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

In the matter of an Appeal under Section 754(1) of the Civil Procedure Code.

CA Case No. 1218 / 1996 (F)

DC Galle Case No. L / 12950

1. **Mohamed Mahful Abdul Wakeel,**
2. **Mohamed Mahful Mohamed Muzammil,**
3. **Mohamed Mahful Mohamed Sally**

All of "Hill View",

Haliwela,

Galle.

Plaintiffs

-Vs-

Malwenna Hewage Sirisena,

Digapotha-godakanda,

Hayley Road, Haliwela,

Galle.

Respondent

And Now Between

1. **Mohamed Mahful Abdul Wakeel,**
2. **Mohamed Mahful Mohamed Muzammil,**

3. **Mohamed Mahful Mohamed Sally,**

   All of "Hill View",

   Haliwela,

   Galle.

   Plaintiff - Appellants

   -Vs-

   Malwenna Hewage Sirisena,

   Digapotha-godakanda,

   Hayley Road, Haliwela,

   Galle.

   Defendant - Respondent

1. **Ranthetige Gunawathie,**
2. **Malwenna Hewage Ramanie Malkanthi,**
3. **Malwenna Hewage Rajeewa Saman Kumara,**
4. **Malwenna Hewage Rasika Nilminie,**
5. **Malwenna Hewage Ranjith,**
6. **Malwenna Hewage Raveendra Hiroshan**

   All of Digapotha-godakanda,

   Hayley Road, Haliwela,

   Galle.

   Substituted Defendant - Respondents

BEFORE	:	**A.H.M.D. Nawaz, J,**
COUNSEL	:	Faisz Mustapha, P.C. with Amarasiri Panditharatne for the Plaintiff-Appellants. Lasitha Chaminda for the Defendant-Respondents.
Written Submissions on :		26.05.2015 (For the Defendant-Respondents) 04.06.2015 (For the Plaintiff-Appellants)
Argued on	:	11.05.2015, 16.06.2015
Decided on	:	27.09.2016

A.H.M.D. NAWAZ, J,

The Plaintiff-Appellants (hereinafter referred to as "the Plaintiffs") instituted this action against the original Defendant-Respondent (hereinafter referred to as "the Defendant"), in the District Court of Galle for a declaration that they be declared entitled to the land called ***Digapothagodakanda,*** in extent 6 acres 2 roods and 5 perches and morefully described in paragraph 2 of the plaint and for ejectment of the Defendant from the house standing thereon and the soil covered thereby, and for damages and costs.

The position of the Plaintiffs is that in or about 1970, the Defendant was permitted to build a small house on the land, with their leave and licence, which they terminated by their letter dated 26.05.1993 requesting him to vacate the land but in spite of this termination the Defendant continued to be in possession of the said land to their detriment and consequently they made a complaint to the Conciliation Board which could not settle the matter and the dispute finally resulted in this action being filed in the District Court.

The Defendant filed his answer on 18.10.1995 denying the averments in the plaint and stating that the land that he occupied was in extent about 30 to 40 perches with

specific boundaries and his occupation had been without any one's permission since 1970, and his uninterrupted and independent possession thereof had inured to him prescriptive rights to **the portion of the said land**. The Defendant further averred that the Plaintiffs had not identified the said land definitely and therefore they had no cause of action that would ground an action against him -*see* paragraph 7 of the Answer.

On 22.04.1996, the trial commenced and the Plaintiff raised issues 1 to 6 and the Defendant raised issues 7 to 9.

The 1st issue raised on behalf of the Plaintiffs reads as follows:

> *Have the plaintiffs become the owners of the land which is the subject matter of the action by virtue of the title set out in the plaint?*

This issue deals with the title to the land which is the subject matter of the action. The Plaintiffs produced deeds marked P2 to P7 in order to establish their title to the land. The learned District Judge of Galle has accepted these deeds and held that in terms of the deeds P3 to P7, it must be admitted that the Plaintiffs are the owners of the subject matter of this action -*see* Page 5 of the judgment. Accordingly, the issue no. 1 as regards title of the Plaintiffs has been answered in the affirmative. It has to be observed that there is no cross-appeal on the part of the Defendant against this finding. Thus title of the Plaintiffs to the land has been established.

As against Issue No. 1, the Defendant raised Issue No. 7, which reads as follows:-

> *"Did the Defendant in or about 1970, without the permission of anyone, come into occupation of **this land** and build a house **on a separate portion of this land** with defined boundaries and acquire a prescriptive title thereto, by possessing the **said portion of the land** adversely, uninterruptedly and independently against the rights of the Plaintiffs and their predecessors in title, for a period of ten years preceding the date the Plaintiffs states a cause of action accrued?* (Emphasis added).

In this issue which flowed from paragraph 6 of the answer the Defendant has clearly admitted that the land possessed by him is a portion of **the land claimed by the Plaintiffs.** I take the view that this is an admission on the part of the Defendant in his answer and though this issue was rejected by the learned District Judge upon an

objection by the Counsel for the Plaintiffs, the Defendant cannot seek to resile from his pleaded admission.

The objection of the Counsel for the Plaintiffs to the issue was on a different ground. The counsel objected to the issue on the ground that the Defendant had not described the portion with boundaries although he had alluded in his answer to a portion of the subject matter with "defined boundaries".

Since the Defendant had failed to identify the land he alleged he possessed with clear boundaries, the Court upheld the objection raised by the Plaintiffs' counsel and rejected issue no. 7.

As is evident, this issue no. 7 is on prescriptive possession and consequent title of the Defendant. When this issue is rejected by the Court, it is very clear that the Court has not made its determination on the Defendant's prescriptive title or rights. If that be so, there is no issue before Court to decide on the Defendant's possession, whether lawful or unlawful. Even when answering the issues raised by parties, the learned District Judge has stated in his judgment that issue no. 7 has been rejected by the Court. Hence, it is clear that the Defendant has not proved his prescriptive possession or for that matter title to his portion.

In the case of ***Siyaneris v. Jayasinghe Udenis De Silva***[1] the Privy Council held that:

> *"In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant."*
>
> *If a person goes into possession of land as an agent of another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal."*

In view of the above decision, if the Plaintiffs' legal title is admitted by Court, the burden shifts to the Defendant to prove his possessory right, whether it is lawful or not and whether it is independent of the Plaintiffs' title or not. This burden of proof by the Defendant has not been properly and satisfactorily discharged by the Defendant in the absence of an issue to that effect. The pith and substance of a finding in favor of the Plaintiffs in regard to their title and that there is no lawful

[1] 52 N.L.R 289

possession that has been established by the Defendant cumulatively show that the Defendant has furnished no evidence of lawful possession before Court.

A similar view was taken in the case of ***Wadduwage Dharmadasa v. Manthree Vithanage Jinasena***[2] where Anil Gooneratne J. held that,

> *"in a rei vindicatio action the Plaintiff must prove and establish his title. If the Plaintiff has so established his title the burden of proof is shifted to the defendant to establish his lawful occupation if any. When the plaintiffs' title is accepted by Court, the burden is on the defendant to establish his prescriptive possession."*

The written submission filed on behalf of the Defendant (from page 3 to 10) refers to the title of the Plaintiffs and states that the Plaintiffs have failed to establish their title and identity of the land. But this is an unsuccessful attempt in vain. When the Court has decided on the title of the Plaintiffs and held that the Plaintiffs have established title to the said land, and rejected issue no. 7 of the Defendant, which issue is vital to prove his prescriptive rights, the only option available to the Defendant was to have preferred a cross-appeal against these findings. But the Defendant has not preferred such an appeal or cross-appeal and therefore he cannot be heard to say in his written submissions that the Plaintiffs have no title to the land in dispute.

Whilst the Plaintiffs grounded their claim to title to the property on several deeds which give them a chain of title and such a claim was established on a preponderance of evidence, the Defendant's position has been a mere assertion of prescriptive possession of the said land. But this assertion remains unproved and unestablished.

The Defendant's contention that the Plaintiffs failed to identify the land in dispute cannot be accepted because the Defendant himself has stated that the land he is occupying is a portion of the Plaintiffs' land. This has to be construed as an admission by the Defendant. Furthermore, the Plaintiffs' land is called **Digapothagodakanda,** and the land possessed by the Defendant is also known as **Digapothagodakanda.** This is very clear on a perusal of the caption of the plaint and answer. The Defendant's address given in the caption clearly shows that he had

[2] (2012) B.L.R Vol XIX, Part II, p 336.

been living on the land called **Digapothagodakanda**. He cannot deny this fact. If he now takes up the position that he had been staying on some other land, there must have been an issue framed on it and evidence led to prove such possession of the different land. Nowhere has he stated that the land which he occupies is a different land by a different name.

It must be noted that the Plaintiffs state that they gave leave and licence to the Defendant to put up a house on the said land in 1970, and the Defendant also states that he came into possession of the land in 1970. This statement of the Defendant corroborates that his possession commenced from the time the leave and licence of the Plaintiffs was granted, which according to the Plaintiffs was in 1970.

No doubt the identity of the disputed land is necessary in view of Section 41 of the Civil Procedure Code, **only** when the dispute is over a specific portion of a larger land. In this case, though the Defendant occupies a portion of the Plaintiffs' land, the Plaintiffs have filed the action in respect of the whole land called **Digapothagodakanda,** in extent 6 acres 2 roods and 5 perches, which has been identified by Plan P1. The Plaintiffs' position is that they are owners of the entirety of the land called **Digapothagodakanda,** which they have satisfactorily proved and the Court also answered their issue no. 1 in the affirmative. If the ownership or title of the Plaintiffs is satisfactorily proved, it is settled law that the burden is on the Defendant to prove his possession as independent of the Plaintiffs' title. But as stated before, the unassailable fact remains that the Defendant has failed to prove his lawful possession.

The Defendant admittedly occupies a portion of the Plaintiffs' land called **Digapothagodakanda.** But the argument on behalf of the Defendant proceeded on the basis that he occupied a different land despite his unequivocal admission that he was on a portion of Plaintiffs' land. In such a situation the burden of proof of the Defendant is traceable to the second limb of Section 101 of the Evidence Ordinance, which states:

> *'When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".*

Thus the burden is on the Defendant to prove that the land he occupies is not a portion of the Plaintiffs' land but a different land and that his possession is nothing to do with the Plaintiffs' land. The Defendant has also changed his position and

states that he is occupying the road frontage of Hayley road. If that be the position of the Defendant, he must prove that the land he now occupies is not the land of the Plaintiffs but a road reservation by a plan, which he has failed to do. The Defendant cannot blow hot and cold in the same breath.

Victor Perera J. in ***Kandasamy v. Gnanasekeram***[3] said:

> *"A man should not be allowed to blow hot and cold, to affirm at one time and deny at another"-*

See comparable dicta of Sharvananda, C.J in ***Ranasinghe v. Premadharma***[4], wherein His Lordship followed Victor Perera J. in ***Kandasamy v. Gnanasekeram.***[5]

Hence, it does not appear sound law to permit the Defendant to state different things about the identity of the land at different times, when he asserted in his answer that he had been living on a portion of Plaintiffs' land.

Even the contention that *"Once issues are framed the case which the Court has to hear and determine becomes crystallized in the issues and the pleadings recede to the background"*[6] should not be misconceived. Although that is the correct position for purposes of resolving the fact in issue in a given case, yet the admissions of the parties in their respective pleadings cannot be lightly ignored. The Defendant's statement in his answer that "he is occupying 30 or 40 perches of the land which is **a portion of the said land**" cannot be totally displaced by a subsequent denial, subject of course to the rules on amendment of pleadings. Given that there is no amendment of the answer filed, I hold that it will be difficult for the Defendant to resile from his admission that the portion in which he has been living is part of the Plaintiffs' land.

This is congruent with Section 58 of the Evidence Ordinance, which states:

> *"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit* ***at the hearing****, or which,* ***before the hearing****, they agree to admit any writing under their hands, or which* ***by any rule of***

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[3] S.C. Appeal No 60/82 (C.A. Appeal No 629/79, D.C. Colombo 2096/RE, S.C. Minutes of 16.6.1983).
[4] (1985) 1 Sri.LR 63.
[5] *Supra*
[6] *Hanaffi v Nallamma* (1995) 1 Sri.LR 73

pleading *in force at the time they are deemed to have admitted by their pleadings:*

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."

According to this section, the admission of a fact could take place at three stages-to wit- (i) at the hearing or trial, (ii) before the hearing or trial, or (iii) by rule of pleading. The admission I have alluded to is found in paragraph 6 of the answer. In other words it was at the stage of pleadings, which would then be governed by the rules of pleading obtaining in Sri Lanka namely Civil Procedure Code. Before I turn to admissions by rule of pleadings, let me also advert to Section 8(1) of the Evidence (Special Provisions) Act No. 14 of 1995, which mirrors the spirit of formal admissions in Section 58.

"in any proceedings it shall not be necessary for any party to tender any evidence of any fact, which is admitted by the opposing party."

Admissions by rule of pleading - Civil Procedure Code

Admissions made in pleadings are also classified as formal admissions within the meaning of Section 58 of the Evidence Ordinance. They constitute formal admissions because they are utilized by Court to understand the scope of the action and admissions before Court and issues more often than not flow from pleadings. The rules of pleading found in the Civil Procedure Code bear repetition. Section 75(d) of the Civil Procedure Code requires that the answer should contain a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence. These would be express admissions, as for example, where the Defendant admits the execution of a promissory note, but pleads want of consideration. [7]

If the Defendant wishes to dispute any averment in the plaint, he is at liberty to raise it in his answer. The provisions of Section 75 are imperative and are designed to compel a Defendant to admit or deny the several allegations in the plaint so that the question of fact to be decided between the parties may be ascertained by court

[7] *See* Section 75 (d) of the Civil Procedure Code.

on the day fixed for the hearing of the action. It is a rule of pleading in England that facts alleged in pleadings, if not denied, are deemed to be admitted.

The effect of the failure of a Plaintiff to deny by replication the statements made by a Defendant in his answer was dealt with in ***Lokuhamy v. Sirimala***[8] and ***Fernando v. The Ceylon Tea Company Ltd***[9]. In these cases, the opinion was expressed that the above rule of the English Law is not applicable under our law. But in ***Fernando v. Samarasekere***[10], our Supreme Court held that where a Defendant does not deny an averment in the plaint, he must be deemed to have admitted that averment. Basnayake J. referred to Section 75(d) of the Code as an imperative provision and distinguished the two earlier decisions on the ground that they dealt with the failure of a Plaintiff to deny by replication the statement made by a Defendant in his answer.

In the instant case before this Court, the Defendant's position is that he came to the land of his own volition and without the permission of anyone in 1970, but he admitted that he has remained on the said land within a defined boundary -*see* paragraph 6 of the answer.

This express admission in the answer becomes admissible in terms of both Sections 21 and 58 of the Evidence Ordinance. The possession of a portion of the plaintiffs' land is admitted and by virtue of Section 58 of the Evidence Ordinance, no evidence is necessary to prove the fact of possession.

Let me digress at this stage on the question of admissions. We come across "admissions" for the first time only in Section 17 of the Evidence Ordinance because the first exception to the hearsay rule in the Evidence Ordinance begins from Section 17. Section 17(1) of the Evidence Ordnance defines an admission as a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. Section 17(1) of the Evidence Ordinance deals with informal admissions, whereas Section 58 deals with formal admissions. Whichever category that an admission belongs to, it has to be remembered that Section 21 of the Evidence Ordinance renders an admission admissible against the maker of the admission. Section 58 of the Evidence Ordinance makes it quite clear that an out of

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[8] (1892) 1 S.C.R 326.
[9] (1894) 3 S.C.R 35.
[10] 49 N.L.R 285.

court statement such as an admission in an answer but filed before Court is probative of its truth against the Defendant.

Formal admissions in terms of Section 58 can be relied upon for the truth contained therein. If the Defendant has made admissions in his answer as in this case, the admission can be relied upon for its truth and Section 58 makes it clear and no evidence is necessary to be led in order to prove such admission. If there is a formal admission, Section 58 of the Evidence Ordinance predicates that it cannot be withdrawn nor could contrary evidence be given to whittle down the effect of the admission. A slew of Sri Lankan cases confirms this principle.

In the context of an admission made by a Defendant it is pertinent to cite Bertram C.J. in the case of ***Mariammai v. Pethrupillai***[11]:

> *"If a party in a case makes an admission for whatever reason, he must stand by it; it is impossible for him to argue a point on appeal which he formally gave up in the Court below."*

On the question of admission of fact, it is relevant to reiterate the observation of H.N.J. Perera J, in ***Jayalath v. Karunathilake***[12]:

> *"It is well established principle of law that parties to a case cannot resile from admissions of fact. While it is sometimes permissible to withdraw admissions on questions of law, admissions of fact cannot be withdrawn."*

So it is quite clear that formal admissions of fact which fall within Section 58 of the Evidence Ordinance cannot be withdrawn. They would operate as estoppel against the maker of admissions. Sometimes admissions in answers are specifically recorded as admissions. Merely because some admissions in an answer as in this case are not recorded specifically so, they do not cease to be admissions. Unrecorded admissions can equally be utilized against the maker. As I have stated before, the defendant sought to frame an issue on paragraph 6 of the answer which contains the admission, but the issue was rejected because the assertion of defined boundaries that was asserted in the said paragraph was not supported by evidence to identify the portion of the land he was in possession of -*see* page 35, 36 and 37 of the brief for the issue No 7, objections thereon by counsel for the plaintiffs and order of the

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[11] 21 NLR 200

[12] (2013) 1 Sri.LR 337

learned District Judge. But the admission in the answer would become admissible against the defendant by virtue of Section 58 of the Evidence Ordinace.

Admissions in pleadings in India

Across the Palk Straits the Indian Supreme Court in the case of ***Nagindas Ramdas v. Dalpatramlchharam alias Brijram and others***,[13] echoed the following dicta on admissions in pleadings:

> *"**Admissions,** if true and clear, are by far the best proof of the facts admitted. **Admissions** in pleadings or judicial **admissions,** admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary **admissions.** The former class of **admissions** are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary **admissions** which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."*

Assertion of another land in appeal

Moreover, in the teeth of the Plaintiffs' assertion that the Defendant got into the Plaintiffs' land with their leave and licence, the Defendant never raised an issue on his possession of a different land nor did he attempt to adduce evidence to prove that the land in dispute was a different land from that claimed by the Plaintiffs. In the absence of such a plea and evidence, the presumption is in favour of the Plaintiffs that the land in dispute is a portion of the Plaintiffs' land and that Defendant got into the land in dispute upon their leave and licence. There was argument urged before this Court that the Defendant had been living on another land. Though this assertion is not sustainable in view of the admission I have already referred to, evidence given by the Defendant puts paid to this argument. The Defendant admitted in cross-examination that he had been in occupation of the Plaintiffs' land -please *see* page 63 of the original record. If the Defendant had wanted to establish that he was living on a different land, there must have been an issue raised and evidence led. He could have produced a plan and established that another land with the same name existed and he was its occupant. This has not

[13] (1973) SC 375, AIR 1974 SC 471, 1974 1 SCC 242

happened and I therefore reject the contention raised in appeal that the Defendant was on another land.

Section 110 of the Evidence Ordinance enacts:

> *"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".*

Accordingly, the Defendant has failed to discharge his burden of giving satisfactory evidence to establish that the Plaintiffs are not the owners of the land in dispute.

I have already referred to the burden of proof devolving on the Plaintiffs. The learned District Judge has found in their favor as regards title. I made reference to the second limb of Section 101 of the Evidence Ordinance and the Illustration (b) to this section states as follows:

> *"'A' desires a court to give judgment that that he is entitled to certain land in the possession of 'B' by reason of facts which he asserts, and which 'B' denies to be true. 'A' must prove the existence of those facts."*

The Plaintiffs have discharged their burden and as against the finding of the learned District Judge, the Defendant has not adduced any evidence to show that the land in dispute is a different land and that it is not a portion of the Plaintiffs' land. The witness Marambahewage Piyasena who was called by the Defendant to give evidence for him is a close relative of the Defendant but this witness has not given any useful evidence to support the Defendant's story, other than stating that the Defendant had got into the land in 1970.

Since the Defendant asserted that his land was a different land, it was his obligation to establish that fact satisfactorily. It must be mentioned here that the Defendant's Counsel made a belated application for a commission but the court turned it down. As I said before, the Defendant should have taken a commission beforehand and proved that his land is not a portion of the land of the Plaintiffs. If a plan on such a commission had been taken, it would have established whether the land in occupation by the Defendant was part of the land belonging to the Plaintiffs or a different land. In absence of such a plan, it is a clear admission by the Defendant that the land he occupies is the land called **Digapothagodakanda.** (as stated in the caption of the plaint and answer).

Thus, having admitted in his answer that the **said land is a portion** of the Plaintiff's land, as stated above, the Defendant is estopped from taking a new stand in appeal that the portion in dispute is a different land.

When the Defendant's application for a commission was rejected by Court, he should have taken up an interlocutory appeal, at that stage, or agitated that question in a cross-appeal. The Defendant has failed to take either course of action.

In the absence of satisfactory proof of prescriptive possession by the Defendant, the Plaintiffs' statement that the Defendant's possession was upon their leave and licence holds good. It is admitted by the Defendant that just like him there are five or six other families which have been occupying some other portions of the Plaintiffs' land. This is permissive possession with the leave and licence of the Plaintiffs. This gives a presumption that the Defendant also must have got into the land with the leave and licence of the Plaintiffs.

Inherent error in the judgment

Having found that the Plaintiffs have established their title to the land in question and concluded that the Defendant has not established his lawful possession, the finding of the learned District Judge that the Plaintiffs have no cause of action to institute and maintain this action is erroneous. It is a *non sequitur.* As a result the answers given by the learned District Judge of Galle to issues no. 8 and 9 are also erroneous. In the circumstances, the learned District Judge's judgment should be set aside. I proceed to set aside the judgment dated 29th October 1996 and enter judgment for the Plaintiffs as prayed for.

Judge of the Court of Appeal