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

Court of Appeal. Case No.
C.A. 913/97 (F)

D.C. Mount Lavinia Case No. 409/95 L

Kurugamage Don Luisa Nona the Administratrix of the Estate of the deceased Semion Meeriyagalla alias Miriyagalla Kankanamalage Don Simion Miriyagalla of No. 200, 'Siriketha' High Level Road, Maharagama.

PLAINTIFF

Vs.

1. Jayathunga Arachchige Rapiel
2. Nawagamuwage Kusumawathie Perera
Both of No. 2/6, Kanatta Road, Thalapathpitiya Nugegoda

DEFENDANTS

AND BETWEEN

1. Jayathunga Arachchige Rapiel

1a. Nawagamuwage Kusumawathie Perera

1b. Jayathunga Arachchige Dona Indirani

1c. Jayathunga Arachchige Dona Lakshmi

1d. Jayathunga Arachchige
Dona Priyanganie

1e. Jayathunga Arachchige
Dona Udeni Trillishiya

1f. Jayathunga Arachchige
Dona Chaminda
Sanjeewa

All of No. 2/6, Kanatta Road,
Thalapathipita, Nugegoda

2. Nawagamuwage
Kusumawathie Perera

2a. Jayathunga Arachchige
Dona Indirani

2b. Jayathunga Arachchige
Dona Lakshmi

2c. Jayathunga Arachchige
Dona Priyanganie

2d. Jayathunga Arachchige
Dona Udeni Trillishiya

2e. Jayathunga Arachchige
Dona Chaminda
Sanjeewa

All of No. 2/6, Kanatta Road,
Thalapathipita, Nugegoda.

SUBSTITUTED DEFENDANT-APPELLANTS

Vs.

Kurugamage Don Luisa Nona the Administratrix of the Estate of the deceased Semion Meeriyagalla alias Miriyagalla Kankanamalage Don Simion Miriyagalla of No. 200, 'Siriketha' High Level Road, Maharagama.

PLAINTIFF-RESPONDENT

Kurugamage Don Prashantha

No. 200/1, High Level Road, Maharagama (Administratrix of the Esate of the deceased Simion Meerayagalla alias Miriyagalla Kankanamalage Don Simion Miriyagalla)

SUBSTITUTED PLAINTIFF-RESPONDENT

BEFORE : **M.M.A GAFOOR, J.**

COUNSEL : Ranjan Suwandaratne, P.C. with Anil Rajakaruna for the Substituted Defendant-Appellants

Nisasiri Dayananda with Jagath Tagaswattage for the Substituted Plaintiff-Respondent

WRITTEN SUBMISSIONS TENDERED ON : 24.04.2018 (Substituted Plaintiff-Respondent)

24.08.2018 (Substituted Defendant-Appellants)

DECIDED ON : **03.09.2018**

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M.M.A GAFOOR, J.

The original Plaintiff-Respondent in this case who described herself as the Administratrix of the deceased Semion Meeriyagalla (hereinafter referred to as the 'Respondent') instituted this action against the Defendants-Appellants (hereinafter referred to as 'Appellants') seeking inter alia, for a declaration that the original Respondent (deceased) is the legal owner of the property described in the Second schedule to the Plaint; to eject the Appellants and all those persons holding under the Appellants from the said property; and also to recover the damages as prayed for in the plaint.

The Respondent in her Plaint alleged that the deceased Semion Meeriyagalla was the owner of the property in suit; he acquired it in 1982 (by deed No. 190 dated 16.06.1982 attested by Sujatha Liyanage, Notary Public – marked as P2); and the Respondent is the duly appointed Administratrix of the estate of the said Semion Meeriyagalla and further alleged that the Appellants have entered in to the said premises unlawfully on or about 16.11.1991 and were occupation thereof causing damages to the said property.

The Appellants whilst denying the Respondent's averments contained in the Plaint, and pleaded that they in consequence to an advertisement appeared in 'Silumina' newspaper met the H. Chandrasiri referred to in the Plaint and his wife G.M. Nandawathei, the owner of the property concerned and purchased the said property after settling the State Mortgage Bank loan amounting to Rs. 60,200/-, and got the said mortgage released and paid Nadawathie a sum of Rs. 150,000/- for the transfer of the property. The Appellants further stated that they after purchasing the said property and after having obtained the necessary approval from the local authority, constructed a house spending over Rs. 500,000/- thereby they moved for the dismissal of the Respondent's action with cost. Therefore the Appellants further stated that by the above purchasing they have obtained title to the said property by

deed No. 157 dated 01.02.1990 attested by M.C.L. Mendis, Notary Public – marked as V2.

Further, the Respondent stated that she became aware that the Appellants have entered the property unlawfully and was building a house upon that she complained to the Police. It was also her evidence that the Police in consequence of her complaint investigated the matter and had filed a case against the aforesaid H. Chandrasiri for forging a deed, in the Magistrate's Court of Nugegoda.

This case was taken up on 13.05.1996 before the District Judge of Mount Lavinia and proceeded for trial and 2 admissions were recorded, i.e. the corpus and that one H. Chandrasiri was the owner of this property at one time. 8 issues raised on behalf of the Respondent and 6 issues raised on behalf of the Appellants. However, upon objection by the Respondent, 2 issues (issues relating to Prescription) of the Appellants were not allowed. Appellants raised an issue in relation to prayer (a) of the Plaint but the learned trial judge rejected the said proposed legal issue.

The documents P1 to P7 were marked on behalf of the Respondent and on behalf of the Appellants the documents V1 to V5 were marked and produced.

On 07.11.1997, after conclusion of the trial the learned District Judge delivered his judgment holding in favour of the Respondent as prayed for in the plaint. Being aggrieved by the said judgment the Appellants preferred this appeal.

The Appellants appealed on the following grounds:

a) The said judgment is contrary to law and against the evidence adduced at the trial.

b) The learned trial judge has erred in Law by rejecting the legal issue raised by the Appellants in relation to the relief prayed for in prayer (a) of the plaint without allowing the parties to make their submission in relation to the said important legal objection.

c) The trial judge has completely misdirected himself in rejecting the documentary official evidence relating to the registration of deed No. 5706 in the absence of any cogent and properly proved evidence to the effect that in fact the deed No. 5706 is a forgery.

d) The trial judge in any event erred in Law by not considering the fact that the Appellants have effected extensive bona fide improvements to the property concerned in arriving at his said judgment.

With reference to the ground (b) of the Appellants, they further submitted that the original Plaintiff-Respondent was acting in representative capacity as the administratix of the intestate estate of deceased Semion Meeriyagalla and therefore she cannot claim the property in question personally for herself and whatever the relief she should ask on behalf of the deceased Semion Meeriyagalla's estate as she was acting on temporary capacity as the adminstratrix of the estate of the said deceased until the conclusion of the testamentary proceedings. In addition to that, the Appellants further stated that the Respondent did not submit the administrtrix certificate along with the Plaint to establish her capacity as a lawful representative person to the deceased. However that certificate had been submitted on a trial date (15.07.1996) and marked as P5.

Before dealing with crux of this appeal, it is necessary to dispose of a belatedness question by the Appellants that focus on the representative capacity of the Respondent on behalf of the deceased as mentioned above.

I am unable to agree with the above contention because there is no authority to challenge the rights of an administrator who acting in representative capacity.

In ***Chelliah vs. M. Wijenathan*** *(1951), 54 N.L.R. 337* Gratian J held that when a person dies intestate, the title to his immovable property is transmitted automatically to his heirs; an administrator is deem to represent the heirs of the intestate and date of

appointment of the administrator is immaterial; the action may also bring for the recovery of an immovable property from a trespasser too.

In a very large majority of actions in our courts for declaration of title to immovable property, the claimant is required to sue in his own name in order to establish his rights. But there are some forms of actions where the assertion of a claimant's rights must be made on his behalf by some other person suing in a representative capacity. In the present case, the administrator is the wife of the deceased; she has obtained the letter of administration of Case No. 29617/T in the District Court of Colombo duly produced and marked as P5 in the trial without any objections of the Appellants, thereby her position cannot be questioned.

Appellants argument on the above point is remind me the decision of ***Silva vs Silva*** *(1907) 10 N.L.R. 234.* In this case a full bench judges from Supreme Court held that the Civil Procedure Code did not entitle an administrator to bring an action for declaration of title to immovable property. However, it is now settled law that the executor or administrator has the same powers as regards immovable properties. In ***Thornton vs. Velaithan Chetty,*** *(1938) 40 N.L.R. 157.* Justice Maartensz and Justice Moseley held that under section 404 of the Civil Procedure Court, Plaintiff's right to bring an action, as administrator for declaration of title to land belonging to the estate cannot be questioned. The same affirmations already held in ***Moysa Fernando vs. Alice Fernando*** *(1900) 4 N.L.R. 201* and ***Fernando vs. Unnanse*** *(1918) 20 N. L. R. 378.*

Considering the above, I am of the view that the said Administratix does have capacity to prosecute and maintain this action and appeal.

In the District Court the Respondent claimed a declaration of title to the land in question. There is abundant authority that when a party claiming a declaration of title must have title himself. In this case the Respondent institute her action for declaration of title for the land (*res*) question with the Deed of Transfer No. 190 dated 16.06.1982 attested by Sujatha Liyanage, Notary Public. Whilst the Appellants

also claim the ownership for the same land with Deed No. 157 dated 01.02.1990 attested by M.C.L Mendis, Notary Public. Further, the Appellants were not challenging the fact that Respondent's husband Semion Meeriyagalla purchasing the said property from H.Chandrasiri by deed No. 190 dated 15.06.1982, but they have raised two different issues on the deed. (P2)

Firstly, the authenticity of Deed of Transfer No. 190 dated 16.06.1982 attested by Sujatha Liyanage, Notary Public was questioned. The Appellants had questioned the authenticity of the said deed as per the testimony alleged to have been given by the said Notary Public (in page 61 of the brief), to the effect that the vendor was unknown to the Notary and that she knew only one of the witnesses who signed the deed.

Therefore, the Appellants take a position that the said deed cannot be considered an authenticate evidence in this case because according to section 31(9) of the Notaries Ordinance, a notary only can attest a deed if he know both witnesses in the case if the vendor or the maker of the document is unknown to him. But in this case said notary testified that he knew only one witness. Thereby the Appellants argue that the evidence of the Notary cannot be considered to prove deed No. 190 in terms of the provisions contained in Section 68 of the Evidence Ordinance.

I do not think that the above argument raised by the Appellants is strong. In the case of ***Wijeyaratne and Another vs. Somawathie*** *(2002) 1 S.L.R 93*, held that non-compliance with the provision of the Notaries Ordinance will not invalidate a deed as long as the provisions of section 33 of the Ordinance and section 2 of the Prevention of Frauds Ordinance. According to this scenario, the said deed cannot invalidate. By this way, if the deed is valid, it could be used as evidence under section 68 of the Evidence Ordinance. For this purpose, the said Notary may consider as lawful witness; and trial judge may record his evidence. Not surprisingly these all have been done by the Respondent.

In the case of ***Wilisindahamy vs. Karunawathi and Others*** *(1980) 2 S.L.R 136* this court has taken a view that Section 68 of the Evidence Ordinance was concerned there was proof of execution if the evidence of this witness was believed, which permitted the deed to be used as evidence. The two witnesses have signed a declaration that they were well acquainted with the executant and that they knew his proper name, occupation and residence. What the Notaries Ordinance Section 31(9) states is that a Notary ***had to satisfy himself that the witnesses were persons of good repute and that they knew the executant's proper name, occupation and residence***. Therefore, the claim made by the Appellants questioning the validity of the deed No. 190 cannot be sustained since the Notary had made and had attested the said Deed fulfilling the lawful requirements stipulated in the Notaries Ordinance and Prevention of Frauds Ordinance, therefore the Respondent would still has a valid deed which can be used as a title.

Secondly, it was the position of the Appellants that thereafter the said Meeriyagalla transferred back the said land in question to H. Chandrasiri in August 1982 (merely after the earlier transaction) allegedly by deed No. 5706 attested by M.D.C. Senaratne, Notary Public. Answering this fact, the Respondent stressed that this was (deed No. 5706) a fraudulent deed. The said M.D.C. Senaratne, Notary Public who attested the deed No. 5706, died before the commencement of the trial. Even though when M.A. Sujatha Wijeyelakshmi Liyanage, Notary Public who was attested the deed No. 190 called for the Respondent's witness, she has admitted that the said M.D.C Senaratne was her father and she has handed over her father's deed protocols to the Land Registry. Further she said that the Land Registry acknowledged that protocols of deeds No. 01 to 5171 was received (marked as P7). Therefore it was the position of Sujatha Liyanage, Notary Public, that her father attested deeds only up to No. 5171, and he never had attested a deed numbering 5706.

Furthermore, the Appellants to build their averments regarding deed No. 5706, they were marked and submitted a document (V1) which was an extract; the only document shows of the existence of such a deed were being registered. But the said witness (Sujatha Liyanage N.P) affirmed that the said deed could not be found even in the land registry duplicates.

Counsel for the Respondent has submitted that the said H. Chandrasiri (Appellants' witness), has admitted a fact that the Police has filed criminal charges against him in the Magistrate's Court of Gangodawila, for preparing a forged deed - No. 5706 (Vide: proceedings at pages 224 and 225 of the Appeal Brief) and the case was still pending therein. *(According to the written submission on behalf the Respondent, dated 04.12.2017)*

As I mentioned earlier, the Appellants further averred that H. Chandrasiri has thereafter transferred the said property to his wife Nandawathei, who in turn has mortgaged it to the State Mortgage Bank. Appellants thereafter paid a sum of Rs. 60, 200/- to that Bank and got the mortgage released and for a further sum of Rs. 150,000/- got it transferred in their names from Nandawathei. Likewise witness Chandrasiri admit the above and he further said that earlier deed was at the Mortgage Bank and once the mortgage was released by the Appellants, the deed would have been given to the Appellants. But in contrast, the Appellants were taken a position that no prior deeds were given to them either by the bank or by Chandrasiri *or* Nandawathei.

Counsel for the Respondent submitted that the Appellants who have not acted with prudence at the time of buying the property in question from Nandawathie who did not have any paper title to the questioned property could not be given proper title merely because of claiming title under an instrument which is not even produced before this Court. I am agreeing with these submissions. Also I observe that no documentary evidence whatsoever was produced at the trial to prove that there in

fact was a Mortgage Bond to the said Bank and the Appellants have got it released by paying Rs. 60,200/- to the Bank. He further submitted that if the Appellants' position is true, no mortgage bond, Cancellation of bond, Land Registry extract where the mortgage was registered or even payment receipts relating to the release of mortgage was produced in this case. Thus the Respondent argues that the Appellants' position could be dismissed.

I am in an accustomed legal view that in civil actions its paramount important that, parties need to submit their relevant document which relates to important matters for the court of law to keep in mind so long as a trial is in progress and they can maintain the sustainability of their oral testimonies with those documentary evidence. The learned District Judge was mindful on these accustomed procedures, thereby he has rejected the Appellants' claims.

Similarly, I observe that Nandawathie failed to testify before the district court when her evidence was led before the court as to how he obtained title to the property (from her husband H. Chandrasiri) in question through the alleged deed No. 157.

Admittedly, I see no reasons for accepting the Appellants' submissions regarding the lawful title to land in question. The Appellants' position still remains skeptical and I feel difficult to fathom the validity of the testimony and submissions.

I am mindful that, this present case instituted for praying a declaration of title for a *res* (*actio rei vindivatio*) by the Respondent. An important feature of the *actio rei vindivatio* is that it has to necessarily fail if the plaintiff cannot clearly establish his title. These significances emphasized this Court and the Supreme Court in several precedents before.

