

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

Udumil Marikkar Sara Umma,  
Maikkulama,  
Chilaw.  
1A Defendant-Appellant

**CASE NO: CA/350/2000 (F)**

**DC CHILAW CASE NO: 22821/E**

Vs.

Mohideen Ebrahim Siththi Afilar  
Umma,  
No. 56,  
Old Town,  
Madampe.  
And 5 Others  
Plaintiff-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Sudarshani Cooray with W. Madawalagama  
for the 1A Defendant-Appellant.  
Ranjan Suwandarathna, P.C., with Anil  
Rajakaruna for the Plaintiff-Respondents.

Decided on: 13.03.2019

Samayawardhena, J.

The plaintiffs filed this action against the five defendants in the District Court seeking declaration of title to the land described in the schedule to the plaint, ejectment of the defendants therefrom and damages. The defendants filed answers seeking dismissal of the plaintiffs' action. After trial the learned District Judge entered Judgment for the plaintiffs as prayed for except damages. Being aggrieved by the said Judgment only the 1<sup>st</sup> defendant has preferred this appeal.

The learned counsel for the 1<sup>st</sup> defendant-appellant has, in paragraph 11 of the written submissions dated 25.06.2012, candidly admitted that the plaintiff-respondents proved paper title to the land in suit at the trial. The appellant has no paper title to the land.

However, the learned counsel, in paragraph 13 of the said written submissions, argues that as the respondents took up the position that the appellant came to the property as a licensee under them, the burden was on the respondents to prove that fact, and as it has not been proved, the respondents cannot succeed in this action.

I am unable to agree with that argument. It is well settled law that in a *rei vindicatio* action such as this, once the paper title is proved by the plaintiff, the burden shifts to the defendant to prove on what basis he is in possession of the land, because the paper title holder has a legal right to possess the land.<sup>1</sup> In other

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<sup>1</sup> Theivandran v. Ramanathan Chettiar [1986] 2 Sri LR 219 at 222, Candappa nee Bastian v. Ponnambalam Pillai [1993] 1 Sri LR 184 at 187, Beebi Johara v. Warusavitharana [1998] 3 Sri LR 9, Wijetunga v. Thangarajah [1999] 1 Sri LR 53, Leisa v. Simon [2002] 1 Sri LR 148

words, possession is one of the essential attributes of ownership. There is no legal requirement that the owner must possess the land.

In this case, the appellant has not proved on what basis he is in possession notwithstanding the paper title to the land is admittedly with the respondents. All his defences taken up at the trial as crystallized in issues are technical. They are: (a) whether there is a mis-joinder of causes of action and parties, (b) whether no cause of action has been revealed, (c) whether leave and license has not been terminated, and (d) whether testamentary case was filed upon the death of Haniffa. The learned District Judge has rightly answered those issues against the appellant, and the appellant does not contest those findings before this Court.

The learned counsel for the appellant in the said written submissions also admits that no issue was raised at the trial claiming title to the land on prescription.

However, the new counsel for the appellant, tendering undated additional written submissions, emphasizing that it is the duty of the learned District Judge, in terms of section 146 of the Civil Procedure Code, to frame issues, invites this Court to raise an issue on prescription and answer it in favour of the appellant or remit the case to the District Court for a retrial.

Even though the appellate Court can raise an issue in deciding the appeal in a rare case, the appellate Court will not, unless there are compelling, cogent reasons to do so, raise an issue on prescription in a *rei vindication* action, which is purely a question of fact as opposed to a question of law. Plea of

prescription must (a) specifically be pleaded and (b) put in issue in the trial Court. Both shall be done if one is to succeed on prescription. Far from raising a plea of prescription in appeal, plea of prescription cannot be raised even in the middle of the trial as you go along.<sup>2</sup> It is a special plea, which defeats, if proved, the title of the true owner, which is a serious thing. Hence, if the defendant decides to take up a plea of prescription at the trial, the plaintiff, as the true owner, shall clearly know it at the very beginning of the trial in order for him to marshal evidence to defeat that defence. How can the defendant make it known to the plaintiff? That is none other than by raising a specific issue on it. This principle, in my view, shall apply not only to *rei vindicatio* actions, but also to all other actions.

Parties can plead anything in the pleadings. But they do not want all what they plead to put in issue at the trial. Ultimately the case is decided on the issues raised. There was no issue on prescription in this case.

The learned District Judge was fully aware of his responsibilities arising out of section 149 of the Civil Procedure Code, and in the course of the Judgment has raised three additional issues on which the right decision of the case appeared to him to depend. On how the trial proceeded, he has not considered prescription as one of the matters on which the right decision of the case depended.

The learned District Judge has, however, considered prescription and stated that the plaintiffs have leased out the coconut trees in the land in suit for third parties for plucking coconuts and tapping toddy. According to the learned Judge,

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<sup>2</sup> Gnananathan v. Premawardena [1999] 3 Sri LR 301

the Deed of Lease marked P5 goes to show that the coconut trees have been leased for that purpose between 1983-1987, and the case has been filed on 23.03.1987, and therefore, plea of prescription in any event cannot succeed.<sup>3</sup> I find that Deed P5 is exactly relevant to the land in issue and it has been marked without any objection and without subject to proof.<sup>4</sup> That means, the appellant had not been in full control of the land to claim by prescription, even if there was an issue on prescription. He has not had *ut dominus* possession.

Under those circumstances, a grave prejudice would be caused to the respondents if this Court is to raise an issue on prescription for the first time in appeal and rewrite the Judgment afresh or send the case for retrial as 19 years have passed since the filing of the action. There shall be a finality in litigation.

Judgment of the District Court is affirmed and the appeal is dismissed with costs.

Judge of the Court of Appeal

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<sup>3</sup> Vide page 275 of the Brief.

<sup>4</sup> Vide page 146 of the Brief.