IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

CA 1137/96 (F)

DC Mt. Lavinia-2185/L

Neththasinghe Parasangilige Susantha Fonseka Samarasekara, No: 459, Galle Road, Mt. Lavinia.

Presently at No:39, Hospital Road, Homagama.

Plaintiff

Vs.

A. Abdul Azeez, No: 122A, Galle Road, Dehiwala.

Defendant

AND/BETWEEN

Abdul Azeez, No: 122A, Galle Road, Dehiwala.

Defendant-Appellant

Vs.

Neththasinghe Parasangilige Susantha Fonseka Samarasekara, No: 459, Galle Road, Mt. Lavinia.

Presently at No:39, Hospital Road,
Homagama.

Plaintiff-Respondent

Before : A.W.A. Salam, J.

Counsel : Lakshman Rohan Welihinda for the Substituted Defendant-Appellant and D. Akurugoda for the Plaintiff-Respondent.

Argued on : 20.03.2012

Written Submissions tendered on: 05.04.2013

Decided on : 12.09.2013

A.W.A. Salam, J.

The plaintiff-respondent (hereinafter referred to in this judgment as the "plaintiff") filed action against the defendant-appellant (hereinafter referred to in this judgment as the "defendant") seeking the following main reliefs...

1. That he be declared the owner of the premises bearing assessment No 122A and the land described in the 2nd schedule to the plaint.
2. A declaration that the defendant had unlawfully constructed shed with galvanise roof and plank.
3. An order directing the defendant to remove the shed and hand over the vacant possession of the strip of land to the south of the land described in schedule 2 to the plaint.

The defendant in his answer *inter alia* denied the main averments in the plaint and averred that in the year 1939 his

father came as the tenant of the plaintiff's father to a premises facing Galle Road and thereafter the said original owner built two boutiques and handed over the boutique bearing No 122A, to the defendant. He further averred that as the new boutique given to him is smaller in size than the previous boutique occupied by him the original owner separately reconstructed the shed in question and gave it to the defendant to be used as a kitchen.

One of the main grounds urged by the defendant as his defence is that he is a lawful and protected tenant of premises bearing No 122A and the land described in the 2nd schedule to the plaint. Admittedly, the said premises bearing No 122A and the land described in the 2nd schedule to the plaint belong to the plaintiff and the strip of land falls outside the boundaries of the 2nd schedule to the plaint has no connection to the substantial relief prayed in prayer (a) to the plaint.

It is noteworthy to repeat the reliefs sought by the plaintiff in prayer (a) to the plaint. That is a declaration that he is the owner of the land and premises described in the 2ndp schedule to the plaint. However, the ejectment sought in prayer (c) is from the land to the South of premises bearing assessment No 122A which is not the land described in schedule 2 to the plaint.

There was no dispute that the defendant is the tenant of the premises bearing assessment 122 A which stands on the land described in schedule 2 aforesaid. In order to eject the defendant

from the land to the South of the land described in schedule 2 to the plaint, on the ground that the defendant has put up an unauthorized construction and to have the said construction removed, the plaintiff is under obligation to establish his title to the said land, as the proceedings he has initiated against the defendant is in the nature of a declaration of title.

The issues raised by the plaintiff at the trial need to be examined with much attention being paid to the corpus identified therein. Issue No 1 reads as follows..

> Is the defendant in possession of the part of the land shown by red lines in plan 4849 produced along with the plaint marked as X?

It is trite law that in this suit relating to declaration of title to immovable property the burden of proof is on the party who asserts ownership and where, in an action for declaration of title to land, the defendant is in possession, the burden is on the plaintiff to prove that he has *dominium.*

In the case of Peiris Vs Sarunhamy 54 NLR 207, it was laid down that the initial burden of proof in a *rei vindicatio* action is on the plaintiff to prove his title and further established the identity of the corpus.

In the case of Wanigaratna Vs Juwanis Appuhamy 65 NLR

165, it was held that in a *rei vindicatio* action the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor, unsatisfactory or not established.

