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

C.A. Case No.522/1999 (F)

D.C. Balapitiya Case No.914/L

1. Witharana Balahamy
2. Jayasinghe Gunadasa

Both of Haththaka

1st and 2nd DEFENDANT-APPELLANTS

-Vs-

1. Wijayasundera Pathirana Arachchige Gnanasena of Haththaka

PLAINTIFF-RESPONDENT

3. P.D. Harmanis and three others

All of Haththaka

3rd to 6th DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Bimal Rajapakshe with Muditha Perera and S.A. Kulasooriya for the Defendant-Appellants.

Vidura Gunaratne with Manori Pathirana for the Plaintiff -Respondent.

Written Submissions on: 10.10.2016 (1st and 2nd Defendant-Appellants)

04.03.2016 (Plaintiff-Respondent)

Decided on : 24.11.2016

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent instituted this *rei-vindicatio* action praying, *inter alia*, for;

a) declaration of title for him and 3rd to 6th Defendants (his siblings) is respect of a land known as "Kethikanadeniya Owita" as depicted in the schedule to the plaint;

b) ejectment of the 1st and 2nd Defendants from the land and restoration of possessions;

c) damages in a sum of Rs. 800 as prayed for it in the plaint.

The Plaintiff traced his title to his father Wijesundera Pathirana Arachchige Davith Singho who, the Plaintiff alleged, owned the land in question. On his intestacy, the Plaintiff averred that title devolved on his children, namely the Plaintiff, Missie Nona (3rd Defendant), Hinnihamy (4th Defendant), Wijesena (5th Defendant) and Hinninona (6th Defendant). The Plaintiff stated further in his amended plaint his siblings-the 3rd, 4th, 5th and 6th Defendants did not join him in the litigation to sue the 1st and 2nd Defendants, he made them Defendants to the case.

The cause of action alleged against the 1st and 2nd Defendants-a wife and husband combination was that they forcibly entered the land on or around 14.11.1983 and unlawfully tapped the rubber trees for latex and ever since had remained on the land. In other words, whilst the Plaintiff alleged title for him and his Defendant siblings flowing from their late father, his complaint against the wife and husband (the Defendant) was that of unlawful possession on the land.

Answer of the 1st and 2nd Defendants

The husband and wife (1st and 2nd Defendants) filed a joint answer denying the title of the Plaintiff and set up their issues.

1. Was Wijesundera Pathirana Davith Singho entitled to Kethikanadeniya Owita as referred to in the Amended Plaint?

2. Did the rights of Davith Singho devolve on his children as referred to in the Amended Plaint?
3. Did the rights of the children devolve on Plaintiff and others referred to in Amended Plaint?
4. Have the Plaintiff and other children have acquired a prescriptive title having possessed for over 10 years?
5. Did the 1st and 2nd Defendants on or about 14.11.1983 forcibly entered the said land and are in forcible possession?
6. If the said Issue is answered in the affirmative is the Plaintiff entitled to the relief claimed?
7. Is the disputed land consist of Lots 16 to 20 of the land partitioned in B.1094 of this Court?
8. If so can the Plaintiff maintain the above action?
9. Has the 2nd Defendant acquired a prescriptive title to the said land?

This is a *rei vindicatio* action and it is trite law that the requisites of a vindicatory action consist of two elements, namely; **(a)** the Plaintiff must be the owner of the property and **(b)** that the property is in possession of the Defendant. The basic principle of *rei vindicatio* action is that the Plaintiff must have title to the land in dispute. Without a proper title, he cannot ask for a declaration. It is therefore to be borne in mind that the burden is on the party who claims title to a property must adduce evidence to prove his title to the satisfaction to the Court. If he has no title, the Court cannot declare him entitled to the property. Our Courts have always emphasized that the Plaintiff who institutes a vindicatory action must prove title - see the pronouncement of Herat J. in ***Wanigaratne v. Juwanis Appuhamy*** 65 N.L.R. 167 (with Abeysundere, J.):

> *"In an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the*

action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title."

In this case, the Plaintiff alleged that he, along with his siblings 3rd to 6th Defendants inherited the land from his father Davith Singho and the 1st and 2nd Defendants (the appellants in the case) entered the land described in the schedule to the plaint entered the land on 14.11.1983 forcibly and had been in possession since then.

