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

D.A. Karunawathie (Deceased)
26/2 Opposite Old Police Station
Pallegama,
Embilipitiya

Plaintiff-Appellant

K.A. Munasinghe,
26/2 Opposite Old Police Station
Pallegama,
Embilipitiya

Substituted Plaintiff-Appellant

Case No. 155/2000(F)

D.C. Embilipitiya Case No. 5699/L

Vs.

1. Lal Siriwardena,
2. Kuruppuarachchi
   Both of Opposite Old Police Station
   Pallegama,
   Embilipitiya

Defendants-Respondents

Before: Janak De Silva J.

Counsel:

N.W. De Silva for the Substituted Plaintiff-Appellant

Ashan Nanayakkara for the Defendants-Respondents

Written Submissions tendered on:

Substituted Plaintiff-Appellant on 21.05.2014 and 05.04.2019

Defendants-Respondents on 29.06.2016

Argued on: 12.03.2019

Decided on: 07.06.2019

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Embilipitiya dated 29.12.1999.

The Plaintiff-Appellant instituted the above styled action and claimed that he was the holder of a permit issued under the Land Development Ordinance (Ordinance)(P1) to the land morefully described in the schedule to the plaint and that the Defendants-Respondents (Respondents) have encroached onto the said land and sought inter alia the following relief:

> "(අ) මෙහි පහත උපලේඛණයේ දැක්වෙන ඉඩම සඳහා තමාට හිමිකම් ප්‍රකාශයක් ලබාදෙන ලෙසත්..."

The Respondents denied the claim of the Plaintiff-Appellant and stated that the 1st Respondent is in possession of a land in extent of 0.086 hectares for over ten years and that the permit P1 is of no force or avail in law.

After trial the learned District Judge dismissed the action of the Plaintiff-Appellant and hence this appeal.

The learned District Judge answered only issue nos. 1, 17 and 18 on the basis that they raised issues on the validity of permit (P1) on which the Plaintiff-Appellant's case was based. He held that P1 was cancelled in terms of section 109 of the Ordinance and thereafter purportedly revalidated contrary to the provisions of section 117 of the Ordinance and hence of no force or avail in law.

The learned counsel for the Substituted Plaintiff-Appellant submitted that permit (P1) was valid as at the date of filing the action and that the learned judge erred in law in looking at subsequent events.

It is true that generally the rights of the parties are determined as at the date of action [*Ponnamma v. Arumogam* (8 N.L.R. 223 at 226), *Silva v. Nona Hamine* (10 N.L.R. 44), *Ponnamma v. Weerasuriya* (11 N.L.R. 217), *Silva v. Fernando et al* (15 N.L.R. 499), *Jamal Mohideen & Co. v. Meera Saibo et al* (22 N.L.R. 268 at 272), *Shariff et al v. Marikkar et al* (27 N.L.R. 349), *Eminona v. Mohideen* (32 N.L.R. 145), *De Silva et al v. Goonetilleke et al* (32 N.L.R. 217), *De Silva v. Edirisuriya* (41 N.L.R. 457), *Lenorahamy v. Abraham* (43 N.L.R. 68), *Kader Mohideen & Co. Ltd., v. Gany* (60 N.L.R. 16), *Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another* (1983) 2 Sri. L. R. 267), *Talagune v. De Livera* (1997) 1 Sri. L. R. 253, *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others* (1998) 1 Sri. L. R. 235, *Lalwani v. Indian Overseas Bank* (1998) 3 Sri. L. R. 197, *Jayaratna v. Jayaratne and another* (2002) 3 Sri. L. R. 331, *Sithy Makeena and others v. Kuraisha and others* (2006) 2 Sri. L. R. 341].

However, it is not an immutable principle and courts have recognized certain exceptions to the general rule. [*Sabapathipillai et al v. Vaithialingam* (40 N.L.R. 107), *Appusinno v. Balasuriya* (16 N.L.R. 385), *Thangavadivel v. Inthiravathy* (53 N.L.R. 369), *Mariam Nurban Hussain Teyabally v. Hon. R. Premadasa and two others* (S.C. No. 69/92, S.C.M. 05.11.1993), *Master Drivers (Pvt) Ltd. v. Karunaratne and others* (CA (PHC) APN 140/2012, C.A.M. 09.08.2018).

But as morefully explained below, this action is a *rei vindicatio* action and it is trite law that a plaintiff who has lost his ownership to the immovable property in dispute in a *rei vindicatio* action pendente lite cannot seek to vindicate his ownership [*Ponnamma v. Weerasuriya* (11 N.L.R. 217), *Eliashamy v. Punchi Banda* (14 N.L.R. 113), *Silva v. Jayawardena* (43 N.L.R. 551), *Eugin Fernando v. Charles Perera and Others* (1988) 2 Sri.L.R. 228].

Thus, the learned District Judge was correct in examining whether the Plaintiff-Appellant ceased to be a permit holder under the Ordinance during the pendency of the action. However, the learned counsel for the Substituted Plaintiff-Appellant (Appellant) contended that the permit (P1) was revalidated prior to judgment whereas the learned counsel for the Respondents submits that it was done contrary to section 117 of the Ordinance. This then is the main question that the learned judge determined in dismissing the action.

However, in my view this Court need not venture to examine the validity of the cancellation and re-validation of permit (P1) in view of certain preliminary matters that arise before the validity of permit (P1) is examined.

Identity of the Corpus

The learned counsel for the Appellant contended that this action is one for the declaration of title and not a *rei vindicatio* action whereas the learned counsel for the Respondents submitted that it was a *rei vindicatio* action.

The affinity between the action for declaration of title and an action *rei vindicatio* has been considered in several landmark decisions in Sri Lanka and South Africa, which seem to suggest that they are both essentially actions for the assertion of ownership, and that the differences that have been noted in decisions such as *Le Mesurier v. Attorney General* are differences without any real distinction. [Marsoof J. in *Latheef v. Mansoor* (2010) 2 Sri.L.R. 333 at 349].

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)].

In a vindicatory action it is necessary to establish the identity of the corpus in a clear and unambiguous manner and the action must fail upon the failure to do so [*Fernando v. Somasiri* (2012 B.L.R. 121)].

The permit (P1) does not specify any boundaries and is in relation to a land in extent of 3 Acres whereas the schedule to the plaint sets out the extent of the corpus as A1 R3 P38 which is less in extent that the land described in the permit (P1).

The evidence also establishes that the Appellant had instituted case no. 5701/L in the District Court of Embilipitiya for the same land using the same permit (P1) [Appeal Brief page 63] and had in that plaint given different boundaries [Appeal Brief page 216].

Hence the Plaintiff-Appellant has failed to establish the identity of the corpus in a clear and unambiguous manner and the action must fail on that ground alone.

Ownership

The term ownership when used in its strictly legal term applies only to corporeal things and is corresponding to the term *dominium* in Roman law. *Willie's Principles of South African Law* [Hutchinson, Van Heerden and Der Merwe (eds), 8th Ed. Third Impression, page 270] explains that ownership is a composite right consisting of a conglomeration of abilities and states that the composite right of an absolute owner of a thing consists of right (i) to possess it (ii) to use and enjoy it (iii) to destroy it and (iv) to alienate it.

Maarsdorp [*The Institutes of Cape Law*, Book II at p.31 (1903)] states that the rights of ownership "..... are comprised under three heads, namely, (i) the right of possession, ownership having indeed been defined by some as consisting in the rights to recover lost possession; (2) the right of usufruct, that is the right of use and enjoyment; and (3) the right to disposition."

Lee [Introduction to Roman-Dutch Law at p.111] states that, "Dominium or Ownership is the relation protected by law in which a man stands to a material thing which he is able to: (a) possess, (b) use and enjoy, (c) alienate."

Van Der Linden [Institutes of Holland, Third Edition, (1897) pp. 45- 46] refers to six consequences of ownership which are (a) the right to enjoy the fruits of the thing owned (b) the right of making proper use of the thing owned as the owner pleases (c) the right of altering the form and shape of the thing owned (d) the right of entirely destroying the thing owned (e) the right of preventing others making use of the thing owned (f) the right of alienating the thing owned or transferring a right in the thing owned to a third party.

Legal requisites to obtain a declaration of ownership

Given the divergent views as to the different rights that make up the notion of ownership, it is important to ascertain what are the rights that a person should enjoy over a corporeal thing to be declared as its owner.

Maarsdorp (supra) provides an answer to this question by reference to the rights of possession, enjoyment and disposition and states as follows:

> "these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time. Thus, though there need not be actual use and enjoyment present in every case, **the right of alienation, coupled with the legal means of effecting such alienation, is at all times necessary in order to constitute valid ownership**: and perhaps a more correct definition of ownership would be that it is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating the same and coupled with the right to claim the possession and enjoyment thereof." (emphasis added)

Professor Max Radin, an authority on Roman Law, in *Fundamental Concepts of the Roman Law* [California Law Review Vol, 13 Issue 3 page 212] states that "...especially the power of transfer, are legally and popularly associated with the idea of dominium as fundamental parts of it."

The Privy Council in *Attorney General v. Herath (*62 N.L.R. 145) adopted part of Maarsdorp's formulation and held that the rights of an owner under the general law of Ceylon are comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2)

the right of use and enjoyment; and (3) the right to alienate and that **these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time.** (emphasis added)

The Supreme Court in *Jinawathie et al v. Emalin Perera* [(1986) 2 Sri.L.R. 121] adopted a similar approach by defining ownership with reference to the rights a person holds over a thing. Ranasinghe J. (as he was then) stated thus:

> "Ownership is the right which a person has in a thing to possess it, to use it and take the fruits, to destroy it, and to alienate it. These rights have been described by the text writers as: jus utendi, jus fruendi, and jus utendi-Grotius 2.3.9, Voet 6. 1. 1. Wille, in his book on the Principles of South African Law (3rd Ed.) discusses at page 190 the "Legal Effects of Ownership" as follows:
>
> "The absolute owner of a thing has the following rights in the thing:
>
> (1) to possess it;
>
> (2) to use and enjoy it; and
>
> (3) to destroy it; and
>
> (4) to alienate it";"

Recently, in *Lamabadusuriya v. Abeygunawardena* [S.C. Appeal 169/2011, S.C.M. 06.04.2018] the Supreme Court was called upon to examine the meaning of the word "owner" in section 2(4)(c) of the Rent Act and Prasanna Jayawardena J. after an exhaustive analysis held that the term "owner" may, in appropriate circumstances, be applied to describe a person who does not possess the entire array of the classical rights of ownership recognized in Roman-Dutch Law. He held that the word "owner" in section 2 (4) (c) of the Rent Act can be reasonably regarded as including a life interest holder who occupied the property on 01st January 1980. However, Prasanna Jayawardena J. did not disapprove of *Jinawathie et al v. Emalin Perera* (supra) but instead drew a distinction by holding that the said decision related to an action in the nature of a *rei vindicatio* where the plaintiff could maintain the action only if he had title to the land

whereas in *Lamabadusuriya v. Abeygunawardena* (supra) Court had to determine the meaning of the word *"owner"* in section 2 (4) (c) of the Rent Act.

This is clear when he states that:

> "it seems to me that, the observations made in of *Jinawathie v. Emalin Perera* (supra) with regard to the attributes of Ownership required to maintain a *rei vindicatio* should not be applied "lock, stock and barrel", to determine the meaning of the word *"owner"* used in section 2 (4) (c) of the Rent Act" (page 13).

The learned counsel for the Appellant submitted that he has not sought a declaration that he is the owner of the land in dispute and in the alternative that he is the owner within the meaning of the Ordinance in view of the amendment made by Act no. 27 of 1981 to the word "owner" in section 2(k) of the Ordinance. Accordingly, he submitted that the term "ownership" in the classical texts of the Roman-Dutch law need not be considered in the instant matter.

The word "හිමිකම" means ownership in Sinhala [ගුනසේන මහා සිංහල ශබ්දකෝෂය, 2015, 1988]. The meaning of "title" is "හිමිකම" or "අයිතිය" [Malalasekera English Sinhala Dictionary, 5th Ed., 1464]. Hence the Plaintiff-Appellant has sought a declaration of ownership. That prayer is not for a declaration that he is the owner within the meaning of the Ordinance. The meaning of "ownership" in section 2(k) of the Ordinance is for the purposes of the Ordinance only.

Accordingly in determining whether the Appellant is entitled to the declaration sought it must be considered in the context of the notion of "ownership" in Roman-Dutch law.
In determining this issue, I am of the view that the principle stated in *Attorney General v. Herath* (supra) and *Jinawathie et al v. Emalin Perera* (supra) must be applied and the Appellant should possess the rights referred to therein, although they need not all be present in an equal degree at one and the same time, to be entitled to a declaration that they are the owners of the lands morefully described in the schedules to the plaint.
The permit (P1) issued to the Appellant is found at page 195 of the Appeal Brief. The Appellant has not been granted any right of alienation to the state land. The rights to possession and use and enjoyment are also subject to certain limitations. In the aforesaid circumstances, I have no hesitation in concluding that the Appellant is not in any event entitled to a declaration that he is

the owner of the state land the possession of which has been given to her on a permit issued under the Ordinance.

In fact, in *S.M.Ratnawathi Manike v. Moonafiya and others* [S.C. Appeal 154/2015; S.C.M. 10.11.2017] Sisira De Abrew J. (with Priyantha Jayawardena J. and H.N.J. Perera J. agreeing) held that "A Grant issued in terms of Section 19(4) of the Land Development Ordinance has to be considered as a deed conveying the title to the grantee by the State. But the same status cannot be given in respect of a permit issued in terms of Section 19(2) of the Land Development Ordinance."

The above position of the law will in any event result in issue no. 1 been answered in the negative even if the permit (P1) is valid and effective.

Palisena v. Perera

The learned counsel for the Appellant submitted that he is entitled to maintain the action in view of the decision in *Palisena v. Perera* (56 N.L.R. 407).

The plaintiff in *Palisena v. Perera* (56 N.L.R. 407) was a permit holder under the Ordinance. He sued the defendant, whom he alleged to be a trespasser, for ejectment and consequential relief. Gratiaen J. characterized the action as "a *vindicatory action* in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser". (supra. page 408) There is no indication that the plaintiff in that case sought a declaration of ownership as the Plaintiff-Appellant sought to do in this case. I am therefore of the view that the *ratio decidendi* in *Palisena v. Perera* (supra) does not enable the plaintiff in this case to maintain an action for declaration of ownership to the land given to him under a permit issued in terms of the Ordinance.

This Court in *Attanayake v. Aladin* [(1997) 3 Sri LR 386 at 389] considered the decision in *Palisena v. Perera* (supra) and Weerasekera J. stated that:

> "clearly therefore what was decided by Gratiaen J. was that in a vindicatory action the relief of ejectment would only be the consequent to a declaration or vindication of the right to possess."

In *Fernando v. Somasiri* (supra) the Supreme Court was confronted with an action by a permit holder under the Ordinance where inter alia a declaration of ownership to state land was sought and obtained in the District Court which judgment was affirmed by the Civil Appellate High Court. The Supreme Court had granted leave to appeal on three questions touching on the identity of the corpus and set aside the judgements of both the Courts on the basis that the identity of the corpus has not been proved. The Supreme Court held inter alia that *Palisena v. Perera* (supra) states that the title of the permit holder is sufficient to maintain a vindicatory action against a trespasser. However as explained above *Palisena v. Perera* (supra) does not support a declaration of ownership to state land in favour of a permit holder under the Ordinance.

In fact, Gratiaen J. himself in *Pathirana v. Jayasundara* (58 N.L.R. 169 at 172, 173), decided within one year after his decision in *Palisena v. Perera* (supra) states as follows:

> "In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour recovery of the property and for the ejectment of the person in -occupation. The plaintiff's ownership of the thing is of the very of the action ". Maasdorp's Institutes (7th Ed.) Vol. 2, 96."
>
> "A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true' owner."

Clearly Gratiaen J. was not in *Palisena v. Perera* (supra) seeking to establish an exception to the fundamental rule in Roman- Dutch law that one must be the owner to maintain a vindicatory action. In law he could not have sought to vary this rule as the full bench of the Supreme Court had in *De Silva et al v. Goonetileke et al* (32 N.L.R. 217) held that a party claiming a declaration of title must have title himself or to bring the action *rei vindicatio* plaintiff must have ownership actually vested in him. A permit holder under the Ordinance does not have title conveyed to him [*S.M.Ratnawathi Manike v. Moonafiya and others* (supra)].

In my view the decision in *Palisena v. Perera* (supra) is limited to the facts of the case as Gratiaen J. held (at page 408):

> "It is **very clear from the language of the Ordinance and <u>of the particular permit P1 issued to the plaintiff</u>** that a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings." (emphasis added)

As explained above the permit (P1) in this case has not granted any right of alienation to of the state land to the Plaintiff-Appellant and the rights to possession and use and enjoyment are also subject to certain limitations.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Embilipitiya dated 29.12.1999.

The appeal is dismissed with costs.

Judge of the Court of Appeal