

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

C.A. Case No.1353/2000 (F)

D.C. Rathnapura Case No.
14022/L

1. Gamage Sisilin Nona
 2. Kulathunga Arachchige Sumanawathi
- Both of Waliaramba, Delwala.

PLAINTIFFS

-Vs-

Kulathunga Arachchige Kusumawathi
of Waliaramba, Delwala.

DEFENDANT

NOW

Kulathunga Arachchige Kusumawathi
of Waliaramba, Delwala.

DEFENDANT-APPELLANT

-Vs-

1. Gamage Sisilin Nona (Deceased)
 2. Kulathunga Arachchige Sumanawathi
- Both of Waliaramba, Delwala.

PLAINTIFF-RESPONDENTS

AND NOW

Kulathunga Arachchige Kusumawathi
of Waliaramba, Delwala.

DEFENDANT-APPELLANT-PETITIONER

-Vs-

Kulathunga Arachchige Sumanawathi
of Waliaramba, Delwala.

2nd PLAINTIFF-RESPONDENT-RESPONDENT

Kulathunga Arachchige Maithripala
of Waliaramba, Delwala.

RESPONDENT

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

COUNSEL : K. Asoka Fernando with A.R.R. Siriwardane for
the 2nd Plaintiff-Respondent
Chandrasiri Wanigapura for the Defendant-
Appellant

Argued on : 17.05.2017

Decided on : 19.11.2018

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

The 1st and 2nd Plaintiffs filed this action for declaration of title to the land more fully described in the schedule to the plaint dated 15 the of September, 1997 against the Defendant claiming *inter alia* ejectment of the Defendant and all those who claimed under her and for damages.

The 1st Plaintiff is the mother of the 2nd Plaintiff and of the Defendant in this case. The plaintiff states that the 1st Plaintiff was an annual permit holder and since 1942 she had been in possession of the said land and the 1st Plaintiff had also constructed a small house thereon and with the assistance of the 2nd Plaintiff, had been planting tea plants and improved the land. On or about 10.05.1995, when the 1st Plaintiff was hospitalized, the Defendant forcibly and unlawfully entered into the house and took possession thereof.

She made a complaint about this dispossession to the Nivitigala Police, which produced the parties before the Primary Court of Ratnapura, which Court in case No. 17247 made an order for the 1st Plaintiff to seek the appropriate remedy in a civil action.

The Defendant filed her answer stating that the said annual permit has expired and therefore the 1st Plaintiff was not the permit holder and that she had no right to institute this action and prayed for a dismissal of the action. Without prejudice to the above the Defendant claimed Rs.40,000/- as compensation for improvement to the land in the event the 1st Plaintiff was declared entitled to the land. The Defendant also claimed a sum of Rs.25,000/- for improvement to the house. The 1st Plaintiff has denied this cross claim in her replication.

When the case was taken up for trial on 08.06.1999, the Plaintiff raised Issue Nos. 1 to 6 and the Defendant raised Issue Nos. 7 to 14. The following were recorded as admissions;

- 1) The subject-matter of the action.
- 2) The owner of the subject-matter is the State.

The learned District Judge, after a full trial has answered Issues 1, 2, 3, 5, and 6 raised on behalf of the Plaintiff in her favour on 30.10.2000 and entered judgment in favour of the Plaintiff declaring the Plaintiff entitled to the land and that the Defendant has no right to the said land.

The Defendant has preferred this appeal praying that the judgment of the learned District Judge dated 30.10.2000 be set aside.

Upon a consideration of the totality of evidence led in this case, it is clear that the subject-matter which is a State land had been since 1942 in the possession of Kulatunga Arachchige Podisingho, who was the husband of the 1st Plaintiff and after his death it had been possessed by the 1st Plaintiff. She had been issued a permit bearing No. 1/10/177/14 marked as 'PI' on 12.09.1995. This is an annual permit which had to be renewed every year by paying the fees for the permit. This permit expired on 31.12.1995 subject to renewal-vide the 1st condition in the permit. There are twelve conditions contained in the permit (PI) and having agreed to all these 12 conditions, the grantee of the permit, the 1st Plaintiff, had set her signature at the bottom of the permit-see the second page of the permit. Accordingly, PI was valid till 31.12.1995.

It would appear that before the expiry of the permit, i.e., when the 1st Plaintiff was still the lawful permit holder, the Defendant had, on 20.05.1995, taken forcible possession of the land and premises when the 1st Plaintiff was sick, as alleged by the Plaintiffs in paragraph 7 of the plaint. The Defendant has admitted this averment of the plaint but says that she came to reside at the invitation of the 1st Plaintiff.

However, the argument taken before this Court by the Counsel for the Defendant-Appellant was that the annual permit had expired and therefore the Plaintiff had no right to the said land. Assuming that the period of the permit had expired, could a third party take possession of the land issued to a permit holder? If the permit is not renewed by the permit holder, that is a matter for the grantor of the permit, i.e., the Divisional Secretary, to take action against the permit holder and no other person has any right to take the law into his land and spoliates a state land. The 2nd condition in the permit states that the permit holder shall pay the lease money for the renewal of the permit on the 1st day of January of each year and continue to possess the land. It does not state that failure to renew the permit will *ipso facto* result in the cancellation of the permit. Therefore it is clear that whether the permit holder renewed the permit or not, he or she has the right to be on the land until the law prescribed for the failure to renew the permit is set in motion by the proper authority. No third party can call in aid the violation of the conditions attached to permit to validate his own act of trespass and spoliation. Moreover there is no evidence on

the record that the permit (P1) has been canceled. By P2 it has been established that P1 had been renewed till 1999.

This action was filed by the Plaintiffs on the 15th of September, 1997. On the date of the plaint, the plaintiff's permit was valid and effectual. Thus it is clear that at the time of the institution of the action the Plaintiff had the right to possess the said land and therefore her right to possession of the said land and premises was lawfully established at the trial.

The next question is whether a permit holder can maintain a *rei vindicatory* action for a declaration of title against a third party who took possession unlawfully In *D.P. Palisena v. K.K.D. Perera* 56 N.L.R. 407, Gratiaen J. held that a permit holder, under the Land Development Ordinance, enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser.

His Lordship further held that, "The learned Judge (trial Judge) has misunderstood the scope of the remedy asked for by the plaintiff and failed to appreciate the nature of permit holder's rights under the Land Development Ordinance."

This is a vindicatory action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and prays that on proof of that title she be placed in possession against an alleged trespasser, i.e., the Defendant in the case. Even if the 1st Plaintiff failed to renew the permit, the Defendant had no right to take possession of the land in dispute against the wish of the 1st Plaintiff who was the mother of the Defendant. It is very clear from the language of the Land Development Ordinance and of the particular permit P1 issued to the Plaintiff that a permit holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings.

The above judgment was alluded to in the case of *Bandaranayake v. Karunawathie* 2003 (3) Sri L.R. 295, where this Court held, *inter alia*, that:-

1. A permit holder under the LDO enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser.

2. As the original owner had nominated his spouse as his successor, it would give her authority to nominate a successor.
3. Section 58(1) and section 60 which deal with registration of nomination or cancellation of nomination do not apply.

The decisions in *D.P. Palisena v. K.K.D. Perera* (*supra*) was followed in the case of *Jayaalath v. Karunatilaka* 2013 (1) Sri L.R. 337, where it was held that the holder of a valid permit is entitled to bring a vindicatory action to eject a trespasser. In a declaration of title or *rei vindicatio* action, if the subject-matter is admitted no further proof of the identity of the corpus is required; for no party is burdened with adducing further proof of an admitted fact.

It must be noted that Defendant in her answer has asked for the dismissal of the plaintiffs' action and for damages only. She has not established her right to possession or her possession is lawful. In a declaratory action it is a pre-requisite for the Defendant to prove that his possession is lawful and that the Plaintiff has no right to ask for ejectment. The defendant's case must fail on this principle. This is manifestly clear upon the foundation on which the Defendant filed her answer. The Defendant did not ask for any declaration of title to the land nor did she pray that she be placed in possession of the said land. The possession given to her by the Primary Court in Case No. 17247 is temporary and cannot stand valid after the judgment of the District Court.

Considering the law and facts involved in this case, I concur with the findings of the learned District Judge and I see no reason to differ from his findings. Accordingly, I affirm the judgment of the learned District Judge dated 30.10.2000 and dismiss this appeal with costs.

JUDGE OF THE COURT OF APPEAL