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

In the matter of an Application for Special Leave to Appeal in terms of Article 128(2) of the Constitution of Sri Lanka.

1. Jamaldeen Abdul Latheef,

2. Koya Mohideen Nizardeen,
Nachchaduwa.

DEFENDANT-APPELLANT-APPELLANTS

S. C. Appeal No. 104/05
S. C. (SPL) L. A. No. 5/05
C. A. No. 908/94 (F)
D. C. Anuradhapura Case No. 12863/L

-VS-

1. Abdul Majeed Mohamed Mansoor,

2. Abdul Majeed Mohamed Nizar,
Of No. 1, Dharga Road,
Govijana Mandiraya,
Nachchaduwa.

PETITIONER-RESPONDENT-RESPONDENTS

BEFORE	:	Hon. J.A.N. de Silva, C.J., Hon. Saleem Marsoof, P.C., J., and Hon. P. A. Ratnayake, P.C., J.
COUNSEL	:	Faisz Musthapha, P.C., with N. M. Shaheed for the Defendant-Appellant-Appellants. W. Dayaratne, P.C., with R. Jayawardane for the Petitioner-Respondent-Respondents.
ARGUED ON	:	18.03.2009 and 30.07.2009
WRITTEN SUBMISSIONS:		1.09.2009 and 23.10.2009
DECIDED ON	:	27.10.2010

SALEEM MARSOOF, J.

This appeal arises from an action for declaration of title filed in the District Court of Anuradhapura in December 1989 by the Petitioner-Respondent-Respondents (hereinafter referred to as "Respondents"), who claimed title to the four acre land named "Palugahakumbura" situated in Mahawela (Pahalabaage) in the Pandiyankulama village, in Nachcha Tulana of Ulagalla Korale in Hurulu Palata in Anuradhapura District in the North Central Province of Sri Lanka, more fully

described in the schedule to the joint petition filed by them. They claimed title by virtue of the Deed bearing No. 6165 dated 9th February 1987 (P1) and attested by Lionel P. Dayananda, Notary Public. The said Deed was executed by one Ibrahim Lebbe Noor Lebbai, the purported Attorney for Meydeen Sadakku Mohideen Abdul Cader, under the Power of Attorney bearing No. 7598 dated 30th October 1981 (P7), attested by S.M.M Hamid Hassan, Advocate & Notary Public in the Ramanathapuram District in Tamil Nadu, India. The Respondents alleged that they had purchased the said property for a sum of Rs. 20,000/-, but the 1st and 2nd Defendant-Appellant-Appellants (hereinafter referred to as the "Appellants") disputed their title and attempted to prevent their *ande* cultivator from working on the said paddy land. The Respondents sought a declaration of title in their favour and a permanent injunction to restrain the Appellants and their servants or agents from disturbing the Respondents, their *ande* cultivators and/or servants or agents from working on the paddy field which formed part of the said land. It is significant that the petition filed by the Respondents in the District Court did not contain a prayer for the ejectment of the Appellants or for damages.

In the joint answer filed in the District Court by the Appellants, it was expressly denied that they disturbed or obstructed the Respondents in the enjoyment of their land or cultivation carried out thereon. From the said answer it appears that while the 2nd Defendant-Appellant-Appellant did not make any claim to the land in question as owner, the 1st Defendant-Appellant-Appellant (hereinafter also referred to as the "1st Appellant") laid claim to a land named "Nilaththu Patti Wayal" in extent 3 acres 2 roods and 26 perches, which was alleged to have been possessed without interruption by the predecessors-in-title to the said Appellant for a period exceeding fifty years. It is also stated therein that although the said property was gifted by the said Appellant to his wife Noor Nisa, he had continued to be in uninterrupted possession thereof. In their joint answer, the Appellants prayed that the action be dismissed, and a sum of Rs. 22,000/- be awarded as damages for the loss of 200 bushels of paddy, but they have not prayed for a declaration of title to the land claimed by them, or that they be placed in possession thereof.

Although, as already noted, neither the Respondents nor the Appellants had sought any order of ejectment in their respective petition and answer, in paragraph 5 of the replication filed by the Respondents, it was averred as follows:

> 5 . විත්තිකරුවන් විසින් පැමිනිලිකරුවන්ට අයිති කුඹුරු ප්‍රමානය වැරදි සහගතව සහ නීති විරෝධීව භුක්ති වඳිමන් සිටින හෙයින්, පැමිනිලිකරුවන්ට 1989/90 මහ කන්නය සඳහා රු. 33,000/- ක අලාභයක් සිදුවී ඇති අතර, එකී මුදල සහ පැමිනිලිකරුවන්ට පැමිනිල්ලේ උපලේඛණයේ සඳහන් කුඹුරු ප්‍රමානය සාමකාමී භුක්තිය දෙනතුරු සෑම කන්නයකට පවතින අලාභය වශයෙන් රු. 33,000/-ක් විත්තිකරුවන්ගෙන් අයකර ගැනීමට පැමිනිලිකරුවන්ට නඩු නිමිත්තක් උපවයවී ඇත.

On the basis of the above averment, the Respondents have in payers (1) and (2) of the replication prayed for damages in a sum of Rs. 33,000/- for every cultivation season (කන්නය), until the quiet and peaceful possession of the land described in the schedule to the petition is restored to the Respondents. I quote below the relevant prayers (1) and (2) of the replication:

> (1) පැමිණිල්ලේ ඉල්ලා ඇති සඟනයන් සහ මෙම ප්‍රති උත්තරයේ ඉල්ලා ඇති පරිදි 1989/90 මාස් කන්නය සඳහා රු. 33,000/- ක අලාභයක් විත්තිකරුවන් විසින් සාමුහිකව සහ වෙන්, වෙන්ව පැමිණිලිකරුවන්ට ගෙවන මෙන් නඩු තීන්දුවක් ලබාදෙන ලෙසද,

(2) තවද, පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩමේ සාමකාමී සහ නිරවුල් බුක්තිය පැමිණිලිකරුවන්ට ලැබෙනතුරු සෑම කන්නයකටම රු. 33,000/- බැගින් පවතින අලාභය විත්තිකරුවන්ගෙන් පැමිණිලිකරුවන්ට ලබාදෙන ලෙසද,

At the commencement of the trial, no admissions were recorded, and the following five issues were formulated by court, which revealed that there was a dispute regarding the identity of the *corpus*. Accordingly, on the application of the Respondents, court issued a commission on D. M. G. Dissanayake, Licensed Surveyor, to survey the land referred to in the schedule to the petition filed by the Respondents as well as the land described in the schedule to the answer filed by the Appellants, and report whether they were the same. After his Plan bearing No. 1176 dated 10th October 1990 and the accompanying report was furnished to court, at the instance of the Appellants, a further commission was issued on K. V. Somapala, Licensed Surveyor, to survey the land claimed by the two contending parties to the case, and his Plan No. 2025 dated 16.04.1991 was also filed of record. Thereafter, on 12.08.1991, the following further issues were framed by court, issues 6, 7, 13 and 14 on the suggestion of learned Counsel for the Respondents, and issues 8 to 12 as suggested by learned Counsel for the Appellants:-

<u>පැමිනිල්ලෙන්</u>

6. පැමිණිල්ලේ උපලේඛණයේ සහ ඩී. එම්. ජී. දිසානායක මානක තැනගේ මැනුම් වාර්ථාවේ සවිස්තර කරන ලද ඉඩම පලුගහකුඹුර නැමති ඉඩම වේද?

7. එම ඉඩම පැමිණිලිකරුට සහ ඔහුගේ පෙර උරුමකරුවන්ට හිමිවීද ?

<u>විත්තියෙන්</u>

8. විත්තිකරු මෙම නඩුවට අදාල ඉඩම අවු. 50 කට අධික කාලයක සිට නොකඩවා භුක්ති වඳ තිබෙද ?

9. එසේ නම් කාල සීමා ආඥා පනතේ විධි විධාන යටතේ වරප්‍රසාද ඔහුට හිමිවෙද ?

10. පැමිනිලිකරු විසින් විත්තිකරුවන්ට විරුද්ධව වාරණ නියෝගයක් ලබා ගැනීමෙන් විත්තිකරුවන් විසින් වගා කරන ලද මෙම කුඹුර සම්පූර්ණයෙන් විනාශ වූයේද ?

11. පැමිනිල්ලෙන් ලබා තිබුන වාරන නියෝගය මෙම අධිකරණය විසින් විසුරුවා හැර තිබෙද ?

12. මෙම 10 සහ 11 යන විසඳනාවන්ට විත්තිකරුවන්ගේ වාසියට පිලිතුරු ලැබෙන්නේ නම් උත්තරයෙන් ඉල්ලා ඇති අලාභ විත්තිකරුට අයකර ගත හැක්කේද?

<u>පැමිනිල්ලෙන්</u>

13. පැමිනිලිකරුවන්ගේ ප්‍රති උත්තරයේ 5 වෙනි ඡේදයේ ප්‍රකාර විත්තිකරුවන් විසින් පැමිනිලිකරුට අයිත් කුඹුරු ප්‍රමානය වැරදි සහගත ලෙස භුක්තිවඳිමන් සිටින හෙයින් 1989/90 මහා කන්නය සඳහා රු. 33,000/- ක් අලාභයක් සිදුවී ඇත්තේද?

14. පැමිනිලිකරුවන්ට අයිති මෙම ඉඩමේ නිරවුල් භුක්තිය ලැබෙන තුරු පවතින අලාභය වශයෙන් කොපමන මුදලක් ලැබිය යුතුද?

On behalf of the Respondents, Abdul Majeed Mohamed Mansoor, the 1st Plaintiff-Respondent-Respondent, Mohomad Ibrahim Lebbai Noor Lebbai, the alleged Attorney under Power of Attorney bearing No. 7598 dated 30th October 1981 (P7), Vijitha Ellawala, Provincial Govi Jana Sewa Officer, Anuradhapura, D. M. G. Dissanayake, Licensed Surveyor, and Ranathunga Herath, Grama Seva Officer, Tulana, Nachchaduwa, testified at the trial. For the Appellants, Jamaldeen Abdul Lathif, the 1st Defendant-Appellant-Appellant, Vidana Arachchige Premadasa, a

cultivator in an adjoining paddy field, Ulludu Hewage Karunaratne, Registrar of Lands, Anuradhapura, and K.V. Somapala, Licensed Surveyor gave evidence.

On the conclusion of witness testimony, and after considering the submissions made by learned Counsel for the contending parties, on 5th October 1994 the learned District Judge entered judgement in favour of the Respondents, answering *inter alia* issues 6, 7 and 11 in the affirmative, and issues 8, 9, 10, 12 and 13 in the negative, with the answer to issue 14 being "රු. 15,000 කි". The essence of the decision of the learned District Judge is contained in the following passage of his judgement:-

> පැමිනිල්ල සහ විත්තිකරු ඉදිරිපත් කර ඇති සියලු සාක්ෂි සහ ලේඛන සුපරීක්ෂාකාරීව විශ්ලේෂණය කර බැලුවෙමි. අදාල විෂය වස්තුව පැමණිල්ලේ උපලේඛණයේ සඳහන් විෂය වස්තුව හා මානක දිසානායක මහතාගේ වාර්තාවේ සඳහන් විෂය වස්තුව එකක් බව තීරණය කරමි. අදාල විෂය වස්තුව සඳහා පැමණිල්ල ඉදිරිපත් කර ඇති ඔප්පුවලට අනුව පැමණිල්ලේ පැමිනිලිකරුවන් හිමිකම් ලබා ඇති බව තීරණය කරමි.

The final order embodied in the judgement of the learned District Judge, if my conjecture be correct, was for the ejectment of the Appellants from the land described in the schedule to the petition, presumably on the basis of a declaration of title to the said land in favour of the Respondents, and damages in a sum of Rs. 15,000 until the quiet and peaceful possession of the land is delivered to the Respondents, with no order for costs, expressed by the learned District Judge in cryptic precision in the following manner:-

> මේ අනුව පැමින්ල්ලට නිරවුල් බුක්තියක් මේ දක්වා කන්නයක් වෙනුවෙන් රු. 15,000- ක වන්දියක් හිමිවන බව තීන්දු කරමි. නඩු ගාස්තු පැමිනිල්ල සහන ලබන නිසා අවශ්‍ය නැත.
>
> මේ අනුව පැමිනිල්ලේ වාසියට තීන්දු කරමි. තීන්දු ප්‍රකාශය ඇතුලත් කරන්න

By its judgement dated 1st December 2004, the Court of Appeal has affirmed the aforesaid decision of the District Court, observing that it is "abundantly clear that the land claimed by the Defendants (Defendant-Appellants-Appellants) is the same land which is described in the schedule to the plaint (petition)". It is important to note that the Court of Appeal concluded as follows:-

> Since this is an action for declaration of title it would be pertinent to consider the decision in *Wanigaratne vs Juwanis Appuhamy* (1962) 65 NLR 167 where in the Supreme Court has held that, "in action *rei vidicatio* the Plaintiff must prove and establish his title." This legal principle has been followed in our Courts right along. In the instant case the learned Judge has duly considered the un-contradicted evidence of the 1st Plaintiff in relation to acquisition of title and has arrived at the finding according to the deeds produced by the 1st Plaintiff, the Plaintiffs had acquired title to the subject matter. I conclude that this is a correct finding on the evidence which had been available before the District Court.

This Court has granted special leave to appeal on several substantial questions of law, but before setting out these questions, it may be useful to mention that in upholding the title of the Respondents to the land described in the schedule to the petition, the District Court and Court of Appeal relied on Deed No. 6165 dated 9th February 1987 (P1) and the prior deeds respectively bearing Deed No. 6024 dated 29th February 1944 (P3), Deed No. 6121 dated 12th May 1944 (P4), Deed No. 6468 dated 10th December 1944 (P5) and Deed No. 7167 dated 8th August 1946(P6) produced in evidence, which admittedly establish that the ownership of the aforesaid four acre land had been transmitted from the original owner Alavapillei Sanarapillai through some

intermediate transferees to one Muhammad Mohideen Cader Saibu Mohideen Sadakku (hereinafter referred to as Sadakku), who died in 1948. The courts below also relied on the Power of Attorney bearing No. 7598 (P7) dated 30th October 1981, purported to have been executed by Sadakku's son Mohideen Abdul Cader appointing one Mohomad Ibrahim Lebbai Noor Lebbai as his Attorney with power to look after and to alienate the land described in the schedule to the petition. It is by virtue of the power alleged to have been vested in him by the said Power of Attorney that the said Noor Lebbai purported to transfer by Deed No. 6165 (P1) dated 9th February 1987 and attested by Lionel P. Dayananda, Notary Public, the entirety of the land described in the schedule to the petition to the Respondents Abdul Majeed Mohomed Mansoor and Abdul Majeed Abdul Nizar.

The substantial questions on the basis of which special leave to appeal has been granted by this Court, are set out below:-

1. (a) Is the Power of Attorney produced marked P7 proved?

   (b) Does the Deed produced marked P1 operate to convey the title of Mohideen Abdul Cader, to the Respondents?

   (c) If not, was the Court of Appeal in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to the subject matter of the action?

2. Did the Court of Appeal err in failing to consider that the Learned District Judge had not duly evaluated the evidence on the question of prescription?

At the instance of W. C. Dayaratne, P.C., who appeared for the Respondents, the following additional questions were also formulated for the consideration of this Court, which are set out below:-

3. Has the issue regarding the validity of the Power of Attorney marked P7 and the deed produced marked P1, been raised for the first time in the Supreme Court at the stage of application for leave?

4. Are the Appellants entitled to take up the said issue at the stage of application for Special Leave to Appeal?

5. Is it mandatory to read the documents in evidence of the Respondents at the conclusion of the trial?

Certain Preliminary Matters

Before dealing with the substantive questions on which special leave to appeal has been granted by this Court, all of which relate to the title of the contending parties to the land described in the schedule to the petition of the Respondents, it is necessary to dispose of the two preliminary questions 3 and 4 raised by learned President's Counsel for the Respondents when special leave was granted. These questions focus on the alleged belatedness in taking up the positions covered by questions 1(a) and (b) above.

Mr. Dayaratne, has strenuously contended that the aforesaid questions relating to "the validity of the Power of Attorney marked P7 and the deed produced marked P1", have been raised for the first time in the Supreme Court at the stage of application for special leave, and that these being mixed questions of law and fact, they cannot be raised for the first time on appeal. He has invited our attention to the decision of a Five Judge Bench of this Court in *Rev. Pallegama Gnanarathana v. Rev. Galkiriyagama Soratha* [1988] 1 Sri LR 99 in which it was held that a question which is not a pure question of law, but a mixed question of fact and law, cannot be taken up for the first time on appeal, and stressed that the apex court, which does not have the benefit of the findings and reasoning of a lower court, should not be compelled to go into a question of fact or mixed question of fact and law, raised for the first time on appeal.

Mr. Faisz Mustapha, PC., did not contest the correctness of the proposition of law urged by Mr. Dayaratne, but submitted that that the questions raised are pure questions of law, and that in any event, they had arisen for consideration in the District Court itself. In this connection, it is necessary to observe at the outset that question 1(a) and (b) on which special leave to appeal has been granted in this case, do not raise the question of *validity* of the Power of Attorney marked P7 and the deed produced marked P1 as stated in question 3, but the first of these deals with the *proof* of the said Power of Attorney and second with the *construction* and *legal implications* of the Deed marked P1. It is also necessary to observe that these questions arise from the very first issue raised at the trial, which was as follows:-

> 1. පැමිනිල්ලේ උපලේඛණයේ විස්තර කොට ඇති ඉඩම පැමිනිල්ලේ 2 සිට 10 දක්වා ජේදයන් ප්‍රකාර පැමිනිලිකරුන්ට අයිතිවේද ?

It is this issue which was subsequently reformulated as issues 6 and 7 (quoted in full earlier in this judgement) in the light of the plans and reports furnished by the commissioned surveyors.

It is noteworthy that paragraphs 2 to 10 of the petition filed by the Respondents in this case narrate the alleged chain of title of the Respondents, all of which have been denied in the Answer of the Appellants, and in particular paragraph 7 refers to the Power of Attorney P7 and paragraph 8 to the Deed P1. Furthermore, the Power of Attorney P7 was marked "subject to proof", and Mr. Mustapha, has stressed that it has never been proved, and that therefore the Deed P1 could not have conveyed any title to the Respondents. He has submitted further that the action from which this appeal arises, being an action for declaration of title which has been treated by both the District Court and the Court of Appeal as a *rei vindicatio* action, the onus was clearly on the Respondents to prove the aforesaid instruments and demonstrate how the Respondents derived title to the land described in the schedule to the petition. Mr. Dayaratne, has contended that an action for declaration of title is distinguishable from a *rei vindicatio* action which required stricter standards of proof, and that the instant case is only an action for declaration of title in which the Respondents would succeed if the Appellants cannot establish a stronger title or a right to possess.

A curious feature of this case is that it commenced as an action for declaration of title in which ejectment was not prayed for by either of the contending parties in their initial pleadings, and a new prayer was introduced into the replication without any express prayer for ejectment for additional relief by way of damages in a sum of Rs.

33,000/- for every cultivation season (කන්නය) *until the quiet and peaceful possession of the land described in the schedule to the petition is restored to the Respondents*. At the trial, no issue was formulated which could justify an order for ejectment, but the learned District Judge by his judgement dated 5th October 1994 ordered ejectment without any express declaration of title in favour of the Respondents. After the Appellants lodged their appeal to the Court of Appeal, the District Court proceeded to issue writ pending appeal for the ejectment of the Appellants from the land described in the schedule to the petition, which order and the subsequent orders reissuing writ of possession made by the District Court, have been stayed by the Court of Appeal from time to time in connected revisionary and appellate proceedings.

The affinity between the action for declaration of title and an action *rei vindicatio* has been considered in several landmark decisions in Sri Lanka and South Africa, which seem to suggest that they are both essentially actions for the assertion of ownership, and that the differences that have been noted in decisions such as *Le Mesurier v. Attorney General* (1901) 5 NLR 65 are differences without any real distinction. In the aforementioned case, Lawrie, J., at page 74 compared an action for the recovery of land in the possession of the Crown to the English prerogative remedy of petition of rights, and observed that-

> I call the action one for declaration of title which, I take it, is not the same as an action *rei vindicatio*.

Similarly, in *Pathirana v. Jayasundara* (1955) 58 NLR 169 where a plaintiff sued an over-holding lessee by attornment for ejectment, and upon the defendant pleading that the land was sold to him by its real owner who was not one of the lessors, the plaintiff moved to amend the plaint to add a prayer for declaration of title, in refusing such relief in circumstances where this could prejudice the claim of the defendant to prescriptive title, Gratiaen, J., observed at page 173 that-

> A decree for a declaration of title may, of course, be obtained by way of additional relief either in a *rei vindicatio* action proper (which is in truth an action *in rem*) or in a lessor's action against the over-holding tenant (which is an action *in personam*). But, in the former case, the declaration is based on proof of ownership; in the latter, on proof of contractual relationship which forbids a denial that the lessor is the true owner.

The above quoted *dictum* does not, of course, mean that a lessor or landlord is confined to the contractual remedy against an over-holding lessee or tenant or that he cannot sue *in rem* to vindicate his title and recover possession. All it means is that if he chooses the latter remedy, he cannot succeed just because the over-holding lessee or tenant fails to prove his right to possess, or simply rely on the rule of estoppel that a tenant cannot contest the title of his landlord, and must be able to establish his title against the whole world.

Clearly, the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei*), which had its origins in Roman Law. The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property, as opposed to a mere action *in personam*, founded on a contract or other obligation and directed against the defendant or defendants personally, wherein it is sought to enforce a mere personal right (*in personam*). The *vindicatio* form of action had its origin in the *legis actio* procedure which symbolized the claiming of a corporeal thing *(res)* as property

by laying the hand on it, and by using solemn words, together with the touching of the thing with the spear or wand, showing how distinctly the early Romans had conceived the idea of individual ownership of property. As Johannes Voet explains in his *Commentary on the Pandects* (6.1.1) "to vindicate is typically to claim for oneself a right in *re.* All actions *in rem* are called vindications, as opposed to personal actions or conductions." Voet also observes that-

> From the right of ownership springs the vindication of a thing, that is to say, an action *in rem* by which we sue for a thing which is ours but in the possession of another. (*Pandects* 6.1.2)

It is in this sense that the *rei vindicatio* action is often distinguished from "actions of an analogous nature" (*per* Withers, J., in *Allis Appu v. Edris Hamy* (1894) 3 SCR 87 at page 93) for the declaration of title combined with ejectment of a person who is related to the plaintiff by some legal obligation (*obligatio*) arising from contract or otherwise, such as an over-holding tenant (*Pathirana v. Jayasundara* (1955) 58 NLR 169) or an individual who had ousted the plaintiff from possession (*Mudalihamy v. Appuhamy* (1891) CLRep 67 and *Rawter v. Ross* (1880) 3 SCC 145), proof of which circumstances would give rise to a presumption of title in favour of the plaintiff obviating the need for him to establish title against the whole world (*in rem)* in such special contexts. These are cases which give effect to special evidentiary principles, such as the rule that the tenant is precluded from contesting the title of his landlord or a person who is unlawfully ousted from possession is entitled to a rebuttable presumption of title in his favour. Burnside CJ., has explained the latter principle in *Mudalihamy v. Appuhamy* (1891) CLRep 67 in the following manner-

> Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep the property against the whole world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his *de facto* possession at the time of the ouster.

The action from which this appeal arises is not one falling within these special categories, as admittedly, the Respondents had absolutely no contractual nexus with the Appellants, nor had they at any time enjoyed possession of the land in question. Of course, this is not a circumstance that would deprive the Respondents to this appeal from the right to maintain a vindicatory action, as it is trite law in this country since the decisions of the Supreme Court in *Punchi Hamy v. Arnolis* (1883) 5 SCC 160 and *Allis Appu v. Edris Hamy* (1894) 3 SCR 87 that even an owner with no more than bare paper title (*nuda proprietas*) who has never enjoyed possession could lawfully vindicate his property subject to any lawful defence such as prescription. Nor would the failure to pray for the ejectment of the Appellants (an omission which has been supplied by the learned District Judge by his decision) affect the maintainability of the action for declaration of title (which declaration the learned District Judge has not granted expressly, although he may have done so by way of implication) or change the complexion of the case, which is essentially an *actio rei vindicatio.* The District Court and Court of Appeal, as has been seen, in their respective judgments have correctly assumed that the action from which this appeal arises is an *actio rei vindicatio.* They have also awarded the Respondents relief by way of ejectment despite the absence of a prayer for ejectment in their petition or even in their replication, the correctness of which award is hotly contested by the Appellants.

An important feature of the *actio rei vindicatio* is that it has to necessarily fail if the plaintiff cannot clearly establish his title. Wille's *Principles of South African Laws* (9th Edition – 2007) at pages 539-540 succinctly sets out the essentials of the *rei vindicatio* action in the following manner:-

> To succeed with the *rei vindicatio*, the owner must prove on a balance of probabilities, first, *his or her ownership in the proper*ty. Secondly, *the property must* exist, *be clearly identifiable* and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration. *(emphasis added).*

In *Abeykoon Hamine v. Appuhamy* (1950) 52 NLR 41, Dias, SPJ. quoted with approval, the decision of a Bench of four judges in *De Silva v. Goonetilleke* (1931) 32 NLR 27 where Macdonell, C.J., had occasion to observe that-

> There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindication* plaintiff must have ownership actually vested In him"- 1 Nathan p.362, s. 593……..This action arises from the right of *dominium*…….The authorities unite in holding that plaintiff must show title to the *corpus* in dispute, and that if he cannot, the action will not lie".

In *Dharmadasa v. Jayasena* [1997] 3 Sri LR 327 G.P.S de Silva, C.J., equated an action for declaration of title with the *rei vindicatio* action, and at page 330 of his judgement, quoted with approval the *dictum* of Heart, J., in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167, for the proposition that the burden is on the plaintiff in a *rei vindicatio* action to clearly establish his title to the *corpus,* echoing the following words of Withers, J., in the old case of *Allis Appu v. Endris Hamy* [1894] 3 SCR 87 at page 93-

> In my opinion, if the plaintiff is not entitled to revindicate his property, he is not entitled to a declaration of title,…..If he cannot compel restoration, which is the object of a *rei vindicatio*, I do not see how he can have a declaration of title. I can find no authority for splitting this action in this way in the Roman-Dutch Law books, or decisions of court governed by the Roman-Dutch Law.

As Ranasinghe, J., pointed out in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 at page 142, a plaintiff to a *rei vindicatio* action "can and must succeed only on the strength of his own title, and not upon the weakness of the defence." In *Wanigaratne v. Juwanis Appuhamy,* (1962) 65 NLR 167 at page 168, Heart, J., has stressed that "the defendant in a *rei vindicatio* action need not prove anything, still less his own title." Accordingly, the burden is on the Respondents to this appeal to establish their title to the land described in the schedule to their petition, and they can only succeed by showing that Mohamed Ibrahim Lebbai Noor Lebbai had the power and authority to convey the title (*dominium*) of the said land to the Respondents by executing Deed No. 6165 (P1). It is for this purpose vital to prove the Power of Attorney marked P7 by which, it is claimed, that Sadakku's son Mohideen Abdul Cader appointed Noor Lebbai as Attorney for executing the Deed marked P1 and that the said deed operated to convey the alleged title of Mohideen Abdul Cader to the Respondents. These were clearly not matters raised for the first time at the stage of grant of special leave to appeal, and ought to have engaged the attention of the learned District Judge in view of issue 1, 6 and 7 framed at the commencement of the trial.

For the aforesaid reasons, I am of the opinion that substantive questions 3 and 4 should be answered in favour of the Appellants. Accordingly, I answer question 3 in the negative and question 4 in the affirmative, and hold that substantive questions 1(a) and (b) have to be addressed in determining this appeal.

Proof of the Power of Attorney

Substantive question 1(a) on which special leave has been granted by this Court, is whether the Power of Attorney marked P7 has been duly proved. As already noted, this question is of extreme importance for establishing the chain of title of the Respondents, as it is by virtue of the power vested in him by the said power of attorney that the Attorney named therein, Noor Lebbai, purported to execute the Deed marked P1, by which the Respondents claimed to have derived their title to the land described in the schedule to the petition. In this connection, it is relevant to note that when the said Power of Attorney was first mentioned in the course of his testimony on 12th August 1991 by the 1st Petitioner-Respondent-Respondent, Abdul Majeed Mohamed Mansoor, the tender in evidence of a photocopy of the said power of attorney was objected to by learned Counsel for the Appellants, and the said photocopy was marked subject to proof.

When a document is marked subject to proof, it is essential for the said document to be proved through witness testimony. The procedure for tendering a document in evidence in the course of witness testimony is dealt with in Section 154 of the Civil Procedure Code, and what is most relevant to this case is the first sentence of Section 154(1), which provides that-

> Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.

The explanation to this section is very useful in understanding this provision, and in particular understanding how a document marked subject to proof is to be proved. The said explanation is reproduced below, in full:-

> If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it. *If, however, on the document being tendered the opposing party objects to its being admitted in evidence*, then commonly two questions arise for the court:-
>
> > Firstly, whether the document is *authentic* – in other words, is what the party tendering it represents it to be; and
> >
> > Secondly, whether, supposing it to be authentic, it constitutes legally *admissible* evidence as against the party who is sought to be affected by it.
>
> The latter question in general is matter of argument only, but *the first must be supported by such testimony as the party can adduce.* If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *prima facie case of authenticity* and is further of opinion that the authentic *document is evidence admissible against the opposing party,* then it should admit the document as before. (*emphasis added*).

The question therefore is whether the authenticity and admissibility of the Power of Attorney (P7), which was marked subject to proof, has been established through subsequent testimony and analytical reasoning.

In Sri Lanka, the rules for the proof of documents are contained in Chapter 5 of the Evidence Ordinance No. 14 of 1895, as subsequently amended. Of particular, relevance to the proof of the Power of Attorney in question are Sections 67 to 73 of the Evidence Ordinance. The Power of Attorney marked P7 is alleged to have been executed and attested in India, but the purported executant Mohamed Mohideen Abdul Cader, was not called to testify regarding its execution, nor was any attempt made to show that the signature of the purported executant appearing on P7 was that of Abdul Cader. Sections 68 to 71 of the Evidence Ordinance deal with the proof of documents which are required by law to be attested, while Section 67 and 72 of the Ordinance deal with the proof of documents which are not required by law to be attested. Section 68 of the Ordinance provides that-

> If a document is required by law to be attested, it shall not be used as evidence until *one attesting witness at least* has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. (*emphasis added*).

