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

Ven. Undugoda Jinawansha Thero
The Trustee,
Wattarama Rajamaha Viharaya, Imbulgasdeniya.

Plaintiff-Appellant

Ven. Gammulle Sumangala Thero,
The Viharadhipathi/Trustee,
Wattarama Rajamaha Viharaya, Imbulgasdeniya.
Residing at Galmaduwa Rajamaha Viharaya,
Kandy.

Substituted Plaintiff-Appellant

Case No: C. A. 656/99(F)
D. C. Kegalle Case No. 4257/L

Vs.

(Deceased) 1. Nissanka Arachchilage Haramanis Appuhamy
Wattarama, Imbulgasdeniya.

1a. Nissanka Arachchilage Dharmasena
Endurupotha, Devalegama.

1b. Nissanka Arachchilage Gunadasa
Kurunduwatta, Imbulgasdeniya.

1c. Nissanka Arachchilage Karunaratne
Wattarama, Imbulgasdeniya.

1d. Nissanka Arachchilage Dayalatha
Endurupotha, Devalegama.

1e. Nissanka Arachchilage Sumanawathie
Godapola, Devalegama.

Substituted 1st Defendant-Respondents

2. Nissanka Arachchilage Karunaratne
Wattarama, Imbulgasdeniya.

2nd Defendant-Respondent

Before: Janak De Silva J.

Counsel:

H.Withanachchi for Substituted Plaintiff-Appellant

Mahinda Nanayakkara for Substituted 1st Defendant-Respondents and 2nd Defendant-Respondent

Written Submissions tendered on:

Substituted Plaintiff-Appellant on 02.05.2019

Substituted 1st Defendant-Respondents and 2nd Defendant-Respondent on 04.04.2019 and 04.06.2019

Argued on: 25.02.2019

Decided on: 05.09.2019

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Kegalle dated 07.07.1999.

The Plaintiff-Appellant (Appellant) instituted the above styled action seeking a declaration of title to the land more fully described in the schedule to the plaint, an order of eviction against the original Defendants who are allegedly in unlawful possession of the land more fully described in the second schedule to the plaint and damages.

The original Defendants denied the title of the Appellant and claimed prescriptive title and moved for a dismissal of the action. However, they did not make a cross-claim.

The learned Additional District Judge dismissed the action of the Appellant and hence this appeal.

A perusal of the plaint filed in this action shows without any doubt that it is a *rei vindicatio* action. 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 [*Latheef v. Mansoor and another* (2010) 2 Sri.L.R. 333]. In such an action it is a paramount duty on the part of the Plaintiff to establish correct boundaries in order to identify the land in dispute [*Peeris v. Savunhamy* (54 N.L.R. 207)]. There is a greater and heavy burden on a plaintiff in a *rei vindicatio* action to prove not only that he has dominium to the land

in dispute but also the specific precise and definite boundaries when claiming a declaration of title [*Abeykoon Hamine v. Appuhamy* (52 N.L.R. 49)]. In a vindicatory action it is necessary to establish the identity of the corpus in a clear and unambiguous manner and the action must fail upon the failure to do so [*Fernando v. Somasiri* (2012 B.L.R. 121)].

The learned Additional District Judge held that the Appellant had failed to establish both his title to the land in dispute and the identity of the said land and as such the action must fail.

The case of the Appellant is primarily based on the assertion that the land more fully described as lot 2 containing in extent A. 139 R.0 P.0 and depicted in plan no. 67415 (P1) of the Surveyor General dated 25.10.1866 is the property of Wattaramey Vihare. Issue no. 2 is based on this position and the learned Additional District Judge held that it was not proved.

Plan no. 67415 (P1) of the Surveyor General dated 25.10.1866 was marked without subject to proof and was led in evidence at the close of the case of the Appellant without any objection. It is a plan prepared by the Surveyor General which describes lots 1 and 2 therein as property of Wattaramey Vihare.

In this context section 83 of the Evidence Ordinance is instructive and reads:

> "Court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and **are accurate**" (emphasis added)

Furthermore, as the trial took place before the repeal of the Land Surveys Ordinance section 6 therein is relevant which reads:

> "**If any plan or survey offered in evidence in any suit shall purport to be signed by the Surveyor-General or officer acting on his behalf**, such plan or survey shall be received in evidence, and may be taken to be **prima facie proof of the facts exhibited therein**; and it shall not be necessary to prove that it was in fact signed by the Surveyor-General or officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate, **until evidence to the contrary shall have first been given**." (emphasis added)

In *Kiri Mudiyanse v. the Attorney-General* (48 N.L.R. 438) the Supreme Court accepted that the entry in a plan prepared by the Surveyor-General that some fields shown therein formed part of an abandoned tank must be accepted as prima facie proof of that fact in terms of section 6 of the Land Surveys Ordinance.

The original Defendants did not seek to assail the plan no. 67415 (P1) of the Surveyor General dated 25.10.1866 and as such this evidence becomes unchallenged evidence [*Edrick De Silva v. Chandradasa De Silva* (70 N.L.R. 169), *Seyed Shahabdeen Najimuddin v. Thureiratnam Nageshwari nee Sunderalingam and Others* (S.C./Appl/165/2010, S.C.M. 17.07.2013)].

Accordingly, there was evidence before the District Court that lot 2 of plan no. 67415 (P1) of the Surveyor General dated 25.10.1866 is the property of the Wattaramey Vihare.

A temple is an institution, *sui generis* which is capable of receiving and holding property that has attributes of a corporation for the purpose of acquiring and holding property [*Kosgoda Pangnaseela v. Gamage Pavisthinahamy* [(1986) 3 C.A.L.R. 48], *Ven. Omare Dhammapala Thero v. Rajapakshage Peiris* [(2004) 1 Sri.L.R. 1].

Hence, I hold that the learned Additional District Judge erred in holding that issue no. 2 was not proved. The Appellant did prove that lot 2 of plan no. 67415 (P1) of the Surveyor-General dated 25.10.1866 is the property of Wattaramey Vihare.

The remaining question is whether the Appellant has proved that the land more fully described in schedule 2 to the plaint falls within the land described in the schedule to the plaint which as explained above has been proved to be the property of Wattaramey Vihare.

The Appellant led the evidence of G.A.R. Perera, Licensed Surveyor who prepared plan no. 247 (P2). He testified that the Appellant had shown him the land in dispute and that he had drawn a plan for the said land which was later superimposed on plan no. 67415 (P1) of the Surveyor General dated 25.10.1866. Based on the superimposition he testified that it can be said that subject to a slight variation in the western boundary the land in plan no. 67415 (P1) is included in plan no. 247 (P2).

The learned counsel for the Substituted 1st Defendant-Respondents and 2nd Defendant-Respondent submitted that the testimony of G.A.R. Perera, Licensed Surveyor did not establish that the land in plan no. 67415 (P1) is included in plan no. 247 (P2). I am unable to accede to this submission. The evidence of the said surveyor as a whole does establish that position. There appears to be a divergence between the parties as to the name of the land in dispute. However, the superimposition in my view must be the determinative factor. The slight variation in the western boundary is insignificant and must be understood in the context of the superimposition being done using a plan made in 1866.

Therefore, I hold that the learned Additional District Judge erred in holding that the Appellant had failed to establish both his title and the identity of the land.

There is also the question of prescriptive title of the original Defendants to be considered.

Section 34 of the Buddhist Temporalities Ordinance reads:

> "In the case of any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance:
>
> Provided that this section shall not affect rights acquired prior to the commencement of this Ordinance."

In *Piyaratana Thero v. Jothiya and Another* [(1985) 2 Sri.L.R. 418] the Supreme Court held that where title by prescription to Buddhist temple land had not been acquired prior to 1931, section 34 of the Buddhist Temporalities Ordinance bars the acquisition of prescriptive title to temple land. The original 1st Defendant testified that he began possessing the land he is presently occupying in 1935 [Appeal brief pages 114, 119].

Accordingly, I hold that the learned Additional District Judge erred in answering issue no. 11 in the affirmative.

The learned counsel for the Substituted 1st Defendant-Respondents and 2nd Defendant-Respondent submitted that it is trite law that the best person to determine issues in relation to the facts of the case is the trial judge who hears and sees the witnesses and his findings should not be lightly disturbed in appeal [*De Silva and Others v. Seneviratne and Another* (1981) 2 Sri.L.R. 7, *Fradd v. Brown & Co. Ltd.* (20 N.L.R. 282), *D.S. Mahawithana v. Commissioner of Inland Revenue* (64 N.L.R. 217), *Alwis v. Piyasena Fernando* (1993) 1 Sri.L.R. 119].

However, when the findings of fact are based upon the trial judges evaluation of facts, the Appellate Court is then in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge and where it appears to an Appellate Court that the findings of the trial judge should be reversed because he has failed to properly evaluate the facts, then the Appellate Court "ought not to shrink from that task" [*De Silva and Others v. Seneviratne and Another* (supra), *Anulawathie v. Gunapala* (1998) 1 Sri.L.R. 63, *De Silva v. De Croos* (2002) 2 Sri.L.R. 409].

For the reasons more fully set out above, the learned Additional District Judge has failed to properly evaluate the facts. I therefore set aside the judgment of the learned Additional District Judge of Kegalle dated 07.07.1999 and answer the issues raised at the trial as follows:

1. මෙම නඩුවේ පැමිණිලිකරු වට්ටාරම රජමහා විහාරයේ නීත්‍යානුකූල භාරකාරයා වේ ද? ඔව්

2. පැමිණිල්ලේ 1 වැනි උපලේඛනයේ සඳහන් ඉඩම් යාය පැමිණිල්ලේ සඳහන් පරිදි වට්ටාරම රජමහා විහාරය සතු දේපළක් වූවා ද? ඔව්

3. පැමිණිල්ලේ 2 වැනි උපලේඛනයේ සඳහන් ඉඩම, 1 වැනි උපලේඛනයේ සඳහන් ඉඩම් යායෙන් කොටසක් වේ ද? ඔව්

4. එකී 2 වැනි උපලේඛනයේ සඳහන් ඉඩම පැමිණිල්ලේ 5, 6 ඡේදයන් හි සඳහන් පරිදි එවකට වට්ටාරම රජමහා විහාරාධිපති හිමියන් යටතේ, විත්තිකරුවන් විසින් රැක බලා ගත්තා ද? පැන නොනගී

5. විත්තිකරු විසින් 1976.06.12 වැනි දින හෝ ඊට ආසන්න දිනයක සිට එකී ඉඩමට විහාරාධිපති සතු අයිතිවාසිකම් නොපිළිගනිමින්, එය බලහත්කාරයෙන් භුක්ති විඳිනු ලබයි ද? ඔව්

6. විත්තිකරු විසින් පැමිණිල්ලේ 9 වැනි ඡේදයේ සඳහන් කර ඇති අලාභහානි මෙම ඉඩමට සිදු කර තිබේ ද? ඔව්

7. ඉහත විසඳිය යුතු ප්‍රශ්න පැමිණිල්ලේ වාසියට විසඳේ නම්, පැමිණිලිකරුට පැමිණිල්ලේ ආයාචනයේ සඳහන් සියලු ම සහනයන් සඳහා නඩු තීන්දුවක් ලැබිය හැකි ද? ඔව්

8. මෙම නඩුවට විෂයය වී ඇති ඉඩම මෙම විත්තිකරුගේ උත්තරයේ උපලේඛනයේ විස්තර කර ඇති නිකපිටියේ හේන නමැති ඉඩම ද? පැන නොනගී

9. එම ඉඩම කෑගල්ල දිසා අධිකරණයේ අංක. 2028 දරණ නඩුවට ගොනු කර ඇති ජී. ඒ. ආර්. පෙරේරා මානක තැනගේ අංක. 247 දරණ පිඹුරේ කැබලි අංක. 3 දරණ ඉඩම ද? ඔව්

10. එකී ඉඩම මෙම 1 වැනි විත්තිකරු විසින් 1935 වර්ෂයේ සිට වගා කරගෙන භුක්ති විඳගෙන එනු ලබන්නේ ද? පැන නොනගී

11. මෙම 1 වැනි විත්තිකරු එකී ඉඩම 10 වසරකට අධික කාලයක් අඛණ්ඩ ව නිරවුල් ව පැමිණිලිකරු සහ අන් සැමට එරෙහි ව ස්වාධීන ව භුක්ති විඳීමෙන් කාලාවරෝධී අයිතිය හිමි කරගෙන ඇත් ද? නැත

12. එසේ නම් පැමිණිල්ල නිශ්ප්‍රභා විය යුතු ද? නැත

13. මෙම නඩුවේ සාවද්‍ය පාර්ශවකරුවන් සම්බන්ධ කිරීමක් කර ඇත් ද? නැත

14. එසේ නම් පැමිණිල්ල නිශ්ප්‍රභා විය යුතු ද? නැත

Accordingly, I enter judgment as prayed for in the plaint and allow the appeal with costs. The learned District Judge of Kegalle is directed to enter decree accordingly.

Judge of the Court of Appeal