No deed was produced by the Plaintiff to establish title but rather documents marked as follows:-

P1. 29.06.1960 - this letter sent from the Office of Rubber Controller in indicative of subsidy given to Davith Singho (possibly the father of the Plaintiff) to re-cultivate rubber on an estate called Kethikanadeniya Owita.

P2.04.06.1960 - this was a letter sent to an unnamed person in respect of an estate small-holding known as Kethikanadeniya Owita, under a Rubber Replanting Subsidy, Scheme, notifying the unnamed addressee that the application for subsidy has been sent to a named officer therein.

P3.01.09.1959 - this is a voucher showing a payment of Rs.1,000/- to W. Davith Singho under the Rubber Planting Subsidy Scheme for replanting a small-holding Kethikanadeniya Owita.

P4. 05.04.1961 - by **P4** the said Davith Singho was informed that an inspection had been placed for July 1961 for the purpose of considering the disbursement of the 5th installment of subsidy for rubber repainting.

P5.01.09.1050 - a cheque for Rs.100 was being sent as rubber subsidy to Davith Singho for replanting.

All these letters marked **P1** to **P5** originated from the Rubber Controller indicating either a payment of a subsidy for replanting rubber on a small-holding called Kethikanadeniya Owita or an intimation that some preparatory act prior to payment of

subsidy would be made. **P3** shows that the extent authorized for Davith Singho to replant rubber in 1958 was 2 roods, whereas his son Gnasena the Plaintiff claims a *rei vindicatio* action for an extent of 1 acre and 6 perches.

In my view, these letters from the Rubber Controller could hardly demonstrate the title of Davith Singho to the extent of 1 acre and 6 perches that the plaintiff claims. No doubt, the letters show that Davith Singho had been engaged in replanting rubber on a small holding called Kethikanadeniya Owita but on a smaller extent than that claimed by the son (the Plaintiff) and these letters do not show that Davith Singho had been engaged in rubber cultivation *qua* an owner or in a independent capacity. In my view, these letters cannot amount to proof of title as adverted to by Herat, J. in ***Wanigaratne v. Juwanis Appuhamy*** *(supra)*.

The 1st issue on behalf of the Plaintiff was whether the land claimed belonged to DavithSingho. This issue has been answered in the affirmative by the learned Additional District Judge of *Balapitiya*. The items of evidence relied upon by the learned Additional District Judge of *Balapitiya* to answer the 1st issue in favour of the Plaintiff are **P1** to **P5**. Even though the Plaintiff produced these letters, it is crystal clear that he could not have proved and established the title of his father on the strength of letters dispatchedby the Rubber Controller.

Another reason proffered by the learned District Judge to utilize **P1** to **P5** as proof of title is that according to him the Defendants had not challenged **P1** to **P5** when they were produced. In a *rei vindicatio* action, the onus of proof is on the Plaintiff to prove and establish title by preponderance of evidence. The failure to object to the letters from Rubber Controller, Colombo may go to reception and admissibility of hearsay evidence provided they are relevant and admissible. Even if these letters are relevant items of evidence, would there be any weight attached to these letters to prove title? Assuming that the learned District Judge admitted the letters in question, having decided that it is relevant to the factors in issue, are they admissible in law in the sense that it does not fall foul of any exclusionary rule in the Evidence Ordinance? It is then the task of the

fact finder to go into this question and assess the extent to which the evidence as a whole proves the facts in issue in the case.

Ian Dennis in his '***The Law of Evidence***' (5th Edition 2013) quite pertinently observes that weight of any particular item of evidence is the strength of its tendency to prove one or more of the facts in issue, when considered in conjunction with the other evidence in the case - *see* Ian Dennis para 4-001 at 4-001.

In no way does the learned District Judge give reasons as to how the weight of **P1** to **P5** can prove the fact in issue in the case namely the title of Davith Singho. There is no analysis as to how **P1** to **P5** issued long time ago in 1969 and produced at the trial in 1994 are relevant and admissible. In the circumstances the affirmative answer given by the learned Additional District Judge to Issue No.1 is erroneous and therefore there is no proof that Davith Singho the father of the Plaintiff was proved to have been the original owner of the land claimed by the Plaintiff in the schedule to the plaint.

If this was the case, issues relating to intestacy and devolution of title to the Plaintiff and 3rd to 6th Defendants through the father could not have been answered in the affirmative.

The partition case B.1094 wherein the final partition decree was entered as far back as 14.09.1969 merits mention at this stage. In this case Davith Singho was the 43rd Defendant, whereas his mother Athukoraralage Emalishamy was the 42nd Defendant. Despite the fact that Davith Singho contested and vied for rights in the land sought to be partitioned in the case, in the end he did not obtain any rights in the land. The Plaintiff whilst giving evidence admitted that his father Davith Singho did not get any rights to soil or plantation in the land-see proceedings dated 10.09.1996 (page 185 of the appeal brief). The final partition decree was marked at the trial as **V1**-see 57 of the appeal brief and Gunadasa -the 2nd Defendant-Appellant in this case is reflected in **V1** as the 94th Defendant. The Final Decree **V1** awarded shares to the 2nd Defendant-Appellant Gunadasa and his case before the District Court was that he had been in possession of the lots allotted to him namely Lots 16 to 20 as one land as there were no

boundaries between these lots. It has to be remembered Lot 13 was allotted to Gunadasa in common with the 92nd, 93rd, 95th, 96th and 97th Defendants in the case. This partition action was decided in 1969 and if Davith Singho through whom the Plaintiff claims in the case had a right to the land, it boggles one's mind as to why Davith Singho could not get any rights in the land. It is also beyond comprehension as to why the rubber planting subsidy documents which would have been available with Davith Singho were not put forward before the District Court in that partition action. These documents some of which were issued in the 60's were put forward only in this *rei vindicatio* action. Therefore the Plaintiff's father could not have become an owner by right of prescriptive possession. Neither did title pass to the Plaintiff's father in the Final Partition decree entered in 1969.

Though an issue on prescription was raised by the Plaintiff as the 4th issue, there is no starting point that has been established by the Plaintiff. It is trite law that 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 squarely and fairly on his or her to establish a starting point for acquisition of prescriptive rights - *see* ***Sirajudeen and two others v. Abbas*** (1994) 2 Sri L.R. 365 at 370. A facile story of receiving rubber replanting subsidy at different times cannot found a claim for prescription on such scant material and the District Judge's affirmative answer to issue No.4 is not supportable having regard to the facts that have emerged in the case.

In the circumstances the prescriptive possession has not been established at all. Nor has title been established by the Plaintiff.

Identity of Corpus

No doubt as His Lordship Justice Marsoof stated in ***Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor*** 2010 2 Sri L.R. 333:-

"To succeed in an action rei vindicatio, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment."

A better part of the argument before me also focused on the identity of the corpus. The Counsel for the Plaintiff-Respondent argued that the land was known as Kethikanadeniya Owita, whilst the Counsel for the Defendant-Appellants contended that the subject matter was indeed Kethikanadeniya Kumbura and not Owita. In fact the contention of the Defendant-Appellants is that the subject-matter in dispute is constituted by Lots 16 to 20 of a land called and known as Kethikanadeniya Kumbura and in an extent of A 1-R0-P16, as depicted in Plan No 139.

The 2nd witness for the Plaintiff was a surveyor called Mendis who submitted Plan No.2330 marked as **X** on behalf of the Plaintiff. In the course of his evidence, he admitted that what he surveyed was the land surveyed by the Defendant's surveyor Gallage. Thus it puts paid to any controversy on the identity of corpus but in the view I have taken of the fact that the Plaintiff has failed prove title to the land he has filed this *rei vindicatio* action for, I need not get into the nitty gritty of whether the land was an Owita or a field (Kumbura) in view of the fact that the Plaintiff has not established his title to the land that he has claimed as his own.

In the circumstances the judgment of the learned Additional District Judge of Balapitiya dated 05.07.1999 is set aside and I allow the appeal of the Appellants and dismiss the action filed by the Plaintiff-Respondent.

JUDGE OF THE COURT OF APPEAL