In ***De Silva vs. Goonatileke*** (1931) 32 N.L.R. 217 Macdonell, C.J. citing authorities on Roman Dutch Law referred to principles applicable to *rei vindicatio* action in the following manner:

> *"There is abundant authority that a party claiming a declaration of title must have title himself......The authorities unite in holding that the plaintiff must show title to the corpus in dispute, and that, if he cannot, the action will not lie."*

As Ranasinghe, J., pointed out in ***Jinawathei vs. Emalin Perera*** (1986) 2 S.L.R. 121 at page 142, a plaintiff to a *rei vindication action* "can and must succeed only on the strength of his own title, and not upon the weakness of the defendant."

In ***Wanigaratne vs. Juwanis Appuhamy*** 65 N.L.R. 167 Herath, J. stated that

> *" the defendant in a rei vindicatio action need not prove anything, still less his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title"*

Accordingly, in this case obviously the Respondent has proved his own title with the proper deed and other evidences. There is a accustomed procedure that once the title is established by the plaintiff, the burden of proof shifts to the defendant to prove that he has a right to possession or occupation of the property (vide: ***Siyaneris vs. Udenis*** ((1951) 52 N.L.R. 289). But they were not done because their title skeptic and dreadful.

For the aforesaid reasons, I am of the opinion that the Respondent had established title to the subject matter of the action.

The Appellants in their submissions stated that they purchased the property as *bona fide* purchasers and entered the property on the same capacity and thereafter constructed a house within the said property without any obstruction.

Further they stated that the trial judge in any event erred in law by not considering the fact that the Appellants have effected extensive *bona fide* improvements to the property concerned in arriving at his said judgment.

However, the Respondent submitted that as per the maxim *caveat emptor* the Appellants have not taken any precaution concerning the property in question prior the sale; have failed to check the existence or non-existence of previous deeds by which Nandawathie alleged to have obtained title to the property in question. Respondent stated further, the Appellants cannot claim remedies of a *bona fide* purchaser since they have failed to exercise prudence and care in checking the creditworthiness of the vendor and whether the vendor had title to the property in question before purchasing.

After careful evaluation of all the documents marked by the Respondent, I observe that P4 is a notice of quit which had been sent to the Appellants by the Respondent. In the trial the Appellants admit that they received the notice; and no evidence from them to show that they disputed the contents therein.

In the District Court, the Appellants in their answer had only sought the dismissal of the plaint; they have not claimed a declaration that they are *bona fide* purchasers. Further they were not raising any issues regarding the matter.

The Appellants for the first time in the appeal, state that they are *bona fide* purchasers. This claim has to be decided by leading evidence and also after raising issues in that aspect before the District Court, the said question is not a question of law. The question under the reference is a question of fact.

Therefore, I am in a view that the Appellants cannot be permitted to raise a question with regard to the question of fact for the first time in the appeal.

It is clear law as held in ***Jayawickrema vs. David Silva*** (1973) 76 NLR 427:

> *" A party cannot be permitted to present in appeal a case different from that presented in the trial Court where matters of fact are involved which were not in issue at the trial, such case not being one which raises a question of law."*

In ***Rev. Pallegama Gnanaratna vs. Rev. Galkiriyagama Soratha*** (1988) 1 SLR 99, a Five Judge Bench of the Supreme Court held that a question which is not a pure question of law, but a mixed question of fact and law, cannot be taken up for the first time on appeal. See, ***Setha vs. Weerakoon*** 49 NLR 225, ***Violet Perera vs. Rupa Hewawasam*** (1985) 1 SLR 229 and ***Candappa vs. Ponnamlampillai*** (1993) 1 SLR 184.

In all the circumstances of this case, in my opinion the learned District Judge has entered judgment in favour of the Respondent based on admissions, issues, documentary evidences and testimonies recorded at the trial. I have considered the entire judgment, and see no basis to interfere and the trial judge has given enough reasons inter alia on the validity of deed No. 190 which has been marked (P2) by the Respondent in the District Court. All necessary primary facts have been considered. And as held in ***Alwis vs. Piyasena Fernando*** (1993) (1) SLR 119, generally this court would not interfere with primary facts unless such findings are highly unacceptable.

Trial Judge has correctly held that Respondent's documents P1 – P7 were used in evidence without any enigmas.

In all the above circumstances, I affirm the judgment of the District Court dated 07.11.1997, and dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL