

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

Induruwage Dislinhamy

Amara Hotel, Kumbukgete.

C.A. Case No. 266/1999 (F)

PLAINTIFF

D.C. Kurunegala Case No. 4479/L

-Vs-

J.M. Jayaratne Banda

Galwewa, Kumbukgete.

DEFENDANT

AND BETWEEN

Induruwage Dislinhamy (Deceased)

Amara Hotel, Kumbukgete.

PLAINTIFF-APPELLANT

a. **Liyanorage Padmasena**

No. 577, Colombo Road,

Ginthota.

b. **Liyanorage Rathnasena (Deceased)**

“Liyanora House” Diyaneggama,

Kumbukgete Junction.

c. **Liyanorage Thamila Lakshmi Bokubura**

“Liyanora House” Diyaneggama,

Kumbukgete Junction.

Substituted a to c PLAINTIFF-APPELLANTS

-Vs-

J.M. Jayaratne Banda

Galwewa, Kumbukgete

DEFENDANT-RESPONDENT

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

COUNSEL : Mahinda Nanayakkara with Aruna Jayathilake for
the Substituted (a) Plaintiff-Appellant
W. Dayaratne, PC with R. Jayawardena for the
Defendant-Respondent

Decided on : 25.06.2018

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

This case raises the oft-recurring question whether the Plaintiff-Appellant (hereinafter sometimes referred to as “the Plaintiff”) has established title in a *rei vindicatio* action.

The Plaintiff instituted this action on 15.11.1991 and an amended plaint was filed on 12.07.1996. The Plaintiff sought a declaration, *inter alia*, that she was the permit holder of the land in question and ejection of the Defendant-Respondent (hereinafter sometimes referred to as “the Defendant”).

The amended plaint led to an amended answer which was filed on 15.11.1996. The respective cases as could be gleaned from the pleadings of the parties are goes as follows:-

Plaintiff's Case

According to the amended plaint, the following averments are made.

- a) On or about 15.09.1956 a Permit bearing No.32779 had been issued to her under the Land Development Ordinance.
- b) She developed the said land by bringing it under cultivation and in or about December 1988 one J.M. Kirimudiyanse agreed to improve the said land by way of cultivation and would possess the same paying the Plaintiff money for his possession.
- c) In early part of 1991 the Defendant who was claiming to be a son of Kirimudiyanse entered the land and disputed the Plaintiff's title and possession.
- d) She went before the Mediation Board to explore a possibility of a settlement, but the Defendant did not agree to a settlement and he was in forcible possession.
- e) In the circumstances she instituted this action seeking a declaration that she was the lawful permit holder, ejectment of the Defendant and all those who were holding under him.

Defendant's Case

The Defendant filed his amended answer and averred the following:-

- a) The Plaintiff's purported permit was cancelled on 23.08.1993 and she was never in possession of the *corpus*.
- b) The subject-matter was a shrub jungle twenty years ago and it was he who had cleared the jungle and effected the plantation.
- c) The Plaintiff had fraudulently obtained a letter from his father to the effect that he was cultivating the *corpus* under her.
- d) The Defendant's father was originally cultivating the *corpus* and thereafter the Defendant took over possession from the father and lived in the said property having constructed a house.
- e) The Defendant also claimed prescriptive title and prayed for a dismissal of the Plaintiff's action.

Trial

No admissions were recorded at the trial. It would appear that Issues No. 1 to 7 of the Plaintiff are traceable to the amended plaint, whilst Issues No. 8 to 14 of the Defendant are hinged on the amended answer.

The permit produced on behalf of the Plaintiff was one that had been delivered in favour of one Bramby Singho who subsequently transferred it to the Plaintiff. This evidence emerged from one H.M. Ratnayake-the Colonization Office of the relevant area-see Permit No.32779 dated 19.03.1957 marked as P1 at the trial (p.142 of the appeal brief).

Documents V1 and V2 were marked through this witness in cross-examination. The document V1 (which is at p.50) notifies the Plaintiff that he had to deposit a sum of Rs.100/- and failure to deposit would result in a cancellation of the permit. This notice of cancellation had been issued under Section 19 of the Land Development Ordinance. The witness himself admitted V1 to be a notice of cancellation.

The document V2 is a copy of a cancellation of the permit P1 and the witness admitted that it was indeed a proper termination of the permit. The witness indentified the signature of the Divisional Secretary who had signed the said revocation of permit and thus the witness testified in response to questions from Court that a cancellation of the permit had been effected by 23.08.1993. The original plaint in the case was filed on 15.11.1993 and by that time there had been a defeasance of title of the Plaintiff.

The 2nd witness for the Plaintiff was the Plaintiff's son who produced Plan No. 95153 prepared by the Court Commissioner S. Wijetunga dated 25.09.1995 and his report marked P3. Upon a perusal of the amended plaint dated 18.07.1996, it is clear that the amended plaint came about after the Commissioned survey.

The Plaintiff's son also produced P4-a letter purported to have been given by the father of the Defendant one Kirimudiyanse to establish the fact that the Kirimudiyanse came into possession to cultivate the land as a result of an agreement between the Plaintiff and Kirimudiyanse. Though the Plaintiff's son testified that his mother's permit

devolved on him, he did not produce any instrument of devolution. When he was confronted with V2, he admitted that this was a cancellation of the permit. Kirimudiyanse who was summoned to prove P4 gave a different version that he did not come into possession of the land consequent to P4.

There is also uncertainty as to the *corpus*. The Commissioner Wijetunga who gave evidence testified that he could not properly identify the *corpus* described in the plaint.

As opposed to this evidence, the Defendant was assertive that he had been in exclusive possession for well over 20 years and had been living thereon for more than 12 years.

The tenor of the judgment of the learned Additional District Judge of *Kurunegala* proceeds on the fact finding as to whether two very important aspects of a *rei vindicatio* have been proved namely a) title to property and b) identity of *corpus*.

It is trite law that a permit holder is entitled to institute a *rei vindicatio* action-see the dictum of Gratiaen, J. in *D.P. Palisena v. K.K. D. Perera* 56 N.L.R. 407. Upon a perusal of the evidence led in the case, when the Plaintiff instituted this action on 15.11.1993, there was no title that inhered in the Plaintiff. Thus he could not have instituted this action.

As regards the identity of *corpus*, the Commission issued to the Surveyor was to survey Lot 37 in Final Village Plan bearing No. 2756 but the land he surveyed was quite different-so stated the Surveyor in evidence.

Justice Marsoof in *Jamaldeen Abdul Latheef and Another v. Abdul Majeed Mohomad Mansoor and Another* (2010) 2 Sri L.R. 333 laid down that the identity of *corpus* was a mandatory requirement in a *rei vindicatio* action. It accords with reason because the decree to yield up possession must identify the property with its proper metes and bounds.

Thus it is crystal clear that the Plaintiff has failed to discharge the burden of proof which was quite pithily summed up by Heart, J. in *Wanigaratne v. Juwanis* 65 N.L.R. 167- "In an action *rei vindicatio*, the plaintiff must prove and establish his title. He cannot

ask for a declaration in his favour merely on the strength that the defendant's title is poor or not established".

In other words the burden does not shift to the Defendant unless the Plaintiff has established his title.

In the circumstances I encounter no error of law or fact in the judgment of the Additional District Judge of *Kurunegala* and I see no reason to interfere with the judgment dated 01.12.1998, wherein he had dismissed the case of the Plaintiff.

I accordingly affirm the said judgment and dismiss the appeal of the Plaintiff-Appellant with costs.

JUDGE OF THE COURT OF APPEAL