Undoubtedly, the position is totally different in a case where a landlord sues his tenant who may later have turned out to be a trespasser for a declaration of title or the owner of a land who sues his licensee for the similar declaration after the termination of the licence. They cannot be strictly categorised as *rei vindicatio* actions. In such cases strict proof of ownership as contemplated in a *rei vindicatio* action may not be necessary. But in this case, it has to be noted that the plaintiff had not sued the defendant on the basis that the latter having entered the land and premises from which his ejectment is sought, as a tenant and later turned out to be a trespasser. Here, the position maintained by the plaintiff is totally different. There is no dispute that the plaintiff is the owner of the allotment of land described in schedule 2 to the plaint and the premises bearing 122A standing thereon. To this effect there is a clear admission made by the defendant that the plaintiff is the owner of the said land and premises, particularly by reason of the contract of tenancy that subsists between the parties.

The action filed by the plaintiff to have the defendant ejected from the land to the South of premises bearing assessment No 122A is totally a different land on the own showing of the plaintiff and he has failed to plead title to the said land in his

plaint. In addition, he has failed to establish his title to the portion of the land from which he sought the ejectment of the defendant, although it is incumbent upon him.

Issue No 1 has been raised as if the defendant had admitted the ownership of the plaintiff in respect of the land to the South of the allotment of land described in schedule 2 to the plaint. Therefore, the admission of the defendant of the contract of tenancy relates to the land and premises which fall outside the land and the shed from which the defendant is sought to be ejected, on the footing that he is an unlawful occupier of the said land & shed and that he has constructed an unauthorised structure on it.

The defendant has specifically raised the question as to whether the plaint filed in the action is contrary to Section 35 (1) of the Civil Procedure Code. In terms of Section 35 of the Civil Procedure Code, in an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any other cause of action, shall be made unless with the leave of the court, except in

(a) Claims regarding mesne profits or arrears of rent in respect of the property claimed;

(b) damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and

(c) claims by a mortgagee to enforce any of his remedies under the mortgage.

The example given in the Civil Procedure Code to Section 35 may be useful and therefore is reproduced below.

> A sues B to recover land upon the allegation that the land belongs to C, and that he A, has bought it of C. A makes C a party defendant; but he cannot, without leave of the court, join with this claim an alternative claim for damages against C for non-performance of his contract of sale.

As has been rightly contended by the learned Counsel for the defendant the causes of action stated in sub-paragraphs (b), (c) and (d) of paragraph 15 of the plaint have been joined with the cause of action set out in sub-paragraph (a) in paragraph 15. This is a clear violation of Section 35 of the Civil Procedure Code, and the learned trial judge has failed to properly address his mind to this issue. Even though the learned District Judge has answered issue No 12 which is based on the alleged violation of section 35 of the Civil Procedure Code, the learned District Judge has not given any reason acceptable in law for his finding relating to issue No 12.

In short, it would be seen that the prayer to the plaint refers to a declaration of title in respect of the land in schedule 2 to the plaint. As suggested by the learned counsel for the defendant issue No 7 is referable to the 2nd schedule to the plaint and not the 1st schedule to the plaint. Issue No 1 is in fact based on the title to the property described in the 1st schedule to the plaint.

Even if the plaintiff establishes his title to the land described in

the 1st schedule to the plaint yet he cannot get the defendant ejected from the land and premises described in the 2nd schedule as he has not asked for the ejectment of the defendant from the land and premises described in the 2nd schedule.

In the circumstances, it is quite clear that the plaintiff has failed to put the correct issue before court and there is no nexus between the prayer and the declaration of title sought.

As has been correctly submitted by the learned counsel for the defendant even if the answer to issue 1 is in the affirmative, yet the plaintiff is entitled to have issue No 7 answered in the same manner as No 1 relates only to lot B in plan No 513. Therefore it could be seen that the judgment of the learned District Judge has been entered on the wrong premise that the plaintiff has established his rights to the land on which the galvanize roofed shed stands.

By reason of the learned District Judge having entered judgment for the plaintiff without clear proof of his title to the land in question, a serious injustice has occurred resulting in the travesty of justice.

No purpose would be served by sending the case back for retrial, as the outcome of the plaintiff's action has to be same on the present pleadings even if evidence is led once again. In the circumstances, I have no option but to set aside the judgment of the learned District Judge and dismiss the plaintiff's action for

want of proof of title to the portion of the land where the defendant is said to have put up a shed.

Accordingly the appeal is allowed and the impugned judgment set aside subject to costs.

Judge of the Court of Appeal

NR/-