Mr. Faisz Musthapha, P.C., has submitted on behalf of the Appellants that in terms of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840, as subsequently amended, any "sale, purchase, transfer, assignment, or mortgage of land or other immovable property" is of no force or avail in law unless the same is notarially attested. He has further submitted that, just as much as Deed bearing No. 6165 dated 9th February 1987 (P1) was required by the aforesaid provision to be notarially attested, even the Power of Attorney (P7), by virtue of which Mohomad Ibrahim Lebbai Noor Lebbai, the executant of P1, purported to have the authority or power to make the same, was required by law to be attested. He based this submission on the premise that the conferment of authority or power to another to enter into any sale, purchase, transfer, assignment, or mortgage of land or other immovable property, was a contract or agreement for "establishing any security, interest, or incumbrance affecting land" within Section 2 of Ordinance No. 7 of 1840, and was governed by the same formalities. It was Mr. Musthapha's contention that just as much as the Deed marked P1 was required by law to be attested, so was the Power of Attorney marked P7, and at least one attesting witness thereof should have been called for the purpose of proving its execution.

The question as to who is an attesting witness has been considered in several leading judgements of our courts, and the gist of the decisions such as *Kirihanda v. Ukkuwa* [1892] 1 S.C.R. 216, *Somanather v. Sinnetamby* [1899] 1 Tambiah 38, and *Seneviratne v. Mendis* 6 C.W.R. 211 is that as a general rule, the witnesses who were present at the time the deed, last will or other instrument was executed are attesting witnesses competent to testify, and even the notary public before whom it was executed is deemed to be an attesting witness *if he knew the executants personally*. However, it is also relevant to note that in *Baronchy Appu v. Poidohamy* 2 Browns's Reports 221, *Hilda Jayasinghe v. Francis Samarawickrame* [1982] 1 Sri LR 249 and *Samarawickrema v. Jayasinghe and Another* [2009] BLR 85, it has been held that where the execution of such an instrument is challenged *on the ground that it had been signed before it was written*,

and at least one of the attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant, is not sufficient and at least one of the attesting witnesses should also be called to testify. Such stringent proof is insisted upon in view of the solemnity that is attached to such a document and the need to prevent fraud. The Power of Attorney marked P7 was purportedly executed in the Ramanathapuram District of Tamilnadu, India before B. M. M. Hamid Hasan, Advocate & Notary Public. It is clear from the certification of the notary in the attestation clause of P7 that the notary did not know the executants Abdul Cader personally and depended on the "information" given by the two attesting witnesses, namely M. Shayeed, son of Mohamed Asanalabai, and V. Ravindran, son of C. Velusamy, both of Ramanathapuram District, India, neither of whom were called to testify in proof of its execution, and no explanation was given for the omission to do so. There was also no evidence in regard to whether or not the aforesaid power of attorney was registered in India in terms of the Indian Registration Act, 1908, and it is clear from the testimony of Ulludu Hewage Karunaratne, Registrar of Lands, Anuradhapura, that the said power of attorney was not registered in Sri Lanka nor was it tendered to the Registry with the second copy of the Deed marked P1 for registration. There is also no evidence to show that P7 was registered in terms of the Notaries Ordinance No. 4 of 1902, as subsequently amended, and what has been produced as P7 is not a certified copy issued under Section 8 of the said Act.

For the Respondents, Mr. Dayaratne has argued with great force that P7 was not a document that required attestation. In particular, he referred to the provisions of the Powers of Attorney Ordinance No. 4 of 1902, as subsequently amended, which provides for the registration of written authorities and powers of attorney. He pointed out that in Section 2 of the said Ordinance, the term "power of attorney" is defined so as to "*include* any written power or authority other than that given to an attorney-at law or law agent, given by one person to another to perform any work, do any act, or carry on any trade or business, and executed before two witnesses, or executed before or attested by a notary public or by a Justice of the Peace, Registrar, Deputy Registrar, or by any Judge or Magistrate, or Ambassador, High Commissioner or other diplomatic representative of the Republic of Sri Lanka", and relied on this inclusive definition for his contention that the law did not insist that a power of attorney must necessarily be in writing or should be registered. He submitted that a person may be appointed as attorney to deal with immovable property through a video recording, voice mail or telephone communication.

Mr. Dayaratne also submitted that the question whether the power or authority given for a person to execute a deed for dealing with immovable property on behalf of its owner should itself be executed in a similar manner had engaged our courts in the late nineteenth and early twentieth century in several cases, and heavily relied on the decisions in *Meera Saibo v. Paulu Silva* (1899) 4 NLR page 229, *Sinnathamby v. John Pulle* (1914)18 NLR 273, *Beebee v. Sittambalam* (1920) 2 CLRec 72 and *Pathumma v. Rahimath* (1920) 22 NLR 159, which have held that the grant of authority to execute a notarial document does not itself require notarial execution. Mr. Dayaratne pointed out that in *Sinnathamby v. John Pulle,* it was argued on the authority of *Hunter v. Parker* 7 M&W 322 that a power of attorney to execute a deed can only be given by an instrument under seal, but Ennis, J., brushed aside this argument stating at page 276 that-

> The laws of Ceylon, however, do not provide for the distinction found in English Law between deeds, *i.e.*, documents signed, sealed, and delivered, and documents under

> hand only. Deeds in the sense in which the word is used in English Law do not exist in Ceylon, and the English Rule cited applies in England to deeds only.

Mr. Dayaratne also stressed that in *Pathumma v. Rahimath* Bertram, CJ., at page 160 referred to the decision in *Meera Saibo's* case and observed that "that was decided more than 20 years ago, and, I think, it must be taken to be now settled law", a view that has been endorsed by Justice Dr. C.G. Weeramanty, in his *Law of Contracts*, Vol. I page 184.

Mr. Musthapha who appears for the Appellants, has submitted that logic and policy demanded a more cautious approach, and contended that a power of attorney by virtue of which a person such as Noor Lebbai claims that he had the power to execute any writing, deed, or instrument for effecting the sale or transfer of any land or other immovable property such as Deed No. 6165 dated 9th February 1987 (P1), should be executed in the same manner in which such writing, deed or instrument is required to be executed. He also drew attention to the decision of the Supreme Court in the case of *Dias v. Fernando* (1888) 8 SCC 182 which supported his submission, and I quote below a passage from the judgement of Burnside, C.J., in this case which I consider very pertinent:-

> Now it is manifest that the object of the (Prevention of Frauds) Ordinance was to secure the most solemn proof of the contract, and not to let it depend upon the very fallible proof which parol evidence would, more especially in this country, afford. It would be, in the language of Lord Eldon, the most mischievous evasion of the Ordinance, if, whilst the instrument of lease itself must be of the solemn character prescribed, yet the authority to execute it and thus bind a party to it might depend upon the weakest and most unsatisfactory of all proof. The English statute requires a mere writing: our Ordinance requires a most solemn writing, which has all of, and more than, the solemnity of the execution of a deed by English Law, and in this material particular the two enactments differ, and open the way to a decision based on the well recognized principle of English Law, that the authority to execute a deed must be by deed.

Of course, the opinion of Burnside, C.J., was not followed by the Supreme Court in *Meera Saibo's* case and the subsequent decisions, but the Chief Justice's hindsight in decrying the possibility of authorizing execution of a deed by a non-notarial conferment of power as "the most mischievous evasion" of the Prevention of Frauds Ordinance, can be more readily appreciated in the context of changing circumstances and developments of the law in Sri Lanka and abroad. In particular, it is necessary to consider the rapid increase in land related frauds in Sri Lanka, which have generally contributed to a sense of lawlessness and social instability leading to murder and other serious crimes.

It is necessary to stress that Withers, J., in his judgement in *Meera Saibo,* quoted the above *dictum* of Burnside, C.J., with some concern, but was persuaded to follow the reasoning of Mr. Berwick, the much celebrated and long standing District Judge of Colombo, set out in his judgement in *Nama Sivaya v. Cowasjie Eduljie* (DC Colombo Case No. 61, 545 decided on 21st January 1873), which he chose to add as an attachment to his judgement in its entirety and has been reproduced in 4 NLR pages 232 to 235.

Mr. Berwick's celebrated judgement in the *Nama Sivaya* case, may for convenience summarized as follows:-

(a) Mere "solemnities" (as the Civil Law calls them), however essential they may be to give validity to an act, and to whatever extent they may have been devised with a view to better authentication and proof under the English law, have not been introduced in Ceylon by virtue of the introduction of the English Law relating to evidence;

(b) It therefore does not follow that, even if in the English Law a power of attorney to execute an instrument must be evidenced by an instrument of equal solemnity, the same is the Law of Ceylon;

(c) The delegation of authority to enter into a deed is a personal act; the execution of the personal delegation is a "real" act. The latter must, in the present case, be done in conformity with the *lex loci citæ*; it may be that the former is to be governed by the law of the place where the delegation is made, viz., England, where the law does not require the conferment of such authority shall be attested either by a notary or by witnesses.

(d) The Roman-Dutch Law authorities are silent as to the necessity of any special solemnities for the valid constitution of the mandate of an attorney, and nowhere in his *Treatise on the Contract of Mandate* does Pothier advert to the necessity for notarial attestation for this purpose;

(e) Van Leeuwen, in his *Censura Forensis* (*part 1, lib. 4, cap. 24*) divides powers of attorneys into general and special, and also into express and tacit; and while he points out that there are many things which cannot be done under a general power of attorney (among others, sales and alienations), but which require a special power, he indicates no such difference under the further division into express (*Quod expressum verbis sit [aut literis]*) and tacit mandates, which is part of the law relating to agents; and

(f) The contention in the context of Ordinance No. 7 of 1840 that the power of attorney itself establish an "interest affecting land" cannot be sustained because the power of attorney does not establish or convey any interest in land; it only authorizes another person to convey such an interest by all legal form and solemnities which the law of the Island may require.

If we have to apply to this case the principles of the Roman-Dutch law so authoritatively enunciated by Mr. Berwick in the aforesaid judgement, the Respondents will necessarily fail simply because the Power of Attorney marked P7 is not a special power of attorney which is requisite for empowering another to enter into a sale or alienation as explained by Van Leeuwen, in his *Censura Forensis* (part 1, lib. 4, cap. 24). I quote below the operative paragraph of P7 which makes it abundantly clear that this was definitely not a special power of attorney:-

5. To superintend, manage and control the aforesaid land or any other landed property which I now or hereafter may become entitled to, possessed of or interested in and to sell and dispose of the said land which now or hereafter I may become entitled to possessed of or interested in by private contract or to enter into any agreement for sale thereof for such price or prices and upon such terms and conditions as my said Attorney shall think fit.

Furthermore, as the distinguished District Judge of Colombo has observed (*vide* sub-paragraph (c) of the above summary), the form of delegation is governed by the law of the place where the delegation is made, which in this case is India, and the Respondents have failed to discharge the burden placed on them by law to prove the applicable legal principles and formalities in force in that country at the relevant period.

It is trite law that in terms of Section 45 of the Evidence Ordinance, the law of a foreign country has to be proved through the evidence of experts, or as outlined in the first proviso to Section 60, through other means such as the production in court of treatises on law where the author is dead or whose presence cannot be reasonably procured, and no expert testimony of the law in force India has been tendered in evidence or other material produced in court. The decision of this Court in *Sreenivasaraghava Pyengar v. Jainambeebe Ammal* (1947) 48 NLR 49 in this regard should be understood in the light of the fact that at the time of that decision, British India was part of Her Majesty's realm as much as Ceylon was, and was not a foreign country. In that case, the Supreme Court refused to rely on a document purporting to be a "true copy" of the original power of attorney, which had been copied by a registering officer in a book kept under the Indian Registration Act, 1908, and held that this was not in itself sufficient to establish the fact of execution of the original power of attorney. In the case before us, what has been produced is a mere photocopy, with no evidence in regard to how the photocopy was obtained, and in this case too there is no evidence to show that the power of attorney had been registered under the Indian Registration Act, 1908.

It was in these circumstances that Mr. Dayaratne sought to rely on the presumption in Section 85 of the Evidence Ordinance in regard to the Power of Attorney marked P7. In my considered opinion, the Respondents cannot invoke the assistance of this presumption, as the "authentication" required to attract the said presumption must be clear, specific and decisive. It has been held in *Mohanshet v. Jayashri* AIR (1979) Bom. 202, that "authentication" for this purpose is something more than execution, and cannot be based on the identification by a third person who is not called to testify in the case, in circumstances where the executant was not personally known to the Magistrate before whom the power of attorney in question was executed. As Desai, J., observed in the course of his judgement at pages 204 to 205 –

> It is now well settled that authentication is more than mere execution before one of the persons designated in Section 85……
>
> As far as the identity of the executant is concerned, the Magistrate in fact indicates that he is personally unaware of the executants but puts his signature on the basis of identification made by an Advocate. It is true that such identification by the advocate is mentioned in the rubber stamp, and one may presume that it is on the basis of such identification that the Magistrate proceeded to put the rubber stamp. But will this amount to authentication by the Magistrate? Section 85 contains a presumption, a presumption which may operate in favour of the party relying on a document and to the prejudice of the party alleging that the document is not a genuine one. For the purpose of such presumption to operate, particularly in the background of the facts above ascertained, the authentication must be clear, specific and decisive, and bereft of the features which I have indicated earlier. If there is the slightest doubt, then the Court must be loathe to rely on the presumption contained in S. 85 and must be

> equally loathe in applying such presumption in favour of the party relying on the document.

The case at hand is similar, as it is evident from the attestation clause of P7 that the Notary Public relied on the "information" provided by the two attesting witnesses with regard to the identity of the executant, who was otherwise not known to him. In these circumstances, I am of the opinion that the Respondents have failed to furnish sufficient evidence to satisfy court that the applicable formalities of the law have been complied with in executing the power of attorney, or to show, as contemplated by Section 69 of the Evidence Ordinance, which is applicable to proof of any document executed abroad, that the "attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

It is also pertinent to note that Mr. Berwick had in his judgement in the *Nama Sivaya* case very correctly analyzed the question of the form of delegation of authority as one falling within the law relating to agents, but it does not appear whether he considered the question as to whether the insertion by Ordinance No. 22 of 1866, of *inter alia* the words "principals and agents" into the Introduction of English Law Ordinance (Civil Law Ordinance) No. 5 of 1852 had the effect of making the English law applicable on this subject applicable in Sri Lanka. Of course, that would not have made any difference to the decision in that case, as Mr. Berwick himself had concluded, as will be seen from sub-paragraph (c) of my summary of the reasoning of Mr. Berwick, that the Statute of Frauds of 1677 did not require attestation for conferment of authority for executing a deed.

However, it is important to note that the relevant provisions of the Statute of Frauds have been replaced in the United Kingdom by Sections 74(3) to 74(5) and Sections 123 to 129 of the Law of Property Act 1925 (c 20) and Section 219 of the Supreme Court of Judicature (Consolidation) Act 1925 (c 49), which in turn have given way to Section 1 of the Powers of Attorney Act of 1971 (c 27). The latter Act has been amended by the Law of Property (Miscellaneous Provisions) Act of 1989 (c 34), and as so amended, Section 1(1) of the Powers of Attorney Act of 1971 would read as follows:-

> 1(1) An instrument creating a Power of Attorney shall be *executed as a deed*, or by direction and in the presence of, the donor of the power. (*emphasis added*).

It is noteworthy that the Law of Property (Miscellaneous Provisions) Act of 1989 generally abolished the prior law which required a seal for a valid execution of a deed by an individual, and substituted for the words "signed and sealed by" which were found in Section 1(1) of the Powers of Attorney Act of 1971 the words "executed as a deed". Section 1(3) of the 1989 Act also provided that-

An instrument is validly executed as a deed by an individual if, and only if—

> (a) it is *signed*—
>
> > (i) *by him in the presence of a witness who attests the signature*; or
> >
> > (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is *delivered as a deed* by him or a person authorized to do so on his behalf.

A question of some difficulty that could arise in Sri Lanka in view of these developments in the United Kingdom is whether the above quoted English statutory provisions would become applicable in Sri Lanka through Section 3 of the Introduction of English Law Ordinance which seeks to incorporate into our legal fabric in regard to "principals and agents", and certain other specified subjects, the law that "would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereinafter to be enacted." Although there does not appear to be a decision of the Supreme Court on this point, it must be pointed out that the decision of the Court of Appeal in *Wright and Three Others v. People's Bank* [1985] 2 Sri LR 292 would appear to suggest an affirmative response to this question. In that case, the Court of Appeal affirmed the decision of the District Judge that Section 2(1) of the English Factors Act of 1889 was part of our law, and it is noteworthy that in the course of his judgement at page 300, G.P.S de Silva, J., (as he then was) observed that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." The Sri Lankan Powers of Attorney Ordinance No. 4 of 1902, as subsequently amended, may not be a stumbling block to an argument in favour of applying the English provisions relating to the *execution* of a power of attorney by an individual, as the local Powers of Attorney Ordinance is confined, as clearly set out in its preamble, to the "*registration* of written authorities and powers of attorney" and there is no contrary provision in regard to the execution of powers of attorney either in that Ordinance or in the Prevention of Frauds Ordinance.

It is, however, unnecessary for the purpose of this case to express an opinion in regard to this question, since as already noted, the Power of Attorney marked P7 was allegedly executed in India and would attract the Indian law relating to form, and furthermore, even if it is regarded as a document that does not require attestation as urged by Mr. Dayaratne, the Respondents would still fail. This is mainly because, according to Section 72 of the Evidence Ordinance, "an attested document not required by law to be attested may be proved as if it was unattested", and Section 67 of the same Ordinance provides that –

> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Admittedly, P7 does not purport to contain Abdul Cader's handwriting, but it contained a signature which is alleged by the Respondents to be his. It is noteworthy that none of the witnesses who spoke about P7 testified that the signature purporting to be that of Abdul Cader was placed thereon in the presence of such witness, nor was any effort made by the Respondents to show by comparison of other documents that may have contained the signature of Abdul Cader, that the signature on P7 was that of Abdul Cader. The Attorney named in the said Power of Attorney, Noor Lebbai has testified in the case, and has stated that in 1972 Sadakku left Sri Lanka leaving the land in his charge, and that much later and after the demise of Sadakku, his son Abdul Cader who lived in India, executed the Power of Attorney marked P7 authorizing him to look after the land and also to alienate it if the need arises.

Although he has placed reliance on P7, he did not state that he was personally present in India when the executant placed his signature on it, or seek to identify the signature as that of the executant Abdul Cader. He also did not explain how P7 came into his hands, or why only a photocopy thereof was tendered in evidence. No doubt, as Widham, J., observed in *King v. Peter Nonis* (1947) 49 NLR 16 at page 17, the so called 'best evidence' rule "has been subjected to a whittling down process for over a Century" and it is not always necessary today to produce in court the original of a document on which he relies. However, the non-production of the original document without any explanation as to why the original is not being produced, is certainly a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead. *See,* the observations of L.H. de Alwis, J., in *Vanderbona v. Justin Perera* [1985] 2 Sri LR 62 at page 68, and A.R.B. Amarasinghe, J., in *Stella Perera & Others v. Margret Silva* [2002] 1 Sri LR 169 at page 173.

It is therefore clear that applying the test of proof of a document that was not required by law to be attested, there was no *prima facie* evidence to prove its authenticity, and the question of its admissibility did not even arise. I am therefore of the opinion that the contention of the learned President's Counsel for the Appellants that the Power of Attorney marked P7 has not been proved as required by law has to be upheld.

There remains, however, one more matter on which learned Counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27th April 1993. This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. For instance, in *Sri Lanka Ports Authority and Another v. Jugolinija – Boat East* [1981] 1 Sri LR 18 Samarakoon, C.J., commented on this practice, and ventured to observe at pages 23 to 24 of his judgement that if no objection to any particular marked document is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held that this is the *cursus curiae* of the original courts. *See, Silva v. Kindersle* [1915-1916] 18 NLR 85*; Adaicappa Chettiar v. Thomas Cook and Son* [1930] 31 NLR 385 *Perera v. Seyed Mohomed* [1957] 58 NLR 246*; Balapitiya Gunananda Thero v. Talalle Methananda Thero* [1997] 2 Sri LR 101; *Cinemas Limited v. Sounderarajan* [1998] 2 Sri LR 16; *Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Others* [2010] BLR 249.

It would therefore follow that even though the Power of Attorney marked P7 had in fact not been proved as required by law, if the learned Counsel for the Respondents had read in P7 in evidence with the other marked documents at the close of the case for the Respondents without any objection being taken on behalf of the Appellants, P7 would have been deemed to be good evidence for all purposes of the law. However, that is not what actually happened in this case. A photocopy of the power of attorney allegedly granted by Abdul Cader to Noor Lebbai was marked P7 subject to proof, no proof whatsoever was adduced to prove the aforesaid photocopy, and

none of the marked documents were read in evidence at the conclusion of the Respondents' case.

For all these reasons, I hold that the Power of Attorney marked P7 has not been duly proved, and cannot be acted upon as evidence. I therefore hold that question 1(a) on which special leave to appeal has been granted in this case, should be answered in the negative.

Title of the Respondents

The other connected substantive question on which leave has been granted, which relate to the title of the Respondents to the land described in the schedule to the petition, has been split up into two sub-questions which are reproduced below:

1. (b) Does the Deed produced marked P1 operate to convey the title of Mohideen Abdul Cader, to the Respondents?

   (c) If not, was the Court of Appeal in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to the subject matter of the action?

Mr. Musthapha has submitted on behalf of the Appellants that Deed No. 6165 (P1) does not operate to convey the title of Mohideen Abdul Cader, to the Respondents. He has contended in so far as the procedure set out in Section 31 of the Notaries Ordinance No. 1 of 1907, as subsequently amended, has not been complied with in respect to the execution of Deed No. 6165 (P1), it is a nullity. The said procedure is found in rule 30, which provides that-

> If he (a notary) attest any deed or instrument executed before him by means of an attorney, he shall preserve a true copy of the power of attorney with his protocol, and shall forward a like copy with the duplicate to the Registrar of Lands

I also note that the Registrar of Land, Anuradhapura, Ulluduhewage Karunaratne, who was called to give evidence on behalf of the Appellants, has stated in his testimony that a copy of P7 has not been forwarded along with the duplicate of the deed marked P1 in compliance with the procedure set out in Section 31 of the Notaries Ordinance. However, in my view this contention cannot be sustained as Section 33 of the Notaries Ordinance clearly enacts that-

> No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form: provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.

Mr. Musthapha has further submitted that a plain reading of Deed No. 6165 marked P1 reveals that the alleged attorney Noor Lebbai has purported to convey the land described in its schedule as its owner, and not as the holder of the Power of Attorney mared P7. He has also stressed that the notary before whom the aforesaid deed was executed has not mentioned in his attestation, in what other capacity Noor Lebbai signed the deed in question. Mr. Dayaratne has, in his response, relied very much on

the language used in the operative part of the deed, wherein Noor Lebbai refers to the Power of Attorney marked P7, and states that-

> ඉබ්‍රාහිම් ලෙබ්බෙගේ පුත්, මොහොමඩ් ඉබ්‍රාහිම් ලෙබ්බේ නුර් ලෙබ්බේ වන මට දකුණු ඉන්දියාවේ තමිල්නාඩු ප්‍රාන්තයේ රාමනාතපුරම් දිස්ත්‍රික්කයේ කීලක්කරෙයි උතුරු වීදියේ එස්. එම්. එම්. හමීඩ් හසන් ප්‍රසිඩ නොතාරිස් තැන විසින් වෂී 1981 ක්වූ ඔක්තෝම්බර් මස 30 වෙනි දින සහතික කළ මදාර් කනී, මොහොම්මදු මොහිදීන් කාදර් සායිබු, මොහිදීන් සදක්කු, මොහිදීන් අබ්දුල් කාදර් යන අයගේ අංක 2633 දරණ ඇටෝර්නි බලපත්‍රයේ අයිතිය පිට අයිතිය නිරවුල්ව බුක්ති විඳ එන මෙහි පහත උපලේඛණයෙහි විස්තර කෙරෙණ දේපල ලංකාවේ වලංගු මුදලින් රුපියල් විසිදාහ (රුපි. 20000.00) කට අංක 01, තක්කියා පාර, තුසව, නාච්චාදුව යන ලිපිනය ඇති අබ්දුල් මජීඩ් අබ්දුල් නිසාර් මහත්මයාද 2. අබ්දුල් මජීඩ් මොහොමඩ් මන්සුර් මහත්මයාද යන දෙදෙනාට මෙයින් විකුණා අයිතිය පවරා භාරදී එම මුදල සම්පූර්ණයෙන් ගැන භාරගතිම්

It is not at all clear from the above quoted words that Noor Lebbai purported to act as an Attorney on behalf of his principal. In fact, in the below quoted words, he even describes himself as the vendor (විකුණුම්කාර), and purports to sell the property in question and also to defend title:-

> එහෙයින් එකී දේපල සහ ඊට අයිති සියළු දේත් ඒ පිළිබඳව එකී විකුණුම්කාර මා සහ උරුම කරුම හිමිකම් හා බලතලත් එකී ගැණුම්කාර අබ්දුල් මජීඩ් අබ්දුල් නිසාර් මහත්මයාද 2. අබ්දුල් මජීඩ් මොහොමඩ් මන්සුර් මහත්මයාද යන දෙදෙනාට සහ ඔවුන්ගේ උරුමක්කාර පොල්ම: අද්මිනිස්ත්‍රාසිකාර බලකාරාදීන්ටත් සදහටම නිරවුල්ව බුක්ති විඳීමට හෝ මනාපයක් කර ගැනීමට පුළුවන් මුළු බලය මෙයින් සලසා දුනිම්. තවද එකී දේපල මෙසේ අන්සතු කිරීමට නීති ප්‍රකාර සම්පූර්ණ බලය මට ඇති බවද එම දේපලවලත් ඉන් කොටසක් හෝ එල ප්‍රයෝජනාදී කිසිවක් අන් සතුවීමට හේතුවන ක්‍රියාවක් මීට ප්‍රථම නොකල බවටද සහතික වෙමින් මෙම විකුණුම්කරය සියලු අයුරින් සවිකර දීමට හා ඊට විරුද්ධව පැමිණෙන යම් ආරාවුලක් වේ නම් ඊට වගඋත්තර කියා නිරවුල් කරදීමටද මෙය වැඩිදුරටත් ස්ථිර කරගැනීම පිණිස අවශ්‍ය වන්නාවු මීටම අදාල වෙනයම් ඔප්පු තිරප්පු ආදයක් එකී ගැණුම්කාර පක්ෂයේ වියදමෙන් සාදවා දෙන ලෙස එකී ගැනුම්කාරයන් විසින් හෝ ඔවුන්ගේ ඉහත උරුමක්කාරාදීන් විසින් ඉල්ලා සිටිනු ලැබුවහොත් එසේ කරදීමටද එකී විකුණුම්කාර මම මා වෙනුවට සහ මගේ උරුමක්කාර පොල්ම: අද්මිනිස්ත්‍රාසිකාර බලකාරාදීන් වෙනුවටත් මෙයින් වැඩිදුරටත් පොරොන්දුව බැඳුනෙම්.

I am of the opinion that in the circumstances, the Deed marked P1 does not purport to be a conveyance of the title allegedly vested in Abdul Cader through the instrumentality of an alleged agent, and is in effect a purported conveyance of title and possession which Noor Lebbai never enjoyed, and which he cannot in law dispose of.

Apart from this, there is also considerable doubt as to whether Abdul Cader himself had title to the said four acre land, as there is inadequate material before court to conclude that the admitted ownership of Sadakku had devolved on Abdul Cader. I find that the Respondents have failed to establish the devolution of title to Abdul Cader. Although it appears from the testimony of Respondents' witness Mohamed Ibrahim Lebbai Noor Lebbai that there was a testamentary case with respect to the estate of Sadakku, no documentary evidence whatsoever has been produced at the trial in regard to how the ownership of the land described in the schedule to the petition devolved on the heirs of Sadakku. It transpires from the testimony of Noor Lebbai, that Sadakku's brother Kachchi Mohideen succeeded to a $2/10^{th}$ share of the land described in the schedule to the petition and that Sadakku's two sons Mohomadu Mohideen and Abdul Cader, also inherited undivided shares in the land, the proportions of which have not been clearly established. Therefore, it is evident from the testimony of the Respondents' witnesses themselves that Abdul Cader was not the *sole* owner of the land described in the schedule to the petition. It follows that, even if the Power of Attorney marked P7 was proved, the evidence led in regard to the devolution of title from Sadakku to Abdul Cader cannot be said to have establish the title of Abdul Cader to the entirety of the land on the standard of proof that is required in a *rei vinidicatio* action. It is also important to bear in mind that, for

the reasons already advanced, in so far as the execution of the Power of Attorney marked P7 has not been duly proved, Noor Lebbai did not have any power or authority to bind Abdul Cader, and for that reason alone, Deed No. 6165 (P1) cannot operate to convey any title to the Respondents.

I therefore have no difficulty in answering the substantive question 1(b) in the negative and holding that the Deed produced marked P1 does not operate to convey the admitted title of Muhammad Mohideen Cader Saibu Mohideen Sadakku, or the alleged title of Mohideen Abdul Cader, to the Respondents.

Sub-question 1(c) was of course intended to be consequential upon question 1(b) being answered in the negative, and requires some attention, because it raises the question, in that event, whether the Court of Appeal was in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to *the subject matter of the action*. It is in this case somewhat difficult to fathom what is meant by the words "the subject matter of the action", as there has been a great deal of confusion in this regard. It was in view of this confusion that this Court specifically invited learned Counsel to make submissions on the question of the identity of the *corpus*, even though none of the substantive questions on which special leave had been granted by this Court, directly raised any issue in regard to the identity of subject matter of the action from which this appeal arises.

It is trite law that the identity of the property with respect to which a vindicatory action is instituted is as fundamental to the success of the action as the proof of the ownership (*dominum*) of the owner (*dominus*). The passage from Wille's *Principles of South African Laws* (9th Edition – 2007) at pages 539-540, which I have already quoted in this judgement, stresses that to succeed with an action *rei vindicatio*, which this case clearly is, 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.* It is also essential to show that the defendant is "in possession or detention of the thing at the moment the action is instituted." Wille also observes that the rationale for this "is to ensure that the defendant is in a position to comply with an order for restoration."

The identity of the subject matter is of paramount importance in a *rei vindicatio* action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the *corpus* to be identified with precision.

Doubts in regard to the identity of the land sought to be vindicated in this case arise from the fact that while the Respondents in their petition laid claim to a four acre land known as "Palugahakumbura", in Mahawela, Pahalabaage situated in the village of Pandiyankulama in Nachcha Tulana of Ulagalla Korale in Hurulu Palata of

the Anuradhapura District, by virtue of Deed bearing No. 6165 (P1), the 1st Appellant asserted prescriptive title to a land described as "Nilattu Patti Wayal" falling within LD 2 Ela in the village of Pandiyankulama in Nachchadoova Tulana of Ulagalla Korale in Hurulu Palata in extent 3 acres 2 roods and 26 perches.

In the schedule to the petition filed by the Respondents, which closely followed the schedules to the deeds marked P1 to P6, there was no reference to any survey plan and the four acre land claimed by the Respondents was described in the following manner:-

> All that field called Palugaha Kumbura situated in the Pahala Bagaya of the Mahawela at Nachchaduwa Pandiankulama in Nachcha Tulana of Ulagalla Korale in Hurulu Palata in the District of Anuradhapura of the North Central Province, bounded on the North by the field of Nawuran Lebbe Mohiyadeen Pitcha and Others, East presently by Welle and the property of Yusoof Lebbe one of the vendors hereof, South by the property of Ali Tamby Lebbe Sharibu and the Others and West presently by the property of Sultan Unus containing in extent Four Acres (4A-0R-0P) more or less together with the paddy crops that are growing now on the land.

In the schedule to the answer filed by the Appellants, which too made no reference to any survey plan, the land claimed by the 1st Appellant was described as follows:-

> The land known as Nilattu Patti Wayal, in extent 3 acres, 2 roods and 26 perches (A3-R2-P26) situated within the LD 2 Ela of the village of Pandiyankulama in Nachchadoowa Tulana of Ulagalla Korale in Hurulu Palata in the District of Anuradhapura of the North Central Province, bounded on the North by the paddy fields belonging to Y. M. Ismail and M. P. Kairun Nisa, on the East by the LD 2 Ela on the South by the paddy field of D. C. M. Wijesinghe and on the West the paddy field of U. Cader Beebee and T. C. M. Munesinghe, together with all things from therein.

It was perhaps in view of the differences in extent and description of the lands claimed by the contending parties, and the circumstance that neither the schedule to the petition nor the schedule to the answer described the land in suit by reference to a survey plan, that the District Court issued a commission on D. M. G. Dissanayake, Licensed Surveyor, to survey the land referred to in the schedule to the petition filed by the Respondents as well as the land described in the schedule to the answer filed by the Appellants, and report whether they were the same. Plan bearing No. 1176 dated 10th October 1990 and the accompanying report prepared by Surveyor Dissanayake after the survey of a land pointed out by the contending parties as the land in dispute, showed that the land which the parties were contending for was only 2 acres, 3 roods and 07.5 perches in extent and was situated in the village of Madawalagama (Final Village Plan 520) within the Nachchadoova GS Division in Kandu Tulana of Kanadara Korale in Nuwaragam Palata, in the Anuradhapura District, which according to the Surveyor Dissanayake, was an altogether different locality from the area where the land described in the respective schedules to the petition and the answer was situated.

It was in these circumstances, that the District Court issued a further Commission on K. V. Somapala, Licensed Surveyor, to survey the land claimed by the two contending parties to the case. Surveyor Somapala prepared Plan No. 2025 dated 16.04.1991, which revealed that the land surveyed by him, the boundaries of which had also been pointed out by the contending parties, was in extent 2 acres 3 roods and 31 perches

and was situated in the village of Pandiyankulama, in Nachchadoova Tulana of Ulagalla Korale in the Hurulu Palata in the Anuradhapura District. Although falling short of the four acres claimed by the Respondents in their petition by approximately 1 acre, 1 rood and 9 perches as well as the land claimed by the 1st Appellant in the answer by 2 roods and 35 perches, the location and boundaries of the land depicted in Plan No. 2025 were somewhat consistent with the description of the land set out in the schedule to the petition of the Respondents as well as the description of the land set out in the schedule to the answer.

It is remarkable that although a comparison of the schedules to the petition and answer filed in this case give the impression that they refer to two distinct and different lands with two different names and dimensions and boundaries having nothing in common except that they were situated in the village of Pandiyankulama in Nachchadoova Tulana of Ulagalla Korale in Hurulu Palata, in the Anuradhapura District, the boundaries of Plan No. 2025 prepared by Surveyor Somapala almost perfectly tally with the boundaries of the land described in the schedule to the answer filed by the Appellant. According to both the aforesaid Plan and the schedule to the answer, on the northern boundary of the land depicted therein are the paddy fields belonging to Y. M. Ismail and M. P. Kairun Nisa, and on the eastern boundary is the LD 2 Ela. The southern boundary of the said Plan and the schedule to the answer, is the paddy field belonging to D. C. M. Wijesinghe and on the western boundary is the paddy field belonging to U. Cader Beebee and T. C. M. Munasinghe. It is relevant to note that in the aforesaid Plan, Surveyor Somapala has also endeavoured to indicate the names of the previous owners of the paddy fields mentioned above, but he does not in his report or testimony in court, disclose how he got these particulars, and it is a reasonable inference that he had got these particulars from Plan No. 1176 and report prepared by Surveyor Dissanayake, which I shall advert to presently.

It is of some significance that Plan No. 1176 prepared by Surveyor Dissanayake, though placing the surveyed land in a different village called Madawalagama in Kandu Tulana of Kandara Korale in the Nuwaragama Division, shows that the northern and eastern boundaries of the land surveyed by Dissanayake substantially tally with the northern and eastern boundaries of the land described in the schedule to the answer of the Appellants. In Plan No. 1176, the northern boundary is shown as the paddy field previously owned by Nawuran Lebbe Mohiyadeen and presently owned by Y. M. Ismail. No reference is made to any paddy field belonging to M. P. Kairun Nisa in Plan No. 1176, although in the schedule to the answer that paddy field too is said to be on the northern boundary. Similarly, the eastern boundary of the land depicted in Plan No. 1176 is the irrigation canal and reservation while in the schedule to the answer it is described as LD 2 Ela.

However, it would appear that the southern and western boundaries of Plan No. 1176 are substantially different from the corresponding boundaries of the land described in the schedule to the answer. In Plan No. 1176, the paddy field on the southern boundary is indicated as previously owned by Ana Ali Thambi Lebbe and presently claimed by D. S. Gunesekera whereas according to the schedule to the answer, the southern boundary consists of the paddy field belonging to D. C. M. Wijesinghe. In Plan No. 1176, the western boundary is shown as the paddy field previously owned by Lebbe Thambi Yusuf and presently claimed by D. S. Gunesekara and P. Jainul Abdeen while in the schedule to the answer, the land described in the schedule to the

petition is bounded on the west by the paddy field of U. Cader Beebee and T. C. M. Munesinghe.

It is interesting to note that Surveyor Dissanayake has endeavoured to show the boundaries of Plan No. 1176 in a manner as to be consistent with the boundaries of the land described in the schedule to the petition filed by the Respondents. Thus, the northern boundary of the said land, is the paddy field of Nawuran Lebbe Mohiyadeen Pitcha and others which is sought to be substantiated in Plan No. 1176 by referring to the Y. M. Ismail as the claimant to the paddy field on the northern boundary as the successor in title of Nawuran Lebbe Mohiyadeen and others. Similarly, the southern boundary in the aforesaid Plan is described as the paddy field claimed by D. S. Gunasekere and previously owned by Ana Ali Thambi Lebbe, while in the schedule to the petition the corresponding boundary is the paddy field belonging to Ali Thambi Lebbe Sharibu. However, there is some inconsistency as far as the eastern and western boundaries are concerned. According to the schedule to the petition, on the eastern boundary of the land described therein is the "wélle" (වැල්ල) and the property of Yusoof Lebbe, whereas in the Plan No. 1176 and report, on the eastern boundary of the land is the irrigation canal and reservation, but there is no reference to the property of Yusoof Lebbe. Of course, the "the irrigation canal" on the eastern boundary of the aforesaid plan does not give rise to much of an issue, as the Sinhalese term "wélle" (වැල්ල) refers to an embankment or mound of a canal or a paddy field, but no light was shed by any of the surveyors or witnesses in regard to the reference to Yousoof Lebbe in the schedule to the petition. Similarly, according to Plan No. 1176 and its report, on the western boundary of the land surveyed is the paddy field claimed by D. S. Gunasekere and C. Jainul Abdeen and originally owned by Lebbe Thambi Yusoof, but the schedule to the petition states that on the western boundary is the property of Sultan Yunoos, which is entirely a different name, and there is no basis on which these boundaries can be said to be consistent.

It is also important to empahsise that neither Surveyor Dissanayake nor any other witness who testified at the trial, including the 1st Petitioner-Respondent-Respondent, the 1st Defendant-Appellant-Appellant and Surveyor Somapala, placed before court any documentary or other evidence to substantiate the alleged succession to title to the fields or paddy fields on the northern and southern boundaries of the land described in the schedule to the petition, which information had been used by Surveyor Dissanayake for the purpose of synchronising the boundaries of the land described in the schedule to the petition with the land depicted in Plan No. 1175 and the accompanying report, and uncritically adopted by Surveyor Somapala in Plan No. 2025 and report annexed thereto. In the absence of such evidence, there is no justification to conclude that the boundaries of the land surveyed by these surveyors as the land in dispute, tally with the land described in the schedule to the petition of the Respondents. To illustrate this point, the statement in the aforesaid survey plans and reports to the effect that the paddy field situated on the northern boundary of the land subjected to the survey was claimed by one Y.M. Ismail is an empirical fact reported and testified to by both surveyors which they were competent to make, but the statement to the effect that the previous owners of the said paddy field were Nawuran Lebbe Mohiyadeen Pitcha and others, is clearly hearsay, in the absence of any documentary or other evidence to substantiate the accuracy of that statement. So also, the statement on the said plans and reports to the effect that the paddy field on the southern boundary originally belonged to one Ali Thambi Lebbe, which substantially tallies with the name of the owner of the property described in the

schedule to the petition, namely Ali Thambi Lebbe Sharibu, is at best hearsay, in the absence of any evidence to relate the aforesaid original owner or owners to the respective claimants of the said property at the time of the survey.

Furthermore, despite the superficial similarity between the lands depicted in Plan No. 1175 and Plan No. 2025, particularly, the bifurcation of the land by two canals, one close to the northern boundary and the other almost at the centre of the land, the said two plans seek to locate the lands by reference to two distinct villages, tulanas, korales and palatas and even the location and description of the land described in the schedule to the petition does not tally with the village, tulana, korale and palata of Surveyor Dissanayake's Plan No. 1175. In any event, this superficial similarity could only be used to show that the lands surveyed by Dissanayake and Somapala were substantially similar, but there is no reference to any such bifurcations of canals in the schedule to the petition.

Despite these obvious differences, the parties did not appear to have any difficulty in identifying the *corpus* at the stage of formulating the issues after the return of the commission to survey the land or lands in dispute. It is unfortunate that neither the learned District Judge, nor the learned Counsel for the contending parties, realized that issue 6 sought to describe the land in dispute by reference to the schedule to the petition of the Respondents as well as Plan No. 1176 and the accompanying report prepared by Surveyor Dissanayake despite their mutual inconsistency in regard to not only the extent of the land but also with respect to the village, the tulana, the korale and the palata in which the land is situated. It is also significant that issue 8 raised on behalf of the Appellants did not seek to describe the land claimed by them by reference to the schedule to their answer or the plan and report prepared by Surveyor Somapala, and that in the aforesaid said issue they had assumed that the bone of contention in the case was one and the same land, which they ventured to describe as "මෙම නඩුවට අදාල ඉඩම".

It is manifest that issues 6 to 8, thus formulated have only confounded the confusion in regard to the identity of the land in dispute, which the testimony of the two surveyors in this case has in no way helped to reduce. Surveyor Dissanayake was unable to explain the differences in the village name, tulana, korale and palata between the schedule to the petition and his Plan bearing No. 1176, although the name of the land and some of the boundaries specified in the schedule to the petition tallied with his plan. On the other hand, Surveyor Somapala was clear in his testimony that the land surveyed by him could not be the same as the land surveyed by Surveyor Dissanayake as the village, tulana, korale and palata within which the two lands were situated were different, although the structure and the bifurcations of the canals on the two plans were similar.

To sum up, from the issues raised by the contending parties as well as the documentation and evidence led in this case, it would appear that despite serious doubts regarding the location of the lands surveyed by the commissioned surveyors, the Respondents as well as the 1st Appellant were claiming title to substantially the same land. It is also material to note that the extracts of the Register of Agricultural Lands produced by respectively the Respondents marked P2 and the Appellants marked "පි1", describe the land described in the schedule to the petition as "Palugahakumbura" in extent 3 acres, 2 roods and 26 perches, under serial No. 15/353 in Cultivation Officer Division of 42A Tulana up to the year 1987, and in the

year 1988 the description of the land was changed to "Nilattu Pattiya" in extent 4 acres, under Serial No. 19/459 in the same Cultivation Officer Division. Of course, the surveys conducted on commissions issued by court disclosed a much smaller land, the earlier plan bearing No. 1176 depicting an extent of 2 acres, 3 roods and 7.5 perches, which was less than the land extent shown in Plan No. 2025 prepared by Surveyor Somapala by approximately 24.5 perches, possibly due to the shifting of the northern boundary due to some encroachments.

In these circumstances, in my opinion, the learned District Judge was justified in concluding that the lands claimed by the contending parties are one and the same and is substantively depicted in the survey plan prepared by Surveyor Dissanayake, a finding which has been affirmed by the Court of Appeal. However, what the lower courts have failed to realize is that this does not necessarily mean that the land depicted by Surveyor Dissanayake, in his Plan No. 1176 is identical with the land described in the schedule to the petition and the title deeds P1 and P3 to P6. Such identification is vital to a vindicatory action such as this in which a declaration of title and ejectment of the Appellants has been sought by the Respondents by virtue of the said title deeds. It is unfortunate that neither the learned District Judge nor the Court of Appeal has taken into consideration the inconsistencies fully outlined above, that exist in identifying the boundaries of the land described in the schedule to the petition with the land actually surveyed by the two surveyors on commissions issued by the court.

The learned District Judge was not helped by the obvious confusion in issue 6 which, as already noted, sought to describe the land claimed by the Respondents by reference to the schedule to the petition filed by them as well as by reference to Plan No. 1176 depicted by Surveyor Dissanayake. The learned District Judge uncritically answered the issue in the affirmative, causing great ambiguity in identifying the land, with respect to which a declaration of title was sought by the Respondents. The learned District Judge had in his judgement purported to make an express order of ejectment, based no doubt, on an implicit declaration of title to land claimed by the Respondents, ignoring the fact that the schedule to the petition referred to in the said issue 6, placed the land in the village of Pandiankulama in Nachcha Tulana in the Ulagalla Korale in Hurulu Palata of the Anuradhapura District, while Plan No. 1176 dated 10th October 1990 prepared by Surveyor Dissanayake placed it in the village of Madawalagam in Kandu Tulane within the Kanadara Korale in Nuwaragam Palata of the same District. The learned District Judge has also failed to make any finding pertaining to the extent of the land described in the schedule to the petition, which was four acres according to the schedule to the petition, while it was only 2 acres, 3 roods and 7.5 perches according to Surveyor Dissanayake's Plan No. 1176. He has also not arrived at any finding in regard to which of the two survey plans that had been prepared on commissions issued by court, depicted the land described in the schedule to the petition accurately, particularly in the context that Plan No. 2025 was more in accord with the location of the land as set out in the schedule to the petition, but depicted a slightly larger land in extent 2 acres, 3 roods and 31 perches.

The learned District Judge has come to the conclusion that the bone of contention between the contending parties is the same as the land described in the schedule to the petition of the Respondents as well as the schedules to the title deeds marked P1 and P3 to P6. In doing so, he has totally lost sight of Section 187 of the Civil Procedure Code, which provides that the judgement "shall contain a concise statement of the

case, the points for determination, the decision thereon, and the reasons for such decision…." It is obvious that bare answers to issues without reasons are not in compliance with the requirements of the said provision of the Civil Procedure Code, and the evidence germane to each issue must be reviewed or examined by the Judge, who should evaluate and consider the totality of the evidence. This, the learned District Judge has failed to do, and the Court of Appeal has overlooked in affirming the decision of the District Court.

It is the primary duty of a court deciding a case involving ownership of land, whether it is a partition action or *rei vindicatio* action, to consider carefully whether the relevant land (*corpus*) has been clearly identified. As already stressed, identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment. In order to make a proper finding, it is necessary to formulate the issues in a clear and unambiguous manner to assist the reasoning process of court. In my considered opinion, the learned District Judge has seriously misdirected himself in the manner in which he formulated issue 6, which makes reference to the schedule to the petition and the plan and report prepared by Surveyor Dissanayake, which differ drastically form each other with respect to the location, boundaries and extent of the land described or depicted therein. By answering the issue in the affirmative without clarifying whether he was going by the schedule to the petition or on the basis of one of the survey plans prepared on the commissions issued by court, and if so which one, the learned District Judge has altogether begged the question of identity of the *corpus* which is so vital to a vindicatory action, which negates the possibility of deciding on the question of title that arises in this case. The resulting judgement, which unfortunately has been affirmed by the Court of Appeal, is fatally flawed, and the finding that title to the land claimed by the Respondents devolved on them by virtue of Deed No. 6165 marked P1 is altogether unfounded.

For all these reasons, I hold that substantive question 1(c) has to be answered in the affirmative, and that the Court of Appeal was indeed in error in affirming the decision of the learned District Judge that the Respondents had established title to the subject matter of the action

Prescription

In view of my answers to the 3 sub-questions of substantive question 1 on which special leave has been granted by this Court, it is unnecessary to decide question 2, which is whether the Court of Appeal erred in failing to consider that the learned District Judge has not duly evaluated the evidence on the question of prescription. I therefore do not propose to go into this question in depth. In a *rei vindicatio* action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated and the action ought to be dismissed without more.

However, I wish to use the opportunity to deal with a submission made by learned President's Counsel for the Respondents before parting with this judgment. He has submitted that in terms of Section 45(3) of the Agrarian Services Act No. 58 of 1979, as subsequently amended, an entry made in the Agricultural Lands Register maintained under that Act is admissible as *prima facie* evidence of the facts stated therein, and that accordingly, the entry made in the Agricultural Land Register, a certified extract from which was produced marked "P1", in which the names of the Respondents appear as

the landlords constitute *prima facie* evidence of their title to the land claimed by them as well as the fact of their possession thereof through a tenant cultivator. It is obvious that Section 45(3) of the said Act was not intended to extend to *title* to agricultural land, and that the presumption arising from the entries in "පි1" with regard to the landlord and description of land is displaced in this case by the overwhelming evidence that the Respondents had never enjoyed possession of the land "Nilaththu Pattiyal" which had been possessed exclusively by the Appellants.

It is the name Hinni Appuhamy that appears in the extract marked "පි1" as tenant cultivator for the ten years from 1979 to 1989, despite the alteration which the Respondents admittedly got done in 1988, by which the name of the 1st Appellant as landlord, and the description of the land as "Nilaththu Pattiyal" in extent 3 acres 2 roods and 26 perches, had been replaced by the names of the Respondents as landlords and description of the land as "Palugahakumbura" in extent 4 acres. Neither Hinni Appuhamy, nor any other witness, was called by the Respondents to establish that the paddy field cultivated by Hinni Appuhamy was in fact the four acre land to which the deeds P1 and P3 to P6 related, and it is manifest that the alteration to the Agricultural Land Register effected in 1989 was a calculated move by the Respondents to stake a claim to the land possessed by the Appellants on the basis that the said land was the same as what is described in the schedule to the petition and the schedules to the said title deeds, which fact however, the Respondents have failed to establish by evidence.

Conclusion

In all the circumstances of this case, I allow the appeal answering the substantive questions 1, 3, 4 and 5 on which special leave had been granted by this Court, in favour of the Appellants. I do not consider it necessary to answer substantive question 2. I would accordingly set aside the judgements of the District Court and the Court of Appeal, and make order dismissing the action filed by the Respondents in the District Court. I also award costs in a sum of Rs. 25,000/- payable to the Appellants jointly, by the Respondents jointly and severally.

JUDGE OF THE SUPREME COURT

HON. J.A.N. DE SILVA, C.J.
I agree.

CHIEF JUSTICE

HON. P.A. RATNAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT