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

S.A. Somawathie,
99, Gangeyaya,
Embilipitiya.
Defendant-Appellant

CASE NO: CA/1349/2000/F
DC EMBILIPITIYA CASE NO: 5279/L

Vs.

S.A. Ajith Satharasinghe,
C/O Janapada Stores,
99, Gangeyaya,
Embilipitiya.
2nd Plaintiff-Respondent
And Others

Before:	A.L. Shiran Gooneratne, J. Mahinda Samayawardhena, J.
Counsel:	Anuruddha Dharmaratne for the Defendant-Appellant. Saliya Peiris, P.C. with Varuna de Seram for the Plaintiffs-Respondents.
Argued on:	21.05.2019
Decided on:	29.05.2019

Mahinda Samayawardhena, J.

The two plaintiffs-respondents filed this action in the District Court of Ambilipitiya seeking declaration of title to the land described in the schedule to plaint in favour of the 2nd plaintiff, ejectment of the defendant-appellant therefrom, and damages. The defendant whilst seeking dismissal of the plaintiffs' action sought declaration of title to the land in her favour by way of a claim in reconvention. After trial, the learned District Judge entered Judgment for the plaintiffs except for damages. Hence this appeal by the defendant.

A Permit under section 19(2) of the Land Development Ordinance, No. 19 of 1935, as amended, has been issued to Podimanike, who was the mother of the 1st plaintiff and the defendant, and the grandmother of the 2nd plaintiff. This Permit has been marked subject to proof by the 1st plaintiff in his evidence as P1. According to P1, Permit has been issued in the name of Podimanike on 06.07.1990 and Permit-holder Podimanike has, on 17.07.1990, nominated her grandson, the 2nd plaintiff, as her successor. As this was marked subject to proof, a Land Officer of the Mahawali Authority has been called to give evidence and that officer who had brought the relevant file regarding issuance of this Permit has in his evidence clearly confirmed the aforesaid nomination. He has further stated in evidence that upon the claim made by the defendant regarding this land, an inquiry was held at the Mahaweli Authority, but they could not grant any relief to the defendant, because Podimanike had nominated the 2nd plaintiff as her successor. It appears that spouse of Podimanike has predeceased her. Therefore, in terms of section 49 of the Land Development

Ordinance, the 2nd plaintiff, as the nominated successor is entitled to succeed to the land.

The pivotal argument of the learned counsel for the defendant-appellant before this Court is that there is no proper nomination in terms of section 56 of the Land Development Ordinance and therefore the said nomination is invalid. According to section 56, the nomination of a successor shall be in the prescribed form executed in triplicate before a Government Agent or a Registrar of Lands or a Divisional Assistant Government Agent or a Notary or a Justice of Peace. Page 4 of P1, of which the Land Officer gave evidence, clearly shows that the nomination has been made by the Permit-holder Podimanike by placing her thumb impression before the same officer (the Divisional Manager of the Mahaweli Authority, Ambilipitiya) by whom the Permit P1 was issued and the said officer has also countersigned the nomination. No question has been put to the Land Officer in cross examination about the requirements of section 56 aforementioned for the said officer to satisfy the Court of compliance with that section with the documents should have been available with him in his file. Without putting that matter in issue in the trial Court, in my view, it is too late in the day to raise that matter for the first time in appeal.

In any event, at the closure of the case for the plaintiffs, reading in evidence the documents marked P1-P3, which includes the Permit P1, no objection has been raised stating that P1 has not been duly proved. Then it is settled law that P1 becomes evidence for all intents and purposes without qualification—Vide Judgments of Chief Justice Samarakoon in *Sri Lanka Ports Authority v. Jugolinija Boat East [1981] 1 Sri LR 18 and* Chief

Justice G.P.S. de Silva in *Balapitiya Gunananda Thero v. Talalle Methananda Thero [1997] 2 Sri LR 101.* If P1 is to be accepted without qualification, the nomination stated in P1 has to be admitted without any further proof. Accordingly, main submission of the defendant-appellant fails.

The next submission of the learned counsel for the defendant-appellant is that the 2nd plaintiff does not become entitled to succession in terms of rule 1 of the third schedule read with section 72 of the Ordinance. Succession under the third schedule becomes relevant if no successor has been nominated or if the nominated successor fails to succeed. Here the consideration of the third schedule does not arise as successor has been nominated from the group of relatives enumerated in the third schedule as stated in section 51 of the Ordinance.

Connected to this argument, the learned counsel also takes up the position that the 2nd plaintiff as the nominated successor failed to succeed. This argument in my view can be advanced provided the defendant-appellant accepts the 2nd plaintiff was the nominated successor. She cannot approbate and reprobate. But the defendant-appellant did not accept it and did not allow the two plaintiffs, father and son respectively, to continue with possession or take possession of the land. In the said circumstances, it does not lie in the mouth of the defendant-appellant now to say that the 2nd defendant-appellant failed to succeed. I reject the second argument.

The third argument of the learned counsel is that the main relief prayed for in the prayer to the plaint, which is paragraph (a) of the prayer to the plaint, whereby the 2nd plaintiff seeks a "හිමිකම් ප්‍රකාශයක්" (title declaration) to the land in suit is misconceived in

law. It is not the submission of the learned counsel that the plaintiffs cannot seek a declaration of title on the Permit. The learned counsel admits that *Palisena v. Perera (1954) 56 NLR 407* allows the plaintiffs to maintain a vindicatory action on a Permit. His argument is regarding the phraseology used seeking that relief. Title declaration, to my mind, means, "declaration of title". It is clear from paragraph 3(a) of the Petition of Appeal that, that is how even the defendant-appellant has understood that relief. I am not impressed by that argument.

I dismiss the appeal but without costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal