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

In the mater of an appeal made against the judgment of the District Court of Kurunegala dated 29.10.1997 in Case No: 4292/L

1. S.S.M. Piyadasa
2. S.M.J. Gunawardene
3. S.M. Leelawathie

   All of Bambaragalwatte,

   Yatigaloluwa.

Plaintiffs

Case No: CA 858/97(F)

D.C. Kurunegala Case No: 4292/L

Vs.

R.W.A.K. Perera

Bambaragalwatte,

Yatigaloluwa.

Defendant

AND BETWEEN

1. S.S.M. Piyadasa (Deceased)
2. S.M.J. Gunawardene (Deceased)
3. S.M. Leelawathie

   All of Bambaragalwatte,

   Yatigaloluwa.

Plaintiffs-Appellants

Vs.

R.W.A.K Perera

Bambaragalwatte,

Yatigaloluwa.

Defendant-Respondent

AND NOW BETWEEN

1A H.T.W.M. Ranmenika

1B S.M.D. Samarakoon

1C S.M.R. Samarakoon

1D S.M. Samarakoon

2A S.M.Podinilame

2B S.M.J. Samarakoon

Substituted 1st and 2nd Plaintiffs- Appellants

1. S.M. Leelawathie

All of Bambaragalwatte,

Yatigaloluwa.

3rd Plaintiff-Appellant

Vs.

R.W.A.K. Perera

Bambaragalwatte,

Yatigaloluwa.

Defendant-Respondent

Before: Janak De Silva J.

Counsel: Anuradha N. Ponnamperuma for 1A to 1D, 2A to 2B and 3rd Plaintiffs-Appellants

Chula Bandara with Gayathri Kodagoda for the Defendant-Respondent

Written Submissions tendered on:

1A to 1D, 2A to 2B and 3rd Plaintiffs-Appellants on 05.09.2012 and 26.10.2018

Defendant-Respondent on 20.09.2012 and 30.10.2018

Argued on: 25.01.2019

Decided on: 03.05.2019

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Kurunegala dated 29.10.1997.

The original plaintiffs in the above styled action prayed for a declaration of title to the land more fully described in the schedule to the plaint referred to as Bambaragalawatta and Kumbura in extent One amuna and five lahas of paddy sowing and for the definition of boundaries between the lands owned by them and the Defendant-Respondent (Respondent).

The original plaintiffs claimed that they were the owners of the land in dispute having inherited it on the death of their father S.M. Kirimudiyanse. According to them it was earlier owned by S.M. Kirimudiyanse and his brother S.M. Herath Banda and later due to a family arrangement possessed in the entirety by the said S.M. Kirimudiyanse who became the owner of the whole corpus. They also alleged that the Respondent had removed the fence situated on the boundary between the lands owned by them and the Respondent.

The Respondent denied the pedigree of the original plaintiffs and claimed that he was the owner of the land called Muttetulande Hena One Rood in extent. The Respondent denied that he had removed any old fence.

The action as instituted then was on one hand an action for a declaration of title and on the other an action for the definition of boundaries the implications of which I shall advert to at the end of the judgment.

The action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei*), which had its origins in Roman Law [*Latheef v. Mansoor and another* [(2010) 2 Sri.L.R. 333]. The law governing an action for declaration of title has two vital components. One deals with the proof of title while the other encompasses the identity of the land.
As Macdonell C.J. stated in *De Silva v. Goonetileke* (32 N.L.R. 217 at 219):

> "To bring the action *rei vindicatio* plaintiff must have ownership actually vested in him". (Nathan p. 362, s. 593.) ...The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."

In *Pathirana v. Jayasundara* (58 N.L.R. 169 at 172) Gratiaen J. stated the principle as follows:

> "In a *rei vindicatio* action proper the owner of immovable property is entitled, on proof of title, to a decree in his favour for the recovery of the property and for ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action." *Maasdorp's Institutes* (7th Ed.) Vol. 2, 96"

In *Mansil v. Devaya* [(1985) 2 Sri.L.R.46 at 51] G.P.S. De Silva J. (as he was then) stated thus:

> "In a rei vindication action, ..., ownership is of the essence of the action; the action is founded on ownership."

In a *rei vindicatio* action it is a paramount duty on the part of the plaintiff to establish correct boundaries in order to identify the land in dispute [*Peeris v. Savunhamy* (54 N.L.R. 207)]. There is a greater and heavy burden on a plaintiff in a *rei vindicatio* action to prove not only that he has dominium to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title [*Abeykoon Hamine v. Appuhamy* (52 N.L.R. 49]. To succeed in an action *rei vindicatio*, 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. The identity

of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment [*Latheef v. Mansoor and another* (supra)].

The learned District Judge held that the original plaintiffs failed to prove both dominium and specific and precise boundaries of the corpus.

As to the boundaries he concluded that there are discrepancies in the boundaries in the deeds relied on by the original plaintiffs. For example, පැ.7 did not have a southern boundary whereas පැ.6 which was written after පැ.7 had a southern boundary and it is not clear as to how it came to be. Furthermore, in පැ.7 the western boundary differs from other deeds. Even the survey taken out by the original plaintiffs (පැ.9) does not reflect the land set out in the deeds relied on by the original plaintiffs. In *Thirunayake v. Fernando* [SC Appeal 18B/2009, S.C.M. 07.03.2014] the Supreme Court held that it is to be emphasized that in a claim of title the land and premises in suit must be described with precision and definiteness and there should not be any discrepancy as to the identity of the land in dispute. In fact, the 2nd plaintiff admitted under cross-examination that they have shown only a portion of a larger land claimed by them [Appeal Brief pages 90-92]. The surveyor who prepared පැ.9 admitted that he did not survey the whole land [Appeal Brief Page 115].

On the issue of title, the learned District Judge has held that the original plaintiffs have failed to establish that Kirimudiyanse is their father. Furthermore, as submitted by the learned counsel for the Respondent even if it is accepted that the original plaintiffs are the children of Kirimudiyanse they have failed to prove how the inheritance passed onto them.

Upon a careful consideration of the evidence in this case, I see no reason to disagree with the conclusions of the learned District Judge that the original plaintiffs have failed to establish title clearly and precisely identify the land in dispute.

The learned counsel for the 1A to 1D, 2A to 2B and 3rd Plaintiffs-Appellants (Appellants) main attack on the impugned judgment is the alleged failure on the part of the learned District Judge to answer all the issues raised at the trial. Altogether 17 issues were raised. The learned District

Judge held that issues 1 to 5 and 7 have not been proved. Based on these answers he held that issues 6, 8 to 16 do not arise.

The learned Counsel for the Appellants relied on *Dona Lucihamy v. Ciciliyanahamy* (59 N.L.R. 214), *Warnakula v. Ramani Jayawardena* [(1990) 1 Sri.L.R. 206] and *Suduwage Mulin and others v. Godallawattage Somawathie* [SC Appeal No. 162/2012, S.C.M. 29.06.2017] to support the proposition that a trial judge must answer all the issues accepted by Court and the failure to do so violates section 187 of the Civil Procedure Code which stipulates the requisites of a judgment.

Assuming that the principle enunciated above is the correct position in law, yet the judgment of the learned District Judge of Kurunegala dated 29.10.1997 need not be set aside since for the reasons set out above on an examination of the totality of the evidence it is clear that the learned District Judge was correct in holding in favour of the Respondent. In *Gunasena v. Kandage and Others* [(1997) 3 Sri.L.R. 393] Weerasuriya J. held:

> "The learned District Judge was in error for failing to adduce reasons for her findings. Nevertheless, the question that has to be examined is whether or not such failure on her part had prejudiced the substantial rights of the defendant appellant or has occasioned a failure of justice. Having considered the totality of the evidence, it seems to me that no prejudice has been caused to the substantial rights of the defendant-appellant or has occasioned a failure of justice by this error, defect or irregularity of the Judgment."

This statement was made in the context of section 187 of the Civil Procedure Code and the Supreme Court refused special leave to appeal against the said judgment in SC (SP/LA) No. 467/97 on 7.2.1998.

Furthermore, in *Victor and another v. Cyril De Silva* [(1998) 1 Sri.L.R. 41] Weeerasuriya J. held:

> "The learned District Judge was in obvious error when she failed to evaluate the evidence, in terms of S. 187, Civil Procedure Code, the failure to comply with the imperative provisions of S. 187, has not substantially prejudiced the rights of the defendant-appellants or has not occasioned a failure of justice to the defendants-appellants, as it is

evident on a close examination of the totality of the evidence that the learned District Judge is correct in pronouncing judgment in favour of the plaintiff-respondent".

Both these judgments are an application of the constitutional provisions found in the proviso to Article 138(1) of the Constitution which mandates that no judgment, decree or order of any court shall be reversed or varied on account of any error defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. Clearly the constitutional provisions prevail over section 187 of the Civil Procedure Code. I hold that even if a trial judge has failed to answer all the issues raised and accepted by Court the judgment need not be reversed or varied if such error defect or irregularity has not prejudiced the substantial rights of the parties or occasioned a failure of justice. One such instance is where upon a close examination of the totality of the evidence it is found that the learned District Judge is correct in pronouncing the judgment.

I wish to add that the interpretation given to section 187 of the Civil Procedure Code that it requires a trial judge to answer all the issues raised and accepted at the trial may need to be revisited as there are provisions in the Civil Procedure Code which allows the trial judge to dispose the action on the answer to some issues. For example, section 147 of the Civil Procedure Code allows an action to be disposed of only on issues of law and there can be no doubt that such a judgment is a judgment within the meaning of section 187 of the Civil Procedure Code although the trial judge has not answered all the issues raised and accepted by Court. The practice of the Courts developed over a long period of time is for all issues to be raised and settled prior to certain issues of law being tried as preliminary issues.

For the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Kurunegala dated 29.10.1997.

Before parting, I wish to advert to a matter raised by the learned counsel for the Respondent in his written submissions dated 30.10.2018 where it is contended that in terms of section 35 of the Civil Procedure Code the original plaintiffs could not have without leave of Court sought a demarcation of boundaries in addition to the prayer for declaration of title as they are different causes of action.

The nature of an action for definition of boundaries *actio finium regundorum* is described in Gane's translation of Voet' s Pandects Book 10 Title 1 Section 6 at page 617 as follows:

> "The action is granted against neighbours to neighbours; whether the latter are owners, usufructuaries, (in which case you would correctly reckon the Clergy also in respect of lands belonging to their livings) creditors holding a hypothec, quitrenters, or possessors in good faith. All such persons are endowed with a jus in re, and in virtue of these rights have a personal interest in unsettlement of boundaries being avoided; and as a general rule good faith bestows on a possessor as much as true: fact if no law stands in the way".

In *Ponna v. Muthuwa* (52 N.L.R. 59 at 60) Gratiaen J. stated:

> "the actio finium regundorum only lies for defining and settling boundaries between adjacent owners whenever the boundaries have become uncertain, whether accidentally or through the act of the owners or some third party (Voet 10.1.1.) ... Such proceedings, in my opinion, presuppose the prior existence of a common boundary which has been obliterated by some subsequent event. The remedy cannot be sought for the purpose of creating on some equitable basis a line of demarcation which had never been there before. The true basis of the remedy, as in England, is that there is a tacit agreement or duty between adjacent proprietors to keep up and preserve the boundaries between their respective estates"

In *Leelawathie Hamine and another v. Gnanasiri* [(1989) 1 Sri.L.R. 322] this Court adopting the approach taken in *Jacolis Appu v. David Perera* (69 N.L.R. 548) held that an action for definition of boundaries lies only where parties are admittedly owners of contiguous lands and the common boundary between the two lands has become uncertain. When the dispute is to lots the appropriate remedy is an action for declaration of title and ejectment. Again, in *Deeman Silva v. Silva and Others* [(1997) 2 Sri.L.R. 382] Wigneswaran J. appears to recognize that an action for declaration of title cannot be combined with an action for definition of boundaries. In fact, in *Alfred Fernando v. Julian Fernando* [(1987) 2 Sri.L.R. 78] this Court held that a plaintiff cannot in the guise of an action for definition of boundaries vindicate title to an encroachment. The fact

that an action for a declaration of title and an action for definition of boundaries encompasses two different and distinct causes of action was clearly recognized by Basnayake C.J. in Ekanayake v. Ekanayake (63 N.L.R. 188) when he refused an amendment of a plaint filed in an action for definition of boundaries which amounted to converting the action to one of declaration of title to land. More recently, in *Somawathie and Others v. Illangakoon* [(2013) 1 Sri.L.R. 94] Amaratunga J. observed that It is clear that the plaintiffs were attempting to vindicate their title to the portion occupied by the defendants through an action disguised as an action for the definition of boundaries.

In my view these authorities establish that an action for declaration of title and an action for definition of boundaries encompass two different and distinct causes of action. However, I am reluctant to consider the consequences flowing from that finding to the instant case as firstly no issue was raised on it and secondly although it is a question of law the Appellants did not have the benefit of prior notice of the point as it was raised only in the second set of written submissions filed by the Respondent after which there was no oral argument.

Appeal is dismissed with costs.

Judge of the Court of Appeal