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

1. M.Seyyadu
2. N.M.Basheer
3. M.M.A.Jaleel
4. A.R.Abbas

All of Ridigama, Rambukkandana

Plaintiff –Appellants

1. M.L.Seinideen and 12 others
of Ridigama, Rambukkandana,
Trustees of Nidhaul Islam,
Jumma Masjid,
Ridigama, Rambukkandana

Substituted-Plaintiff-Appellants

Vs.

1. Seyyed Mohammed Mohammed Thaha
and 02 others.
All of Ridigama, Rambukkandana

Substituted-Defendant-Respondents

C.A. NO. 467/98(F)
D.C.KURUNEGALA
CASE NO.1012/L

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : H.Vithanachchi for the Substituted Plaintiff-Appellants

W.Dayaratne, P.C. with R.Jayawardane and Ms.D.N.Dayaratne for the 1st Substituted-Defendant-Respondent

ARGUED ON : **19.06.2013 & 05.07.2013**

WRITTEN SUBMISSIONS FILED ON : 29.07. 2013 by the Plaintiff-Appellants
02.05.2013 by the Defendant-Respondent

DECIDED ON : **17. 09.2013**

CHITRASIRI, J.

The Substituted-Plaintiff-Appellants filed this appeal stating that it is wrong to have rejected the title to the land referred to in the second schedule to the amended plaint dated 04.04.1986, claimed by the original plaintiffs, (hereinafter referred to as the plaintiffs) in terms of the Service Tenures Ordinance No.4 of 1870. Accordingly, they sought to set aside the judgment dated 16.12.1997of the learned District Judge of Kurunegala.

In paragraph 4 of the said amended plaint, the plaintiffs have clearly stated that the mosque of which the plaintiffs were trustees became entitled to the land in dispute in terms of the provisions, particularly Section 24 of the said Ordinance No.4 of 1870. The aforesaid position has been put in suit by framing the issues bearing Nos.3 and 4 of the plaintiffs. The issues of the original defendant (hereinafter referred to as the defendant) had been framed to establish that the land in dispute had been given to one Seyyadu Mohammadu Gama Arachchi, by a 'Sannasa' from Ridi Viharaya to perform a particular Rajakariya. Accordingly, issue No.19 has been framed to establish that the defendant became entitled to the land, by way of a Deed of Gift executed by his father said Seyyadu Mohammadu Gam Arachchi who alleged to have obtained rights under the aforesaid Sannasa from Ridi Viharaya.

The learned District Judge rejected the claim of the defendant as well, having declined to accept the aforesaid claim made relying upon the Deed of Gift bearing No.46971 referred to above. The said decision of the learned District Judge had not been appealed against by the defendant. Therefore, this Court is not required to consider the correctness of the decision as to the rejection of the claim made by the defendant relying upon the title derived from the said deed 46971.

Accordingly, the issue before this Court is to determine whether the learned District Judge is correct when he decided to reject the title claimed by the plaintiffs in respect of the land in question. Admittedly, the land in question is the land referred to in the Second Schedule to the amended plaint dated 04.04.1986. The plaintiffs' claim basically emenates from the document marked P1 namely a page found in the Register which indicates "Panguwa" (subject matter) given by Ninda Lord (Ridi Viharaya) as well as the name of "Nilakaraya" (Jumma Mosque) of that Panguwa. This document was marked and produced in evidence by the then incumbent Priest of Ridi Viharaya namely Thibbatuwawe Sri Siddhartha Sumangala Thero. Even though the existence and/or the legality of the said document has been accepted by the learned District Judge, he has declined to determine that the plaintiffs could claim title to the land in dispute under Section 24 of the Service Tenures Ordinance No.4 of 1870. In concluding so, the learned District Judge in his judgment has stated thus:

" පැ.1 දරණ ලේඛණය මත ලැබුණ ප්‍රවේනි නිල අයිතිය එකී ප්‍රවේනි නිල පංගුව නොගෙවන්නේ නම් එකී ප්‍රවේනි හිමිකම රඹුකන්දන මුස්ලිම් ජුම්මා පල්ලිය සතුව පවතී යයි කිසිසේත් අර්ථ නිරූපනය කළ නොහැකිය. **ප්‍රවේනි නිල පංගුව ගෙවීම පැහැර හැරීමක් සමඟ නැවත එහි හිමිකම රිදී විහාරය සතු වනු ඇත.**" (emphasis added)

The above findings show that the learned District Judge was of the view that the failure to pay Paraveni Nila Panguwa by the Jumma Mosque does not become entitled the plaintiffs to obtain title to the disputed land in terms of Section 24 of the Service Tenures Ordinance No.4 of 1870. He was of the view that the title then reverse back to Ridi Viharaya. It is the decision that is being appealed against.

I will refer first to the particular provision in law upon which the appellants have relied on to make their claim. It is the Section 24 of the Service Tenures Ordinance and it reads thus:

> *"Arrears of personal services in cases where the paraveni nilakaraya shall not have commuted shall not be recoverable for any period beyond a year; arrears of commuted dues, where the paraveni nilakaraya shall have commuted, shall not be recoverable for any period beyond two years. If no services shall have been rendered, and no commuted dues be paid for ten years,and no action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost forever, and the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues therefore".*

In terms of the above section, the Pangu shall be deemed free from any liability if no services have been rendered and no commuted dues been paid for a period of ten years. The land in dispute had been given to Palliya Watta Jumma Mosque in the year 1870 subject to a particular Rajakariya being performed. Rajakariya to be performed in this instance was to pay a specified sum of money and to perform the services mentioned in the document P1. (vide proceedings at page 227, 228 and 509 of the appeal brief)

There is no dispute as to the non-payment of dues or non-performance of duties by the mosque for more than 40 years. The learned District Judge too has concluded so. (vide proceedings at page 439 and 452 of the appeal brief). The next question then arises is to ascertain whether the plaintiffs could then be entitled to the land given to the mosque by Ridi Viharaya, under Section 24 of the Service Tenures Ordinance. Plain reading of the said Section 24 shows that such non-performance or non-payment of dues would result the Nilakaraya becoming entitled to the land free from any liability.

The law referred to in the aforesaid section 24 had been interpreted in the case of **Herath v The Attorney General. [60 N.L.R. at 193]** In that decision Basnayake C.J. had noted the distinction between Paraveni Nilakaraya and Maruwena Nilakaraya and the nature of services Nilakarayas had to render to Nindagama Proprietor. [at page 207] In that decision, it was

further held that a Paraveni Nilakaraya was competent to institute a partition action in respect of his Pangu in the event he failed to pay the dues and failed to perform the duties. [at page 209] On appeal, the Privy Council in the same case namely **Herath vs. The Attorney General. [62 N.L.R at 145],** His Lordship L.M.D.De Silva J having taken a further step had endorsed a view expressed by Ennis J in **Appuhamy v Menike. (19 N.L.R. at 361)** In that decision Ennis J held thus:

> *"In my opinion a paraveni nilakaraya holds all the rights which, under Massdorp's definition, constitute ownership, but he, nevertheless, does not possess the full ownership, in that the Ninda Lord holds a perpetual right to service, the obligation to perform which attaches to the land".*

In the circumstances, it is clear that in terms of Section 24 of the Service Tenures Ordinance, a Paraveni Nilakaraya possesses all the essential attributes which a person must possess as an owner and that the Ninda Lord has only a bare right to services when Nilakaraya fails to attend to Rajakariya specified in Panguwa. Hence, it is seen that the mosque being the Nilakaraya in this instance would become entitled to the land subjected to Rajakariya in the event it fails to pay the dues or fails to perform Rajakariya mentioned in Panguwa for a period of ten years. Accordingly, I must state that the learned District Judge misdirected himself when he concluded that the ownership reverts back to

Ninda Lord in the event Nilakaraya fails to pay the dues or fails to perform the duties referred to in Panguwa.

However, the learned President's Counsel for the respondent submitted that Paraveni Nilakaraya should have had the physical possession of the land for him to claim title to the land subjected to Rajakariya if he is to claim title under Section 24 of the aforesaid ordinance.

Some assistance could be drawn from the decision in **Banda v. Soysa [1998 (1) S.L.R.255]** in considering the contention advanced by the learned President's Counsel. In that judgment His Lordship Justice G.P.S.de Silva C.J. held thus:

> *"the 300 acres could have been leased, as rightly submitted by Mr.Samarasekera for the plaintiff-appellant, only on the basis that the land was in the possession of the trustee of the temple, for* ***if it was paraveni land, it would have been in the possession of the paraveni nilakarayas".*** (emphasis added)

In the light of the above decision, it is seen that the Paraveni Nilakaraya, the plaintiffs in the instant case, should have established that the mosque had the possession of the land subjected to Rajakariya given by Ninda Lord, in order to claim title to the land even under Section 24 of the Service Tenures Ordinance No.4 of 1870.

At this stage it is pertinent to note that the very purpose of granting Panguwa by Ninda Lord is to permit Nilakaraya to be in possession of the land subjected to Panguwa. The document marked P1 which refers to Panguwa speaks for itself as to the said purpose. The way in which the possession of Panguwa is to be carried out has been described in the said Panguwa. In such a situation conditions imposed on Nilakaraya to pay or perform a duty becomes secondary as far as the possession of Panguwa is concerned. Therefore, once the Nilakaraya abandoned the possession of the land referred to in Panguwa, the said purpose of granting Panguwa would be loss.

In the circumstances, I am of the view that even though non-payment of dues or non-performance of services for ten years would be a reason for the Nilakaraya to become entitled to Panguwa in terms of the said Section 24, such a failure cannot be a reason to take away the very purpose of granting Panguwa, namely to be in possession of the land subjected to Rajakariya. Hence, the obligation on the part of Nilakaraya to be in possession of Panguwa would become it a precondition to claim rights under Section 24 of the Service Tenures ordinance. In the circumstances, it is my considered view that Nilakaraya who loses possession of Paraveni Panguwa will not be able to recourse to Section 24 and to claim rights under the Service Tenures Ordinance No.4 of 1870.

Then the question arises as to the kind of possession that the Nilakaraya should establish for him to claim title. Therefore, I will now consider whether the mosque, it being the Nilakaraya had been successful in establishing possession of the land subjected to Paraveni Panguwa. Possession in such a situation can be either physical possession or possession through an agent or a servant.

I will now turn to consider whether the plaintiffs were in possession either physically or through an agent, of the land subjected to Paraveni Panguwa. Preponderance of evidence is found to show that the defendant and his predecessors had been in possession of the land referred to in the Second Schedule to the plaint for well over 50 years (vide proceedings and the documents found at pages 345-351,554-558,578,579,580,584,585 and 589 of the appeal brief). In fact when the case was called before the learned District Judge on 10.03.1993, the plaintiffs themselves have admitted that the defendant and his predecessors had been in possession of this land for about 40-50 years (vide proceedings at page 217 of the appeal brief). Therefore, undoubtedly the defendant had been in physical possession of the land subjected to Rajakariya Panguwa for well over 40 years.

Then the question arises whether the defendant was acting as an agent or a servant of the plaintiffs when he possessed the land in question or in other words whether the defendant had possessed the land devoid of denying the

rights of the plaintiffs. The contention of the plaintiffs was that the original defendant and his father Seiyyadu Mohammadu Gam Arachchi had been living on the land pursuant to a license given by the mosque. The 4th plaintiff and Mohammadu Lebbe Mohamed Lebbe, in their evidence have stated that the first officiating priest appointed to the mosque was Ahamadu Lebbe, who was permitted by the mosque to occupy a house put up by the community on the mosque property (vide proceedings at pages 286 and 289 of the appeal brief). A relation of the defendant, who was called as a witness by the plaintiffs has clearly stated that the first officiating priest of the mosque was the said Ahamadu Lebbe who was not paid any remuneration for the services he performed. Undoubtedly, being the officiating priest, the mosque would have allowed Ahamadu Lebbe to occupy the house found on the disputed land as a servant of the mosque. The dispute as to the possession arose only after Seyyadu Mohhamad Gam Arachchi who is the son-in –law of the said Ahamadu Lebbe commenced possessing the land probably after he married the daughter of Ahamadu Lebbe, namely Sara Umma.

The evidence also reveals that after Ahamadu Lebbe, Mahammadu Lebbe was appointed as the priest. He is the father of the witness Mohammadu Lebbe. Pursuant to the death of Mahammadu Lebbe, the brother of the witness Mohammadu Lebbe namely, Abdul Hameed was appointed as the priest. (vide proceedings at pages 355, 356 of the appeal brief). However, no evidence is found to establish that those who became priests after Ahamadu

Lebbe were in possession of the land referred to in the second schedule to the plaint.

The said Ahamadu Lebbe's daughter namely, Sara Umma married the father of the defendant, namely Seyyadu Mohammadu Gam Arachchi. (vide proceedings at page 285 of the appeal brief). Admittedly, the family members of Seyyadu Mohammadu Gam Arachchi and his successors have been in occupation of the house situated on the land after Ahamadu lebbe ceased to be the officiating priest. Said Seyyadu Mohammady Gam Arachchi with his wife Sara Umma & family and their successors had been in possession of the land not because they were the priests or servants of the mosque. The defendant alleged that they were in possession of the land subjected to Rajakariya because of a Sannasa alleged to have been given to Seyyadu Mohammadu Gam Arachchi by Ridi Viharaya which had been referred to earlier in this judgment. There is no evidence to show that Seyyadu Mohammadu Gam Arachchi and Sara Umma and the original defendant were living on the land as agents or servants of the mosque. In the like manner they have been in possession of the land in dispute for at least well over 40 years. These facts have been elicited through the evidence of the 4th plaintiff himself. (vide proceedings at pages 320 and 321 of the appeal brief)

The case of the defendant could be seen in the evidence of the substituted 1st defendant namely, Seiyyadu Mohamed Mohamed Thaha. He, in his evidence has stated that his father, the original defendant, was the son of Seiyyadu Mohamadu Gam Arachchi. The aforesaid Seiyyadu Mohamadu Gam

Arachchi by Deed bearing no.46971 dated 19.01.1928 marked **"V9"** had gifted this property to his son Seyyed Mohammadu who is the defendant. Substituted defendant has further stated that his father having obtained permission from the Local Authority even constructed a building on this land. This position of the defendant strengthen the fact that Seyyadu Mohammadu Gam Arachchi along with his wife Sara Umma and their successors were never been servants or agents of the mosque and that they were possessing the land independently against the rights of the mosque.

In the light of the above, it is clear that the original defendant and his parents had been living on this land subjected to Panguwa, independent of the rights claimed by the mosque. At the same time, the defendant also alleged that he obtained title to the land by the execution of the deed marked V9 and it is on that right they were in possession of the land referred to in the second schedule to the plaint. Hence, it is clear that no evidence is forthcoming to show that the defendant was acting as agents or servants of the mosque for which the plaintiffs represent during the period he and his parents possessed the land which counts well over 40 years.

In the circumstances, it is my opinion that the plaintiffs have failed to establish that the Mosque had the possession of the land in question either physically of through an agent or a servant which to my mind is a pre-requisit to claim title in terms of Section 24 of the Service Tenures Ordinance.

Learned Counsel for the appellants also in his written submissions filed in this Court has referred to two other points of law referring to the provisions contained in the Prescription Ordinance and in the Trust Ordinance. I have not relied upon the Prescription ordinance in deciding this issue and therefore I do not wish to discuss the relevancy of the provisions contained in the Prescription Ordinance at this juncture. In any event, I do not find any provision in that law preventing the defendant claiming that the plaintiffs have not proved their case as required by the law.

The other argument advanced by the learned Counsel for the appellant is on the basis that the defendant being a member of the congregation of the mosque he becomes a beneficiary to the trust property. Hence, he has argued that the defendant being a beneficiary to a trust property he is prevented from claiming rights to that trust property. Once again it must be noted that this Court has not relied upon the provisions of the Trust ordinance to decide the issue. However, such a position which contains mixed questions of facts and law cannot be agitated at this appeal stage. No issues have been accepted or even suggested on those lines in the District Court either. Therefore, I am not inclined to consider the said argument advanced by the learned Counsel for the appellant relying upon the provisions contained in the Prescription and the Trust ordinance as well.

In the circumstances, it is my conclusion that there is sufficient evidence to establish that the defendant had been in possession of the land described in the Second Schedule to the plaint for well over 40 years, independently acting against the rights of the others, particularly against the rights of the mosque. Therefore, as I have already stated earlier in this judgment, the plaintiffs cannot claim title to the land in question under Section 24 of the Service Tenures Ordinance without establishing that the land in dispute was under the control of the mosque at all material times though the plain reading of Section 24 of the Service Tenures Ordinance seems to suggest such a proposition.

At this stage, it must be noted that as stated before in this judgment, the reason stated by the learned District Judge to have the plaint dismissed seem to be erroneous. However, for the reasons assigned hereinbefore in this judgment, his conclusion to have the action dismissed is correct. In such a situation this Court should not disturbed the decision of the lower Court. This position in law is clearly mentioned in the proviso to Article 138 of the Constitution of the Republic of Sri Lanka. It reads thus:

"Provided that no judgment, 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."

In the circumstances, I do not wish to interfere with the decision of the learned District Judge. For the aforesaid reasons, this appeal is dismissed. Having considered the circumstances of the case, I make no order as to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL