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

Hettiarachchige Chandrasena,
Levdeniya,
Utigaloluwa Post.

Defendant-Appellant

Vs.

Hettiarachchige Muthumanika (Deceased)
Levdeniya,
Utigaloluwa Post.

Plaintiff-Respondent

Court of Appeal Case No. 736/97(F)

D.C. Kurunegala Case No. 3727/L

Hettiarachchige Indrani,
Levdeniya,
Utigaloluwa Post.

Substituted Plaintiff-Respondent

Before: M.M.A. Gaffor J.

Janak De Silva J.

Counsel:

M.D.J. Bandara Defendant-Appellant

Pubudu De Silva for Substituted Plaintiff-Respondent

Written Submissions tendered on:

Defendant-Appellant on 26.10.2012 and 21.03.2018

Substituted Plaintiff-Respondent on 11.05.2012, 06.08.2013 and 14.03.2018

Argued on: 11.01.2018

Decided on: 31.07.2018

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Kurunegala dated 15.07.1997.

The Plaintiff-Respondent (Respondent) instituted the above action in the District Court of Kurunegala by way of plaint dated 13.11.1984. Subsequently the Respondent filed an amended plaint on 07.11.1990. In the amended plaint, the Respondent claimed that she had been in possession of the portion of land described in the schedule to the plaint as "Maha Arambe Hena", through her predecessors in title, for close to 50 years. She further claimed that the Defendant-Appellant (Appellant) who had no right or entitlement to the said land had forcibly entered it and cut down a Halmilla tree worth Rs 1000/- and had also plucked coconuts worth Rs 2160/- by encroaching on the said land on four occasions.

On this basis the Respondent prayed for, inter alia, (a) a declaration that the Respondent is the owner of the land described in the schedule to the plaint (b) damages amounting to Rs 3160/- for the acts of the Appellant.

The Appellant in his amended answer claimed that the land identified by the Respondent in the schedule to the amended plaint was a portion of a larger land named "Innawatta" described in the second schedule to the amended answer and shown in Plan No 422 prepared by Licensed Surveyor P.B Dissanayake. The Appellant contended that he and his five siblings had inherited the larger land identified as "Innawatta" and that the Respondent had only entered possession of the land identified in the amended plaint with the permission of the Appellant's father in and around 1983.

On this basis, the Appellant inter alia prayed for (a) dismissal of the plaint (b) ejectment of the Respondent from the portion of land she is in possession out of the larger land set out in the 2nd schedule to the amended answer and (c) judgement that the Appellant is a co-owner of the said land.

After evaluating the evidence led at the trial, the learned Additional District Court judge came to the conclusion that the Respondent had adduced sufficient evidence to show that she was in possession of the land named "Maha Arambe Watta" since from at least 1962 through her predecessors and that she was entitled to the relief prayed for in prayer (ඌ) and (ඍ) in her amended plaint namely a declaration that the Respondent was the owner of the land described in the schedule to the plaint and costs. Hence this appeal by the Appellant.

One of the main points raised by the Appellant is that the Respondent had failed to properly identify the land in dispute with sufficient precision, despite it being her burden to do so. The Appellant on this basis contends that the judgment of the learned District Court judge was erroneous in so far as it had concluded that "Maha Arambe Watta", the subject matter of the dispute, was the same as Lots 1, 2 and 3 of Plan No 422.

Before embarking on a factual analysis of the Appellant's contention, it is relevant to survey the procedural law relating to the establishment of the identity of the subject matter of the dispute in land related matters. Section 41 of the Civil Procedure Code reads:

> "When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only."

In *Dayawathie vs Baby Nona Panditharatne* [CA 728/93(F); C.A.M. 10.05.2001], it was held that:

> "...a party who claims prescriptive title to a particular allotment of land is obliged to clearly describe it either by boundaries or extent of the land that he claims to have prescribed. Section 41 of the Civil Procedure Code requires to define such land with reference to physical metes and bounds or by map or sketch."

In *David v Gnawathie* [(2000) 2 Sri. L. R. 352] the plaintiff who was claiming a servitude of a right of way by prescription had failed to describe with certainty and precision the servient tenement over which he claimed the right of way. This Court observed that the servient tenement had been described in an imperfect manner in the plaintiff's plaint and that strict compliance with section 41 of the Civil Procedure Code was necessary since an interest in a specific portion of the land was being claimed in the action.

In *Peeris v Savunhmay* (54 N. L. R. 207) the court indicated the high degree of proof necessary to identify a land in dispute by observing that statements of boundaries in title deeds between third parties are not admissible under section 32 of the Evidence Ordinance to identify the land in dispute.

In *Latheef v Mansoor* [(2010) 2 Sri. L. R. 333] which has a certain affinity to the present action in that the plaintiff in that case had only asked for a declaration of title and not prayed for ejectment, the Supreme Court stated that an action for a declaration of title was the modern manifestation of the *actio rei vindicatio*. Marsoof J. held:

> "It is trite law that the identity of the property with respect to which a vindicatory action is instituted is a fundamental to the success of the action as the proof of the ownership (dominum) of the owner (dominus). The passage from Wille's Principles of South African Laws (9th Edition-2007) at pages 539-540, which I have already quoted in this judgement, stresses that to succeed with an action rei vindicatio, which this case clearly is, the owner must prove on a balance of probabilities, not only his or her ownership in

the property, **but also that the property exists and is clearly identifiable.**" (emphasis added)

It is therefore a well-established principle that a plaintiff who wishes to make a claim in relation to a land or portion of land is under a strict obligation to identify the subject matter in dispute. This would be the case whether the claim made is one of ownership based on paper title or prescription.

In the present dispute, the amended plaint of the Respondent identifies the subject matter in dispute as "Maha Arambe Hena" which is 1 acre in extent. The boundaries of this land as identified in the schedule are:

උතුරට ඇලද, නැගෙනහිරට කුහුලිදගාවහෙන සහ හල්මිල්ල ගහ මුල හේනද , දකුණට බක්මී ගහ මුල හේනේ ගල් අන්දද , බස්නාහිරට පින්නගොල්ලේ හේනද...

However, the learned Additional District Judge held that the Respondent is entitled to "Maha Arambe Watta". The Respondent testified that the land in dispute is shown in Plan No 1262 of M.H.S. Herath Licensed Surveyor which was produced by the Respondent at the trial (Vide page 119 of the Appeal Brief). However therein M.H.S. Herath Licensed Surveyor identifies the land as "Maha Arambe". Thus, it is seen that there is a discrepancy in the name of land as between the amended plaint, plan relied on by the Respondent and the land identified in the judgement. This by itself may not establish a dispute on the identity of the land if the boundaries and the extent of the land in dispute is the same.

The schedule to the amended plaint also states that the said "Maha Arambe Hena" is the area depicted cumulatively as Lots 1, 2 and 3 in Plan No 422 of P.B. Dissanayake Licensed Surveyor. It is also important to note that Plan No 1262 of M.H.S. Herath Licensed Surveyor was produced by the Respondent at the trial as being further proof of the identity of the subject matter of the dispute. The report accompanying Survey Plan No 1262 states that the portion of the land surveyed in Plan No 1262 is the same land described in the schedule to the amended plaint (Vide Page 228 of the Appeal Brief).

However, far from corroborating the boundaries and extent of the land identified as "Maha Arambe Hena" in the schedule to the amended plaint, the said Plan No 1262 brings about a number of discrepancies. Firstly, although the schedule to the amended plaint describes a land which is in extent one acre, Plan No 1262, describes a land which is 3 Roods in extent (Vide Page 226 of the Appeal Brief). Secondly, the boundaries of the land described in Plan No 1262 do not match the boundary description of "Maha Arambe Hena" in the schedule to the amended plaint.

During his evidence, M.H.S Herath Licensed Surveyor described the boundaries Plan No 1262 as follows:

උතුරට ඇලද, නැගෙනහිරට තිබෙනවා අඩි පාරක්, සහ කම්බි පැල ඉන වැට, ඊශාන නැගෙනහිරට තිබෙනවා එ.එම් කිරිබණ්ඩාට අයති ඉඩම, දකුණට තිබෙනවා ගලක්, බස්නාහිරට තිබෙනවා පැල ඉනි කම්බි වැට

No evidence has been led by the Respondent to prove that the land to the North-East identified as being owned by A.M Kiribanda was the same land identified in the schedule to the amended plaint as "නැගෙනහිරට කුහුලිදගාවහෙන සහ හල්මිල්ල ගහ මුල හේනද". In fact, M.H.S. Herath Licensed Surveyor admits in his cross examination that he had failed to identify the boundaries to the land in Plan No 1262 by reference to the names of the adjoining lands (Vide Page 123 of the Appeal Brief). Finally, the schedule to the amended plaint also states that "Maha Arambe Hena" corresponds to Lot 1, 2 and 3 of Plan No 422. Although "Maha Arambe Hena" is described as being in extent one acre (or roughly four roods as per the standard conversion of roods to acres), Lot Nos. 1, 2 and 3 of Plan No 422 do not cumulatively amount to four roods (Vide Page 232 of the Appeal Brief).

In this context, the decision in *Yapa v. Dissanayake Sedara* [(1989) 1 Sri.L.R. 361] is instructive. There it was held by this Court that inconsistency in extent will not affect the question of identity if the portion of land conveyed is clearly described and can be precisely ascertained. However, in this case, there is inconsistency in extent as well as disparity in the boundaries.

Therefore, the evidence led before the trial court clearly indicates that the land identified as "Maha Arambe Hena" in the schedule to the amended plaint does not clearly correspond in boundaries or extent to either (a) Lot No 1, 2 and 3 in Plan No 422 or (b) the land surveyed as "Maha Arambe" in Plan No 1262. This means that the Respondent has failed to clearly describe the land over which she claims prescriptive title in the lower court.

In fact, Plan No. 422 prepared by P.B. Dissanayake Licensed Surveyor and marked as "Y" by the Respondent corroborates the case of the Appellant to some extent. The Appellants contention was that the land identified by the Respondent in the schedule to the amended plaint was a portion of a larger land named "Innawatta" which the Appellant and his five siblings had inherited. The five lots of land in plan no. 422 is identified by P.B. Dissanayake Licensed Surveyor as forming the land named "Innawatta". The Respondent testified that the land claimed by her was part of the said plan no. 422 (Vide page 84 of the Appeal Brief).

However, the learned Additional District Judge has concluded that although lots 4 and 5 in plan no. 422 is identified as part of "Innawatta" lots 1, 2 and 3 of plan no. 422 shows "Maha Arambe Watta". The record is devoid of any evidence supporting this conclusion. The learned Additional District Judge does not refer to any evidence from which he draws this conclusion. P.B. Dissanayake Licensed Surveyor who prepared plan no. 422 was not called as a witness. The conclusion drawn by the learned Additional District Judge contradicts the evidence contained in the said plan. In fact, nowhere in the amended plaint does the Respondent identify the land in dispute as "Maha Arambe Watta". The schedule to the amended plaint identifies the land in dispute as "Maha Arambe Hena".

For the foregoing reasons, I am of the view that the Respondents action must fail for want of identification of the corpus.

The question left to be addressed is whether the Appellant is entitled to his cross-claim.

The Appellant's case also has the same infirmity as in the Respondents case. He has failed to properly identify the land in dispute as required by law. Therefore, I am of the view that the cross-claim of the Appellant must fail.

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

Accordingly, I set aside the judgment of the learned Additional District Judge of Kurunegala dated 15.07.1997.

I dismiss the action of the Respondent with costs.

I also dismiss the cross-claim of the Appellant with costs.

The Appeal is partly allowed.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal