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

Jayawardana Mudiyanselage Sumanawathie
Viharamulla, Monaragala.

Plaintiff-Appellant

Case No. C. A. 994/2000(F)
D.C. Monaragala Case No. 1641/L

Vs.

1. Hon. Attorney General
   Attorney General's Department, Colombo 12.

2. Premathilaka
   Superintendent of Post,
   Office of the Superintendent of Post,
   Monaragala.

3. D. A. Edirisuriya
   Divisional Secretary,
   Divisional Secretary's Office, Monaragala.

Defendant-Respondents

Before: Janak De Silva J.

K. Priyantha Fernando J.

Counsel:

K. Ashoka Fernando for Plaintiff-Appellant

Vikum De Abrew SDSG for Defendants-Respondents

Written Submissions tendered on:

Plaintiff-Appellant on 09.09.2014 and 30.05.2019

Defendants-Respondents on 15.03.2019 and 10.06.2019

Argued on: 30.04.2019

Decided on: 05.09.2019

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Moneragala dated 29.11.2000.

The Plaintiff-Appellant (Appellant) instituted the above styled action and sought a declaration of title to the land more fully described in the schedule to the plaint, a declaration that the Appellant is entitled to possess the said land and building, order of eviction of the Defendants-Respondents (Respondents) and their agents and servants from the said land and damages.

The Appellant claimed that he had been in undisturbed and uninterrupted possession of the said land against the State and all others for a period of over 35 years and as such had obtained prescriptive title. It was further stated that steps had been taken under the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended (Act) in M.C. Moneragala Case No. 54018/95 against the Appellant for the said land and an order of eviction made on 09.01.1996.

The Respondents claimed that the land in dispute is state land and denied that the Appellant had obtained prescriptive title to the said land.

The learned Additional District Judge dismissed the action and hence this appeal.

Parties have taken up disparate positions on the nature of the action in that the Appellant claims it is an action instituted in terms of section 12 of the Act [Additional Written Submissions dated 30.05.2019 paragraph 5] whereas the Respondents contend that it is neither a *rei vindicatio* action nor an action in terms of section 12 of the Act. The learned Additional District Judge held that it is not an action filed in terms of section 12 of the Act as the Appellant was not evicted.

Rei Vindicatio Action

Reclame or *Rei vindicatio* is the action which arises under the head of property. It lies for the owner of anything movable or immovable, corporeal or incorporeal, against the possessor or, any person who has *mala fide* divested him of the possession to deliver it up to the owner with all its fruits then in existence and those which the *mala fide* possessor has already enjoyed, or

might have enjoyed under the deduction, however, of the costs and charges of the possessor in the thing [V.d.L.1.7.3].

Marsoof J. in *Latheef v. Mansoor* [(2010) 2 Sri.L.R. 333 at 350] sought to explain the origins of the *actio rei vindicatio* and its contemporary expression as follows:

> "Clearly, the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei)*, which had its origins in Roman Law. The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property, as opposed to a mere action in *personam*, founded on a contract or other obligation and directed against the defendant or defendants personally, wherein it is sought to enforce a mere personal right (*in personam*), The *vindicatio* form of action had its origin in the *legis actio* procedure which symbolized the claiming of a corporeal thing (*res*) as property by laying the hand on it, and by using solemn words, together with the touching of the thing with the spear or wand, showing how distinctly the early Romans had conceived the idea of individual ownership of property. As Johannes Voet explains in his *Commentary on the Pandects* (6.1.1) "to vindicate is typically to claim for oneself a right in *re*. All actions *in rem* are called vindications, as opposed to personal actions or conductions.""

Although the Appellant claimed in the plaint that he was dispossessed from the land in dispute in evidence he admitted that he continues to be in possession of the said land despite the Magistrates Court of Moneragala issuing an order of eviction as the said order was not enforced [Appeal brief page 26].

The question arises then whether the Appellant can maintain a *Rei vindicatio* action given that the formulation of *Voet* set out earlier implies that dispossession is a requirement for such an action. But it has been held that in an action *Rei vindicatio*, where the defendant contests the plaintiff's title, but denies ouster, and no ouster is proved, there is no objection to a decree, subject to an appropriate order as to costs, merely declaratory of the plaintiff's title to the property claimed as against the defendant, if such title be established [*Terunnanse v. Dias* (7 S.C.C. 145].

However later in *Pathirana v. Jayasundara* (58 N.L.R. 169 at 172) Gratiaen J. appears to state that dispossession is a requirement for the action to be maintained. In fact, in *Theivandran v. Ramanathan Chettiar* [(1986) 2 Sri.L.R. 219 at 222] Sharvananda C.J. held:

> "In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and **that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant**. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession." (emphasis added)

This principle was re-stated in *Luwis Singho and Others v. Ponnamperuma* [(1996) 2 Sri.L.R. 320].

In these circumstances, it is difficult to hold that the Appellant can maintain this action as a *rei vindicatio* action as he was not dispossessed.

Contrary to the above legal position, if the Appellant can maintain such an action it is established that an *actio rei vindicatio* can be brought against even the State [*Le Mesurier v. The Attorney-General* (5 N.L.R. 65].

Therefore, absence of any change in this position under common law and if the position set out in *Pathirana v. Jayasundara* (supra), *Theivandran v. Ramanathan Chettiar* (supra) and *Luwis Singho and Others v. Ponnamperuma* (supra) does not reflect the correct legal position, the Appellant can maintain an *actio rei vindicatio* against the State given that the State is contesting the title of the Appellant to the land in dispute.

The question that arises then is whether the Act has changed this position in common law in that a statute may extend the common law to cases which it did not cover, or may restrict or exclude its operation as to cases which it did cover, or may merge it wholly in the statute law, e.g. by codification [*Craies on Statute Law*, 7th Ed. (2nd Indian Reprint 2002), 338].

State Lands (Recovery of Possession) Act

The Act was intended to provide the State with an expeditious process to recover possession of state land from persons in unauthorized or unlawful occupation thereof. The main Act did not have a definition of what was meant by "unauthorized possession or occupation". The Act was amended by State Lands (Recovery of Possession) (Amendment) Act No. 29 of 1983 and one of the amendments was to include a new definition of the word " unauthorized possession or occupation" to mean "except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law and includes possession or occupation by encroachment upon state land".

The Act while providing the State with an expeditious method to recover possession of State land, also provided a safeguard in sections 12 and 13 which reads as follows:

> "12. මේ පනතේ විධිවිධාන යටතේ ඉඩමකින් නෙරපන ලද යම් තැනැත්තෙකු විසින් හෝ එහි අයිතිකරු යයි හිමිකම් පාන යම් තැනැත්තකු විසින් හෝ නෙරපීමේ ආඥාවේ දින සිට මාස හයක් ඇතුළත එම ඉඩමට ඇති ඔහුගේ අයිතිය ඔප්පු කිරීම සඳහා රජයට විරුද්ධ ව නඩුවක් පවරනු ලැබීම මේ පනතේ ඇතුළත් කිසිවකින් වලක්වනු නොලැබිය යුතුය."
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> "12. Nothing in this Act contained shall preclude any person who has been ejected from a land under the provisions of this Act or any person claiming to be the owner thereof from instituting an action against the State for the vindication of his title thereto within six months from the date of the order of ejectment."
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> "13. මේ පනත යටතේ යම් ඉඩමකින් නෙරපනු ලැබූයේ යම් තැනැත්තකු ද ඒ තැනැත්තා විසින් එම ඉඩමට ඇති තම අයිතිය ඔප්පු කිරීම සඳහා රජයට විරුද්ධ ව 12 වන වගන්තිය යටතේ පවරනු ලැබූ යම් නඩුවක් ඒ තැනැත්තාගේ වාසියට තීරණය කරනු ලැබූ අවස්ථාවක ඒ ඉඩමේ සන්තකය භාර දීමට තමාට බල කිරීමේ හේතුවෙන් දරන්නට සිදු වූ අලාභය වෙනුවෙන් යුක්ති සහගත වන්දියක් අයකර ගැනීමට ඔහු හිමිකම් ලබන්නේය."

"13. Where an action instituted under section 12 by any person against the State for vindication of title to any land from which he has been ejected under this Act has been decided in favour of such person, such person shall be entitled to recover a reasonable compensation for the damage sustained by reason of his having been compelled to deliver up possession of such land."

The issue that arises for consideration is whether the above provisions extended the common law to cases which it did not cover, or restricted or excluded its operation as to cases which it did cover, or merged it wholly in the Act by codification.

In deciding this issue, I am mindful of certain rules of interpretation that should guide this exercise.

Where there is a conflict between an act of Parliament and the common law, the act of Parliament prevails. Statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare [Bindra, *Interpretation of Statutes*, 10th Ed., page 239]. In the construction of statutes, you must not construe words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature [per Brown L.J. in *Re Cuno* ((1889) 43 Ch.D. 12,17]. It is a rule as to the limitation of the meaning of general words used in a statute, that they are to be, if possible, construed so as not to alter the common law [*Craies on Statute Law*, 7th Ed. (2nd Indian Reprint 2002), 188].

Section 12 of the Act applies to two classes of persons, namely (i) any person who has been ejected from a land under the Act or (ii) any person claiming to be the owner thereof.

The actio *rei vindicatio* can be maintained only by an owner [*De Silva v. Goonetileke* (32 N.L.R. 217), *Pathirana v. Jayasundara* (58 N.L.R. 169), *Mansil v. Devaya* [(1985) 2 Sri.L.R. 46], *Latheef v. Mansoor* [(2010) 2 Sri.L.R. 333]. To that extent the second category of persons in section 12 of the Act are in any event permitted under the common law to maintain such action and therefore that part of section 12 is merely a codification of the existing position under the common law.

Section 4 of the prescription Ordinance permitted any person who shall have been dispossessed of any immovable property *otherwise than by process of law*, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. However, this remedy is not available to a person evicted under the Act since the eviction is by virtue of a court order and hence by a process of law. Therefore, the first part of section 12 of the Act is an attempt by the legislature to provide a person who is not the owner but was in possession of the land from which he was dispossessed under the Act to institute an action. To that extent, the Appellant may be able to claim that he comes within section 12 of the Act.

However, the Act requires both classes of persons coming within section 12 to institute the action *within six months from the date of the order of ejectment*. This is a modification of the common law *actio rei vindicatio* in relation to an owner by providing a specific time limit by which the action should be filed.

There is no need for ejectment to have been done for the party to institute the action as held by the learned Additional District Judge. Any other interpretation leads to absurdity for example if the State obtains an order of ejectment but stays its hand until six months lapse from the date of the order of ejectment, the party ejected does not have a remedy under the Act. To that extent, section 12 modifies the requirement of dispossession of an owner as enunciated in *Pathirana v. Jayasundara* (supra), *Theivandran v. Ramanathan Chettiar* (supra) and Luwis *Singho and Others v. Ponnamperuma* (supra).

The learned Senior Deputy Solicitor General further contended that section 13 of the Act limits the relief that such a person can obtain only to damages. I have no hesitation in rejecting this submission. If that is the correct legal position it means that merely because a competent authority formed the opinion that a particular land is state land in terms of the Act, the ownership of such private land passes onto the State without action taken under for example the Land Acquisition Act to acquire the private land. I hold that in an action filed under section 12 of the Act the owner of the land in dispute can get a declaration that he is the owner of the said land.

Parties admitted [admission no. 3, Appeal brief page 22] that the order in M.C. Monaragala case no. 54018/95 was made on 09.01.1996 (V3) . This action was filed on 08.05.1996. Therefore, the action was filed within the time permitted by section 12 of the Act. The Appellant arguably could have filed the action as he claimed to be the owner. However, as the learned Additonal District Judge correctly held he has not established his ownership for the reasons more fully set out below and the action was correctly dismissed.

Prescription in relation to the land in dispute

The question arises whether in any event it is possible to claim prescriptive title to the land in dispute.

During the trial, the Respondents marked in evidence as "V6" a tracing bearing no. 5/95 and parts of FVP 172 with the tenement list [Appeal brief pages 108-110]. The land officer through whom these documents were marked testified that the land in dispute is lot 256 of FVP 172 [Appeal brief page 62]. This evidence was not challenged by the Appellant and as such becomes unchallenged evidence [*Edrick De Silva v. Chandradasa De Silva* (70 N.L.R. 169), *Seyed Shahabdeen Najimuddin v. Thureiratnam Nageshwari nee Sunderalingam and Others* (S.C./Appl/165/2010, S.C.M. 17.07.2013)].

The tenement list identifies lot 256 as "Reservation along Moragala Oya". These documents have been prepared on behalf of the Surveyor-General.

Court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate [Section 83 of the Evidence Ordinance].

Furthermore, as the trial took place before the repeal of the Land Surveys Ordinance section 6 therein is relevant which reads:

> "If any plan or survey offered in evidence in any suit shall purport to be signed by the Surveyor-General or officer acting on his behalf, such plan or survey shall be received in evidence, and may be taken to be prima facie proof of the facts exhibited therein; and it shall not be necessary to prove that it was in fact signed by the Surveyor-General or officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate, until evidence to the contrary shall have first been given."

Accordingly, a Court can relying on "V6" a tracing bearing no. 5/95 and parts of FVP 172 with the tenement list [Appeal brief pages 108-110] conclude that the land in dispute in this action is a reservation along Moragala Oya. [*Dehiwela-Mount Lavinia Municipal Council v. Fernando and others* (2007) 1 Sri.L.R. 293].

Section 52 of the State Lands Ordinance reads:

> "No person shall, by possession or user of any **State reservation** after the commencement of this Ordinance, acquire any prescriptive title to any such reservation against the State; and neither the Prescription Ordinance nor any other law relating to the acquisition of rights by virtue of possession or user shall apply to any such reservation after the commencement of this Ordinance."(emphasis added)

Therefore, in any event the Appellant could not have claimed prescriptive title to the land in dispute.

The learned counsel for the Appellant relied on *Kirimudiyanse v. Attorney General* (48 N.L.R. 438) and *Senanayake v. Damunupola* [(1982) 2 Sri.L.R. Sri.L.R. 621] to support his proposition that the Appellant can claim prescriptive title to the land in dispute after 30 years of possession. However, section 52 of the State Lands Ordinance was not in issue in those cases.

Prescription

Contrary to the legal position set out above, even if prescriptive title can be pleaded against the State for the land in dispute, the question is whether the Appellant has proved the necessary requirements to claim prescriptive title to the said land.

Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property the burden of proof rests fairly and squarely on him to establish the starting point for his or her acquisition of prescriptive rights [Gratiaen J. in *Chelliah v. Wijenathan* 54 N.L.R. 337 at 342].

The Appellant claimed [paragraph 3 of the plaint] that he was in possession of the land in dispute for over 35 years. As the plaint was dated 1996 this meant that he was claiming to have possession of the land in dispute from 1961. However, under cross-examination he testified that he entered the land in 1965 [Appeal brief page 30] whereas H.M. Gunawansa who was called on behalf of the Appellant claimed that the Appellant was in possession of the land from 1958 and that he had worked for him as a labourer [Appeal brief page 34]. Hence the Appellant has failed to clearly establish a starting point for his acquisition of prescriptive rights.

The principles of burden of proof and mode of proof where a party claims prescriptive title was succinctly stated by the Supreme Court in *Sirajudeen and two others v. Abbas* [(1994) 2 Sri.L.R. 365] as follows:

> "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.
>
> One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner."

The Appellant has failed to adduce any evidence which supports his claim for prescriptive title other than mere statements to state that he possessed the land in dispute. It was even admitted by him that his wife and family lived elsewhere. There is no evidence to show of any cultivation he has done on the land.

In this context it is important to bear in mind that prescriptive title is a means of defeating the paper title in a party and as such great caution is required before recognising such title. In *D.R. Kiriamma v. J.A. Podibanda and 8 others* (2005 B.L.R. 9 at 11) Udalagama J. adverted to some important points to be borne in mind in considering a claim of prescriptive title:

> "Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by title adverse to an independent to that of a claimant or plaintiff."

Hence the Appellant has in any event failed to prove his claim of prescriptive title.

For all the foregoing reasons and subject to my conclusions on the ability to institute an action under section 12 of the Act without dispossession, I see no reason to interfere with the judgment of the learned Additional District Judge of Moneragala dated 29.11.2009.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal