

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

1. Mohamed Fareed Mohamed Thamseer of Horombawa.
2. Shahul Hameed Ahamed Kabeer Rawther of Horombawa.
3. Segu Ismail Habeeb Mohamed of Horombawa.
4. Abdul Hameed Mohamed Hussain of Horombawa.
5. Seyadu Saly Kamaldeen of Horombawa.
6. Cader Meera Sahib Mohamed Ibrahim of Horombawa.
7. A. M. Mohamed Rawther of Kadahapola, Horombawa.

Plaintiffs

Case No: C. A. 837/2000(F)

D. C. Kuliypitiya Case No. 10300/RE

Vs.

1. Hameedu Lebbe Mohammed Issadeen of Metiwalagedara, Horombawa.
2. Hameed Lebbe Mohammed Nissardeen of Metiwalagedara, Horombawa.
3. Hameed Lebbe Mohammed Ashrofdeen of Metiwalagedara, Horombawa.
4. Hameed Lebbe Mohammed Lafeer of Horombawa.

Defendants

NOW BETWEEN

1. Hameedu Lebbe Mohammed Issadeen of Metiwalagedara, Horombawa.

3. Hameed Lebbe Mohammed Ashrofdeen of Metiwalagedara, Horombawa.

4. Hameed Lebbe Mohammed Lafeer of Horombawa.

Defendants-Appellants

Vs.

1. H.M. Shihabdeen

2. M.F.M. Niyas

3. A.M.M. Suwair

4. M.H.M. Ramsi

5. M.M.M. Milhan

All of Al Masjidul Jamai, Horambawa,
Kurunegala

Plaintiff-Respondents

Before: Janak De Silva J.

Counsel:

M.U.M. Najeeb for the Defendants-Appellants

Nizam Kariapper P.C. with M.I.M. Iynullah for the Plaintiffs-Respondents

Written Submissions tendered on:

Defendants-Appellants on 16.06.2014

Plaintiffs-Respondents on 01.03.2019 and 08.07.2019

Argued on: 06.03.2019

Decided on: 25.07.2019

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Kuliypitiya dated 07.11.2000.

When this matter was taken up for argument on 06.03.2019 the learned counsel for the Defendants-Appellants (Appellants) informed that he has not received any instructions from the Appellants although he has written to them seeking instructions. Since both parties had filed written submissions and as this is an appeal filed in the year 2000, Court decided to determine

the matter on the merits in order to provide a finality to parties who have had to unfortunately wait for nearly 19 years for the appeal to be argued to a conclusion.

The original Plaintiffs were the trustees of Al-Masjidul Jamiya Muslim Mosque, Harambawa and instituted the above styled action against the original Defendants seeking a declaration of title to the property described in the schedule to the plaint, ejection of the original Defendants and for damages.

The original Defendants denied the title of the mosque to the buildings occupied by them and claimed that the said buildings are situated on part of Erabadugahamulawaththa described in the schedule to the answer and claimed prescriptive title to the said land and buildings.

The learned District Judge entered judgment as prayed for in the plaint and hence this appeal.

The Appellants have raised the following grounds in appeal:

- (1) Failure to comply with section 25(1) of the Muslim Mosques and Charitable Trusts Act (Wakfs Act)
- (2) All the trustees of the Al-Masjidul Jamiya Muslim Mosque, Harambawa have not been made Plaintiffs
- (3) Failure to establish the identity of the corpus

Failure to comply with section 25(1) of the Wakfs Act

Section 25(1) of the Wakfs Act reads:

“25(1). The trustee or trustees of a registered mosque may with the approval of the board sue for the recovery of any property vested in such trustee or trustees under section 16, or for the recovery of the possession of any such property, or for any other purpose connected with, or incidental to, the exercise and performance of the powers and duties of such trustee or trustees.”

This section empowers a trustee of a registered mosque, with the approval of the board, to sue for the recovery of any property vested in such trustee [*Ishak v. Thawfeek* (71 N.L.R. 101 at 103), *Bhai Beebi and Others v. A.M.M. Naeem and Others* (1981) 2 Sri.L.R. 335 at 345].

The learned counsel for the Appellants submitted that the purported approval of the Wakfs Board marked P3 has been granted on 30.12.1991 whereas the action was filed on 06.12.1991. He relied on the principle that the rights of the parties must be decided as at the date of action and relied on the decision in *Silva v. Fernando* (15 N.L.R. 499) which stated that principle.

The learned President's Counsel for the Plaintiffs-Respondents (Respondents) countered that this issue was determined by the learned District Judge when admitting the document marked P3 on 23.07.1997 by interpreting section 25(1) of the Wakfs Act in a permissive manner and not as mandatory. Accordingly, he contended that the Appellants cannot now raise this issue as they failed to challenge the order dated 23.07.1997.

The question then is whether the Appellants should have challenged the impugned order when it was made or could have waited, as they appear to have done in this case, to challenge it in the final appeal.

An interlocutory appeal should be rejected as premature only in cases, where the matter could more expeditiously be dealt with in a final appeal [*Girantha et al v. Maria et al* (50 N.L.R. 519)]. However, if the incidental order goes to the root of the matter it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage [*Anushka Wethasinghe v. Nimal Weerakkody and Others* (1981) 2 Sri.L.R. 423].

The alleged failure to comply with section 25(1) of the Wakfs Act in my view goes to the root of the case and as such the Appellants should have challenged the order dated 23.07.1997 rather than waiting to raise it in the final appeal.

Therefore, I hold that the Appellants are not entitled to raise this issue in appeal.

Failure to name all trustees of the Al-Masjidul Jamiya Muslim Mosque as Plaintiffs

The document P1 contains the names of the trustees of the Al-Masjidul Jamiya Muslim Mosque at the material time to this application. There are 8 names therein but only 6 have filed this action as Plaintiffs. The learned counsel for the Appellants contends that this is fatal and that the action must fail on this ground alone.

He relied on the decision in *Sinna Lebbe v. Mustapha* (51 N.L.R. 541) where it was held that a court has no jurisdiction to entertain an application made under sections 15 and 16 of the Muslim Intestate Succession and Wakfs Ordinance unless all the trustees of the charitable trust or place of worship in question are made Respondents.

The learned President's Counsel for the Plaintiffs-Respondents (Respondents) submitted that no issue was raised on this matter and as such this is not a matter that can be taken up in the appeal for the first time.

While a pure question of law can be raised for the first time in appeal [*Talagala v. Gangodawila Co-operative Stores Society Limited* (48 N.L.R. 472), *Setha v. Weerakoon* (49 N.L.R. 225), *Jayawickrema v. Silva* (76 N.L.R. 427), *Leechman & Company Limited v. Rangalla Consolidated*

Limited (1981) 2 Sri.L.R. 373] a mixed question of fact and law cannot be raised for the first time in appeal [*Jayawickrema v. Silva* (supra), *Candappa nee Bastian v. Ponnambalampillai* (1993) 1 Sri.L.R. 184].

The issue raised by the Appellants is a mixed question of fact and law and it is raised for the first time in appeal. Hence, I hold that that Appellants are not entitled to raise this issue for the first time in appeal.

Failure to establish the identity of the corpus

As this is a *rei vindicatio* action the Respondents must prove on a balance of probabilities, not only their 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* (2010) 2 Sri.L.R. 333].

The learned counsel for the Appellants submitted that the Respondents have failed to do so based mainly on the survey report of licensed surveyor Bandara who has in his report [Appeal Brief page 443] mentioned that it cannot be clearly stated whether the land sought to be partitioned is the land surveyed. Of course, the reference to partitioned is misplaced but the question is whether the surveyor did indeed state that he is unable to identify the land.

Licensed Surveyor Bandara was called as a witness and during his testimony explained the reasons for the above statement. He said that since the Appellants requested lot 2 of his plan to be separately indicated he made the above remark but that he can state that to a great extent the land which is described in the schedule to the plaint is what he surveyed and depicted in his survey plan.

The learned District Judge has carefully analysed the evidence of Surveyor Bandara as well as the other evidence dealing with the identity of the corpus and correctly concluded that the Respondents have established the identity of the corpus.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Kuliypitiya dated 07.11.2000.

The appeal is dismissed with costs.

Judge of the Court of Appeal