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

In the matter of an Appeal under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Appeal Case

No. 539/97 (F)

D.C. Kandy Case No.

16606/L

Senarath Gedara Somadasa,
No.449, Sir Kuda Rathwatte Mawatha, Kandy

Plaintiff

Vs.

H.M.Rasik alias Thajjik,
No.69A, Sirimawo Bandaranayaka Mawatha, Kandy

Defendant

And now between

Senarath Gedara Somadasa,
No.449, Sir Kuda Rathwatte Mawatha, Kandy

Plaintiff-Appellant

Vs.

H.M.Rasik alias Thajik,
No. 69A, Sirimawo Bandaranayaka Mawatha, Kandy

Defendant-Respondent (Deceased)

1A. Abdul Razak Mohamed Rushdi,
No.69A, Peradeniya Road (formerly known as Sirimawo Bandaranayaka Mawatha), Kandy

Substituted-Defendant-Respondent

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Mahinda Nanayakkara with D. Hettiarachchi for the Plaintiff–Appellant

N.R. Sivendran with R. Udumulla and M.T. Sivanandaraja for the substituted Defendant–Respondent

Written submissions tendered on:

05.03.2020 and 05.04.2019 by the Plaintiff–Appellant

05.03.2020 and 05.04.2019 by the substituted Defendant–Respondent

Argued on: 10.01.2022

Decided on: 23.02.2022

S.U.B. Karalliyadde, J.

The Plaintiff-Appellant (the "Plaintiff") instituted the instant action in the District Court of Kandy against the Defendant–Respondent (the "Defendant") seeking reliefs, *inter alia*, a declaration that he is the owner of the land described in the schedule to the plaint, eject the defendant and those who under him from the said land and damages. In the amended answer, the Defendant has sought to dismiss of the Plaintiff's action or if, the Court held with the Plaintiff recover Rs. 100,000/= as damages for the expenses incurred by the Defendant to construct the building standing thereon.

The case proceeded to trial on 29 issues and after the trial, the learned District Judge concluded that the Plaintiff has failed to prove his title to the disputed property and the

action has been dismissed accordingly. This Appeal is against that judgment dated 25.04.1997 of the learned District Judge.

At the argument of this appeal, the learned Counsel appearing for the Plaintiff argued that the impugned judgment should be set aside for the reason that it is not in conformity with the provisions of section 187 of the Civil Procedure Code. That argument is based on the fact that even though, Surveyor Mr. Palamakumbura who had carried out the survey on a Commission issued by the Court had testified at the trial, his evidence has not been considered by the learned trial judge and the issue numbers 1 and 2 which were dealt with the identification of the subject matter has been answered as "Not proved".

Those two issues raised on behalf of the Plaintiff were as follows;

"(1) (අ) පැමිණිල්ලේ සඳහන් ඉඩම 1975.04.15. වන දින මිනින්දෝරු ඊ. ඩී. සෝමදාසගේ අංක 789 දරන පිඹුරේ පෙන්වා ඇතිද?

(ආ) එම ඉඩම් කැබැල්ල 1972.03.19 වන දින මැන සාදන ලද සී. පලාමකුඹුර මහතාගේ අංක 2878 දරන පිබුරේ කැබලි අංක 1, 2 වශයෙන් නිරූපනය කර ඇතිද?

(2) එම ඉඩම් ප්‍රමාණයට අයත් වපසරිය පර්චස් 1.10 ක් ද?"

(at pages 60 and 61 of the Appeal brief)

Mr. Palamakumbura has superimposed Surveyor Mr. Somadasa's plan No. 789 on his plan No. 2878. Those two plans were marked and tendered at the trial to the Court marked as පැ-1 and ව-2 respectively. The learned Counsel for the Plaintiff admitted that the deed No. 1849 dated 17.11.1983 on which the Plaintiff derives title to the land in dispute was not produced at the trial. The learned Counsel further admitted that, albeit, the Plaintiff has made an application before the Court of Appeal seeking permission to produce his title deed by adducing fresh evidence, that application was dismissed and further, that the application for special leave to appeal to the Supreme Court against the Order of the Court of Appeal was also refused. The position of the learned Counsel for

the Plaintiff was that even though, the conclusion of the learned District Judge that the Plaintiff has failed to prove his title to the property in dispute is according to the evidence led before the Court, his conclusion that the identity of the property has not been proved is against the evidence led. Therefore, the learned Counsel argued that since a part of the impugned judgment is erroneous, the entire judgement should be set aside and send the case back to the District Court for a trial *denovo*.

In *rei vindicatio* actions the plaintiff must prove and establish his title to the property in dispute and the defendant need not prove anything. If the plaintiff fails to prove and establish his title, the action of the Plaintiff should fail. [1]

In the instant action, the Plaintiff has failed to produce his title deed (No. 1849) at the trial. Since the action of the Plaintiff is for a declaration of title, the learned District Judge had no option other than dismissing the Plaintiff's action. The argument of the learned Counsel was that although the Plaintiff has proved the identity of the land, the learned trial Judge has failed to consider the evidence in favour of the Plaintiff on the corpus and answer the issues on the corpus affirmatively in favour of the Plaintiff. When scrutinising the impugned judgment, it is apparent that the learned District Court Judge has mainly drawn his attention to the fact whether the Plaintiff has proved his title to the property in dispute to have a declaration of title in his favour.

Article 138 (1) of the Constitution, which deals with the jurisdiction of the Court of Appeal states thus;

"138. (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other

[1] *D. A. Wanigaratne Vs. Juwanis Appuhamy et al* 65 NLR 167, *Loku-Menika and others Vs. Gunasekara* (1997) 2 SLR 281, *Dharmadasa Vs. Jayasena* (1997) 3 Sri L.R 327, *De Silva Vs. Goonetilake* (1931) 32 NLR. 217 at 219, *Lokumanika Vs. Gunasekara* (1997) 2 SLR 281.

institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:

Provided that no judgement, 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****"* (emphasis added).

In *Gunasena Vs. Kandage & Others*[2], where the District Judge failed to adduce reasons for her findings in a r*ei vindicatio* action, Justice Weerasuriya held that,

"... Nevertheless, the question that has to be examined is whether or not such failure on her part had prejudiced the substantial rights of 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…"

In a matter pertaining to a *rei vindicatio* action which the District Judge has failed to evaluate the evidence following the same line of ruling his Lordship reiterated in the case of *Victor and Another Vs. Cyril de Silva*[3],

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

[2] (1997) 3 SLR 393 at 400.

[3] (1998) 1 SLR 41 at 46.

In the instant action even though, the learned District Court Judge has correctly held that the Plaintiff has failed to prove his title, his failure to consider and evaluate the evidence about the corpus is obviously an error in terms of section 187 of the Civil Procedure Code. Since the Plaintiff has failed to prove his title to the property his action for a declaration of title is liable to be dismissed. That failure of the trial Judge has not caused any prejudice to the substantial rights of the parties or occasioned a failure of justice. Therefore, in the light of the above stated Constitutional provisions and the case law, I hold that a necessity does not arise to interfere with the findings of the learned District Judge.

Hence, I affirm the impugned judgement dated 25.04.1997 of the learned District Court Judge and dismiss the appeal with costs. The District Judge is directed to enter a decree according to the impugned judgement

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL