-respondent sought and obtained a declaration that she is the lawful permit-holder to the land described in the schedule to the plaint and not a declaration that she is the owner of the land given under a permit issued under the Ordinance. Hence this decision only supports the right of a valid permit holder under the Ordinance to obtain a declaration that he is the lawful permit holder to the state land. Similar approach was taken by Weerasekera J. in *Attanayake v. Aladin* [(1997) 3 Sri LR 386] when he states that "in this case the plaintiff-appellant whilst only stating that he came to possess on the permit under the Land Development Ordinance did not seek a declaration from Court that he was entitled to possess the land in dispute on the alleged yearly permit issued under the Land Development Ordinance." Certainly, there is no impediment for a permit holder under the Ordinance to obtain a declaration that he is entitled to possess the land in dispute on the alleged yearly permit issued under the Ordinance.

The plaintiff in *Palisena v. Perera* (56 N.L.R. 407) was a permit holder under the Ordinance. He sued the defendant, whom he alleged to be a trespasser, for ejectment and consequential relief. Gratiaen J. characterized the action as "a *vindicatory action* in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser. (supra. page 408) There is no indication that the plaintiff in that case sought a declaration of ownership as the Plaintiffs seeks to do in this case. I am therefore of the view that the *ratio decidendi* in *Palisena v. Perera* (supra) does not enable the plaintiff in this case to maintain an action for declaration of ownership to the land given to him under a permit issued in terms of the Ordinance. In any event, the Court of Appeal in *Attanayake v. Aladin* (supra) considered the decision in *Palisena v. Perera* (supra) and Weerasekera J. stated that:

> "clearly therefore what was decided by Gratiaen J. was that in a vindicatory action the relief of ejectment would only be the consequent to a declaration or vindication of the right to possess." (supra. page 389)

In *Fernando v. Somasiri* [(2012) B.L.R. 121] the Supreme Court was confronted with an action by a permit holder under the Ordinance where inter alia a declaration of ownership to state land was sought and obtained in the District Court which judgment was affirmed by the Civil Appellate High Court. The Supreme Court had granted leave to appeal on three questions touching on the identity of the corpus and set aside the judgements of both the Courts on the basis that the identity of the corpus has not been proved. The Supreme Court held inter alia that both *Palisena v. Perera* (supra) and *Bandaranaike v. Karunawathie* (supra) states that the title of the permit holder is sufficient to maintain a vindicatory action against a trespasser. However as explained earlier neither of the cases support a declaration of ownership to state land in favour of a permit holder under the Ordinance.

In *Piyasena v. Wijesinghe and others* [(2002) 2 Sri.L.R. 242] J.A.N. De Silva J. (as he was then) held that by the amending Act No. 27 of 1987 of the Ordinance, the interpretation of "owner" was extended to also cover "a permit holder who has paid all sums which he is required to pay . . . and has complied with all the other conditions specified in the permit" and that a broader definition attributed to the term "owner" and the legal entitlement of a permit holder to be regarded as such are salutary features of the amending Act No. 27 of 1987. However, his Lordship was not giving an extended meaning to the word "owner" under Roman-Dutch Law but was only referring to the changes made to the definition of "owner" for the purposes of the Ordinance. In the instant case, the Plaintiffs are not seeking a declaration that they are the "owners" of the corpus within the meaning of the Ordinance.

The learned Counsel for the Substituted Plaintiff-Appellant appears to have appreciated the difficulties he will have to overcome in defending the prayer seeking a declaration of ownership. Hence in the written submissions it is stated that:

> "I respectfully and most humbly submit on behalf of the Respondent that the mere phrase in the prayer of the plaint, "ඉඩම මෙම පැමිණිලිකරුවන්ට අයිති බවට තීන්දු ප්‍රකාශයක්" does not change the Plaintiff's action from an action in personam to a rei vindication action. The aforesaid phrase is an error in the plaint."

It is further submitted that if one reads the plaint as a whole it is manifestly clear that the Plaintiffs prayed to declare them as the lawful permit holders of the state land. The learned Counsel for the Substituted Plaintiff-Appellant relied on the judgement of the Supreme Court in *Wimala Herath (Deceased) Sarathchandra Rajapaksha and others v. Kamalawathie and another* (supra) and submitted that a practical solution was applied there and the decision of the District Court affirmed although the District Court declared the permit holder as a lawful owner of the state land thereto.

I am unable to accede to these arguments for several reasons.

It is trite law that no court is entitled or has jurisdiction to grant relief to a party not prayed for in the prayer to the plaint. [*Sirinivasa Thero v. Sudassi Thero* (63 N.L.R. 31), *Martin Singho v. Kularatna* (CA 249/95; C.A.M. 18.12.1996), *Wijesuriya v. Senaratna* (1997) 2 Sri.L.R. 323, *Surangi v. Rodrigo* (2003) 3 Sri.L.R. 35, *National Development Bank v. Rupasinghe and other* (2005) 3 Sri.L.R. 92, *Doris Siriwardena and others v. De Silva* (2006) 2 Sri.L.R. 309]. The Plaintiffs sought a declaration that they are the owners of the land in dispute. No Court can then grant them a declaration that they are the lawful permit holders of the state land in dispute. It will also amount to a change of the character of the action.

It is true that the Supreme Court in *Wimala Herath (Deceased) Sarathchandra Rajapaksha and others v. Kamalawathie and another* (supra) was confronted with a decision of the District Court which declared a permit holder under the Ordinance as a lawful owner of the state land which the Supreme Court affirmed. However, the issue of whether the plaintiff is entitled to a declaration of ownership was not argued. But in *S.M.Ratnawathi Manike v. Moonafiya and others* (supra) Sisira De Abrew J. (with Priyantha Jayawardena J. and H.N.J. Perera J. agreeing) held that "A Grant issued in terms of Section 19(4) of the Land Development Ordinance has to be considered as a deed conveying the title to the grantee by the State. But the same status cannot be given in respect of a permit issued in terms of Section 19(2) of the Land Development Ordinance." I am inclined to follow the judicial dicta in *S.M.Ratnawathi Manike v. Moonafiya and others* (supra) as it is in conformism with the principles stated in *Attorney General v. Herath* (supra) and *Jinawathie et al v. Emalin Perera* (supra).

It is true that the State is not a party to the action and the declaration of ownership the Plaintiffs sought was against the Defendant and not against the State. This however does not in my view change the principle stated in *Attorney General v. Herath* (supra) and *Jinawathie et al v. Emalin Perera* (supra). A party claiming a declaration of ownership to land in terms of the Roman-Dutch law must enjoy (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right to alienate and that **these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time.** (emphasis added)

The next question is whether the Plaintiffs are entitled to the second relief claimed, namely an order evicting the Defendant from the state land which, although not claimed in the plaint, was framed as issue no. 16 and accepted by Court. In my view, it is not possible to grant that relief to the Plaintiffs. The relief of ejectment is based on the declaration of ownership sought by the Plaintiffs which as explained earlier cannot be granted.

In *Somawathie and others v. Illangakoon* [(2013) 1 Sri.L.R. 94] the plaintiffs claiming to be co-owners of the land instituted action against the defendant for the demarcation of the boundaries and eviction of the defendant. The prayer (a) to the plaint prayed "for a demarcation of the boundaries of the said land and premises described in the schedule hereto." The second relief prayed for in the prayer to the plaint was that the defendant be ejected from the said land. Amaratunga J. held that the granting of the relief of ejectment depends on the granting of relief claimed in paragraph (a) of the prayer to the plaint, namely demarcation of boundaries of the plaintiffs' land and held that in the absence of averments in the plaint necessary to properly constitute an action for the demarcation of the boundaries and the evidence necessary to sustain a case for the demarcation of the boundaries the Court cannot grant the relief prayed for in paragraph (a) of the plaint. He further held that If the Court cannot in law grant that relief it necessarily follows that the Court cannot grant any other reliefs which are consequential reliefs which depend on the relief sought in prayer (a) to the plaint.

The same principle is applicable to this case. The Plaintiffs sought an order of ejectment on the basis of the declaration of ownership they sought to the state land. For the reasons adverted to earlier, they are not entitled to such a declaration. Hence the Court cannot grant an order of ejectment as it is a consequential relief to the declaration of ownership.

For the reasons set out above, I am of the view that the judgement of the learned District Judge is wrong in law and must be set aside.

Accordingly, I set aside the judgement of the learned District Judge of Mahawa dated 10th November 1997 and dismiss the action of the Plaintiffs.

For the reasons set out earlier, the cross-claim of the Defendant is dismissed.

The appeal is partly allowed. No costs.

Judge of the Court of Appeal

**M.M.A. Gaffoor J.**

I agree.

Judge of the Court of Appeal