<u>IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

1. Galolu Kankanamlage Kirinelis
   Singho,
   No. 121,
   Owitigama,
   Pugoda.

1A. Galolu Kankanamlage Wijeratne,
   No. 121A,
   Owitigama,
   Pugoda.

2. Galolu Kankanamlage Sujith
   Leelappriya Kumara,
   No. 121,
   Owitigama,
   Pugoda.

   <u>Defendant-Appellants</u>

CASE NO: CA/1366/2000/F

DC PUGODA CASE NO: 2/L

<u>Vs</u>.

1. Gannoru Kankanamalage
   Sirisena,
2. Gannoru Kankanamalage
   Gunawardena,
   Both of No. 124A,

Prathapakanda,
Owitigama,
Pugoda.
Plaintiff-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: A.K. Chandrakantha for the Defendant-Appellants.
S. Jayathillaka for the Plaintiff-Respondents.

Decided on: 11.03.2019

Samayawardhena, J.

The plaintiff instituted this action in the District Court of Pugoda seeking declaration of title to the land described in the second schedule to the plaint, ejectment of the defendants therefrom and damages. The defendants filed an answer seeking dismissal of the plaintiffs' action. After trial the learned District Judge entered Judgment for the plaintiff. Hence this appeal by the defendants.

The sole contention of the defendants in appeal is that the learned District Judge erred in entering the Judgment for the plaintiff without properly identifying the land. This contention, in the facts and circumstances of this case, is well-founded.

The plaintiffs in the first schedule to the plaint described a land named as *Galabadawatta* in extent about 10 acres. They say that this land was amicably partitioned among the co-owners in 1933 and one of the co-owners, namely, Podinona, got the portion of land described in the second schedule to the plaint.

The second schedule to the plaint described a land known as *Galabadawatta* in extent 3 Roods and 21 Perches, shown as Lot K in Plan No. 518 dated 13.12.1933 made by D.W. Edirisinghe, L.S. This Plan No. 518 is said to be the amicable Partition Plan.

It is the position of the plaintiffs that upon Podinona's death, the rights of Podinona devolved on Misinona, and Misinona transferred the said Lot K in Plan No. 518 dated 13.12.1933 in extent of 3 Roods and 21 Perches to the two plaintiffs by deed marked P1 dated 27.02.1989. That means, this transfer has been done, more than 55 years after preparing the said Plan.

However, after the said purchase, the plaintiffs have not been allowed to clear the land by the defendants and thereafter in a section 66 Application filed under the Primary Courts Procedure Act, the possession of the defendants has been confirmed.

The plaintiffs admit that when executing the deed P1, Misinona did not have the Plan referred to in the deed, i.e. Plan No. 518 dated 13.12.1933, and also referred to in the second schedule to the plaint. The details of the Plan have been written down in a piece of paper by Misinona and given to the Notary.[1] Up to the conclusion of the case, the said Plan was not produced. It is not to be found.

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[1] Vide page 97 of the Brief.

The plaintiffs have got a Plan prepared for the purpose of this case. That Plan was marked as P2. The surveyor who prepared that Plan in his report has stated that the land surveyed is 36.4 Perches less than the land described in the second schedule to the plaint. The surveyor in his evidence has stated that he is unable to state from which side, the land has got reduced. The surveyor further states that he is unable to state that the land surveyed and depicted in Plan P2 is the same land described in the second schedule to the plaint because the Plan No. 518 described in the second schedule to the plaint was never produced to him. This is critical. It is clear that the boundaries described in the second schedule to the plaint do not tally with those in Plan P2.

Despite these glaring discrepancies and infirmities in respect of the identification of the land, the learned District Judge has entered Judgment for the plaintiff substituting the land depicted in Plan P2 for the land described in the second schedule to the plaint. This conclusion is plainly unacceptable on the evidence of the surveyor, who made Plan P2.

When I read the Judgment of the learned District Judge, which runs into 24 pages, it is clear that she has tried her best to give equitable reliefs to the plaintiffs. This is made amply clear by reading the paragraph of the Judgment which appears just before the answers to the issues.[2] At the end of that paragraph the learned Judge says that once the Plan No. 518 is found, the plaintiff can re-demarcate the boundaries! That means, the learned Judge has given a temporary order until the Plan No.

[2] Vide page 296 of the Brief.

518 mentioned in the second schedule to the plaint is found. This is a *rei vindicatio* action, and not a section 66 Application filed under the Primary Courts Procedure Act. That itself goes to show that the boundaries in Plan P2 are not correct and Plan P2 does not depict the land the plaintiffs claim in this action. Let me quote that paragraph of the Judgment in full.

“එමෙන්ම රූඩ් 3 පර්.21 න් අඩුව ඇති පර්.36.4 ක ප්‍රමාණය උතුරු පැත්තෙන් අඩු වූවාද, අනික් තුන් පැත්තෙන් අඩු වූවාද යන්න කිසිදු සාක්ෂියකින් අධිකරණයට නිගමනය කළ නොහැකිය. එසේ හෙයින් මිනින්දෝරු මහතා මැන පෙන්වා දුන් ඉඩම ඒ ආකාරයෙන් ම පැමිණිලිකරුවන් හට හිමි විය යුතු බවට මෙම අධිකරණය තීරණය කරයි. පැමිණිලිකරුවන් විසින් පර්.36.4 ක් අඩුවීම දරා ගත යුතුවේ. මන්ද යත්, ඔවුන් විසින් ඉඩම මිළට ගැනීමේදී අංක. 518 දරණ පිඹුර සොයා බලා මායිම් ස්ථාපනය කරගැනීමට උනන්දුවක් වී නොමැති අතර, වැසිකිළිය එම කාලයේ සිටම තිබූ බවට සාක්ෂි මගින් පෙනී ගොස් ඇති හෙයිනි. දෙවෙනි විත්තිකරු සාක්ෂි දෙමින් තම ඉඩමේ පල්ලෙහා හරියේ වැසිකිළියක් ඇති බවට කියා සිටින ලදී. (පිටුව 86) ඒ අනුව පෙනී යන්නේ විත්තිකරුවන් එම ඉඩමට පල්ලෙහා හරියේ ඇති වැසිකිළියට පහළින් ඇති පැමිණිලිකරුවන්ගේ ඉඩම භුක්ති විඳ නොමැති බවයි. එනම් තම ඉඩමේ අවසානය වැසිකිළිය ආසන්නයේ බවට දැන සිටි බවටය. එකී වැසිකිළිය අත්හැර දැනට පෙන්වා ඇති මායිම් පැමිණිලිකරුවන්ගේ මායිම ලෙසට පිළිගන්නා ලෙසට අධිකරණය පාර්ශ්වකරුවන්ට දන්වා සිටිනු ලබයි. ඒ හැරුණු කළ වෙනත් විකල්පයක් මෙම අධිකරණයට නොමැත. ඉඩමේ බස්නාහිර පැත්තෙන් පුවක් පැලඉණි වැටක්ද, මායිම් ගල් දෙක අතර වැටමාර ගසක් ද, ඇති හෙයින් බස්නාහිර මායිම පිළිබඳව ද මෙම අධිකරණයට වෙනසක් කළ නොහැක. නැගෙනහිර මායිම අගලකින්ද, දකුණු මායිම ඇලකින්ද, මායිම් ව ඇත. පැමිණිලිකරුවන්ගේ උතුරු මායිම පවත්නා ආකාරයට වඩා වෙනස් ආකාරයකින් ස්ථාපනය කිරීමට හෝ විත්තිකරුවන් විසින් පැමිණිලිකරුවන්ගේ ඉඩමෙන් කොටසක් අල්ලා ගත් බවට නිගමනය කිරීමට හෝ මෙම අධිකරණය ඉදිරියේ අංක. 518 පිඹුර නොමැති හෙයින් මෙම අධිකරණයට මෙලෙස තීරණය කිරීමට සිදු වේ. එනම් - වැසිකිළිය අත්හැර පැ. 2 අ. ලෙස ලකුණු කළ කම්බි කණුවේ සිට දිගට මායිම් ස්ථාපනය කරණ ලෙසටය.

කිසියම් අවස්ථාවක පමිණිල්ලේ දෙවැනි උපලෙඛණයේ දක්වා ඇති අංක. 518 පිඹුර සොයා ගනු ලැබුවේ නම් මායිම් නැවත ස්ථාපනය කර ගැනීම සඳහා මෙම තින්දුව බාධාවක් ලෙස සළකනු නොලැබිය යුතුය."

It is essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision. This becomes extremely important for the execution of the decree in the event the plaintiff succeeds. *(David v. Gnanawathie [2000] 2 Sri LR 352, Gunasekera v. Punchimenika [2002] 2 Sri LR 43)*

It was held in *Peeris v. Savunhamy (1951) 54 NLR 207* that a plaintiff in a *rei vindicatio* action such as this, not only must prove *dominium* to the land, but also the boundaries of it by evidence admissible in law.

In *Hettiarachchi v. Gunapala [2008] 2 Appellate Law Recorder 70 at 79* it was held that if the plaintiff fails to identify the land which he claims *dominium* with the land on the ground, his action must fail.

Justice Marsoof in *Latheef v. Mansoor [2010] 2 Sri LR 333 at 378* had this to say on this matter: "*The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate*

objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision."

Then it is abundantly clear that the plaintiff is not entitled to succeed in this action.

The learned District Judge in the Judgment has found fault with the defendants for not producing the Plan No. 518, which she says was with the first defendant's father, Romanis.[3] The defendants do not accept that it was with Romanis. The learned District Judge has also found fault with the defendants for not superimposing their Plan V2 on Plan P2 to identify the land claimed by the plaintiffs. This is unknown to our law. The learned Judge has expected the defendants to prove the plaintiffs' case.

It is well settled law that in a *rei vindicatio* action, the plaintiff must strictly prove his title as pleaded and relied upon by him no matter how weak the defendant's case is. The defendant need not prove anything, still less his own title. If the plaintiff fails to prove his title, his action must fail. *(vide Dharmadasa v. Jayasena [1997] 3 Sri LR 327 at 330, Loku Menika v. Gunasekare [1997] 2 Sri LR 281, Jayatissa v. Gunadasa [2008] BALR 293 at 295)*

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[3] Vide page 291 of the Brief.

The Judgment of the District Court cannot be allowed to stand, and the same is set aside. The plaintiffs' action in the District Court shall stand dismissed.

According to the plaintiffs, their father and the first defendant's father and several others are co-owners of the larger land of *Galabadawatta*. Even assuming that there was an amicable partition in 1933, it appears that, it has not been acted upon. The parties to that amicable partition have not separated off their portions and possessed them as distinct and different lots thereafter. Had it been done, there would not have been any difficulty to identify the portion of Podinona. Under those circumstances, this Judgment shall not prevent any party filing a partition action to partition the larger land, if so advised.

Appeal is allowed. I make no order for costs.

Judge of the Court of Appeal