

Wijemunige David Singho and Others vs. Wijemunige Elbin Pallehagoda

Supreme Court
Tilakawardane, J..
Imam, J.
Ratnayake, J.
SC. Appeal No. 58/2011
SC.(HC) CA. LA. No. 267/10
SP/HCCA/MA/288/04(F)
DC. Walasmulla Case No.579/L
February 02nd July 2010

Rei Vindacatio Action- Identification of the land in question- Subject matter related to a land given by the State under the Land Development Ordinance. The Surveyor has surveyed a larger land than the land described in the plaint- Action dismissed for non-identification of the corpus.

Held

(i) a mistake has been made in respect of the northern and southern boundaries in the permit 'P1' in that the Southern boundary is given as the Northern boundary and the Northern boundary is given as the Southern boundary; (ii) the said mistake should not affect the identity of the corpus in the case and thus this mistake should not affect the identity of the corpus in the case; (iii) the wrong description of the boundaries in the permit 'P1' can thus be overlooked: (iv) the plaintiff was prevented from obtaining relief due to the conduct of the surveyor who had surveyed a larger land than the land described in the plaint.

The judgment of the DC and CHC were set aside and the DJ was directed to re-survey the land and rehear the case by adopting the evidence already led and by permitting further evidence as to identification of corpus.

Appeal from a judgment of the Civil Appellate High Court of the Southern Province Holden at Matara

Cases Referred to:

- [1]Wanigaratne vs. Juwanis Appuhamy 65 NLR 167
- [2]Jamaldeen Abdul Latheef, Vs Koya Mohideen Nizardeen,S.C. Appeal No. 105/05 decided on 27.10.2010

Acts Referred to:

- [1] Primary Courts Procedure Act No. 44 of 1979
- [2] Land Development Ordinance

W. Dayaratne, P.C. with Ms. R. Jayawardena for 1st -6th Defendant-Respondent-Appellants
Anuruddha Dharmawardane for Plaintiff-Appellant-Respondent

This is an appeal from the Civil Appellate High Court of the Southern Province holden at Matara. Where the Civil Appellate High Court set aside the judgment of the District Court of Walasmulla and granted the reliefs prayed for by the Plaintiff-Appellant-Respondent hereinafter referred to as the "Respondent".

Respondent instituted action in the District Court of Walasmulla seeking a declaration of title to the corpus, ejectment of the Defendant-Respondent-Appellants hereinafter referred to as the "Appellants", and for damages

The subject matter of this case is a land where the Respondent became entitled by virtue of a permit given by the State under the Provisions of the **Land Development Ordinance**. The extent of the land is given in the plaint as 2 acres and is described in paragraph 2. It is averred in the plaint that the Appellants forcibly entered a part of the land which is the subject matter in this case and was in unauthorized possession of the said part. The possession of the Appellants were also fortified by an order given by the Primary Court under Section 66 of the **Primary Courts Procedure Act No.44 of 1979**. In the circumstances, the Respondent filed action in the District Court to obtain relief as prayed for in the plaint. After the trial was concluded in the case, District Judge of Walasmulla by his Judgment dated 5th November 2004 dismissed the action of the Respondent. The main ground for dismissal appears to be the non identification of the subject matter. The Civil Appellate High Court in its judgment dated 2nd July 2010 has set aside the judgment of the District Court and granted relief to the Respondent. The Appellant appealed to the Supreme Court from the said judgment of the Civil Appellate High Court and the Supreme Court granted Leave to Appeal on the following questions of law;

- (a) Did their Lordships err in law when they came to the conclusion that the Plaintiff/Appellant/Respondent has established his title to the corpus when it is clearly proved that the corpus described in the plaint has not been identified properly?

- (b) Did their Lordships err in law when their Lordships came to a conclusion that in terms of two permits marked as 'ප්‍ර1' and 'ප්‍ර2' 'the Plaintiff/Appellant/Respondent has title to the corpus when the boundaries given in the said two permits are contrary to each other especially the northern boundary?
- (b) Did their Lordships err in law when they failed to draw their minds to the fact that a larger land has been surveyed than the land described in the plaint as the corpus?

As could be observed all 3 questions of law are based on the non identification of the corpus.

In the plaint that has been filed and in the permit issued to the Plaintiff under the Land Development Ordinance Chap.464 which was produced marked 'P1' at the District Court the extent of the corpus is given as 2 acres. On the commission issued by Court, the Licensed Surveyor prepared Plan No. 18/2 where the extent was given as 3 Acres, 1 Rood and 23.12 Perches. The permit issued under the Land Development Ordinance does not refer to a survey Plan describing the land that is given to the Respondent. The permit only describes the metes and bounds of the land. The difference between the extent given in the permit and the land surveyed and depicted in survey plan 'X' and document 'X1' is substantial. The difference is 1 Acre 1 Rood and 23.12 Perches. In the circumstances there is a difficulty in reconciling the difference in the extents given in the permit "P1" and survey plan "X".

The evidence given by the Surveyor who did the survey could easily be construed to say that he was not certain as to whether the land he surveyed and depicted in the survey plan was the land that is described in the permit 'P1'. The Learned President's Counsel for the Appellant drew the attention of Court to the following statements made by the Surveyor contained at page 3 of the proceedings of 28.04.2004 when he was cross examined during the trial;

ප්‍ර: අක්කර 2ක ඉඩමක් මගින් කියල තිබෙයි අක්කර 3ක ඉඩමක් මැනලා තිබෙනවා. මෙහි පරස්පරයක් තිබෙනවා නේ?
උ: ඔව්.

ප්‍ර: එහෙම වෙන්න හේතුව පැමිණිලිකරු පෙන්නපු ඉඩම?
උ:- එහෙම වෙන්නේ පැමිණිලිකරු පෙන්නපු ඉඩම සහ එයාට අයිති නැති කොටසක් පෙන්නල තිබෙනව.

ප්‍ර: පැමිණිලිකරු වැඩියෙන් පෙන්නල තිබෙනව?
උ: ඔව්.

ප්‍ර: මහත්තයාට ස්ථිර වශයෙන් කියන්න බැහැ පැමිණිල්ලේ සඳහන් ඉඩම වැඩිවෙලා තිබෙන නිසා?
උ: ඔව්.

ප්‍ර: මේ ඉඩමේ උතුරු මායිම පෙන්වා තිබෙනව?
උ: අවිනිශ්චිත කියා පෙන්නලා තිබෙනව. ලී කුකුළුද පෙන්නල තිබෙනව. මායිම් නැහැ.

ප්‍ර: මහත්තයා පිළිගන්නව උතුරු මායිම දිගටම අවිනිශ්චිතයි කියා?
උ: ඔව්.

ප්‍ර: මහත්තයා 'X' ලෙස සලකුණු කරල ඉදිරිපත් කරල තිබෙන ඉඩම මේ නඩුඉඩමද කියා හරියට කියන්න බැහැ?
උ: හරියට කියන්න බැහැ."

He has specifically stated that the reason for the difference in the extent is due to his surveying and including in his plan as the subject matter of the case an area of land shown by the Plaintiff. In addition his above evidence is to the effect that he cannot positively say that the land depicted in the plan is the land described in the plaint due to the addition in the extent.

The Learned Counsel for the Respondent drew the attention of Court to the fact that during the Evidence-in Chief the Surveyor has specifically stated that he was satisfied that the land is the land described in the Commission where he says

"කොමිසමේ සඳහන් ඉඩම කියා මම සැහිමකට පත්වුනා. ඒ අනුව මැනලා 'X' සහ 'X1' වාර්තාව අධිකරණයට ඉදිරිපත් කළා.,

The Learned Counsel for the Respondent also brought to the notice of Court the fact that 1st Defendant in the District Court case (1st Defendant-Respondent-Appellant) was present during the survey and did not object to the survey or state that it was not the subject matter of the action as stated by the Surveyor in his evidence. The 1st Defendant in the District Court case has denied being present at the survey. During his cross examination he states as follows:-

ප්‍ර: තමා ඉඩම මගින් වෙලාවේ හිටියා ?
උ: නැහැ.

ප්‍ර: තමා වෙනුවෙන් කවුද හිටියේ?

උ: අපේ ප්‍රමිති ගෙදර හිටියා. ප්‍රමිති මොනවා කීවද දන්නේ නැහැ".

In re-examination he says " " මගින් අවස්ථාවේ මම හිටියේ නැහැ. 1වෙනි විත්තිකරු හිටියා කියා තිබෙනම් වැරදියි ' දරුවෝ ගැණි හිටියා. මම ලෙඩවෙලා හමුවන්නොට රෝහලේ සිටියෙ He has not produced any medical certificate or other evidence to show that he was else where. Even assuming he was present his conduct alone cannot be taken as a positive admission to the effect that the land surveyed was the subject matter described in the plaint. In my view the above fact alone would not vitiate the effect of the statement made by the Surveyor during his cross examination to the effect that the land depicted in his plan 'X' may not be the land described in the plaint.

Another argument that is advanced on behalf of the Appellants is the difference in the boundaries that are given in the Survey Plan and the permit 'P1'. In accordance with the permit 'P1' the boundaries are as follows:-

North - 100 yard road
East - by- lane
South - David Singho's land
West - Piyadasa's land

In accordance with the Survey Plan of the Court Commissioner the boundaries are given as follows:-

North - David Singho's land
East - by- lane
South - 100 yard road
West - Piyadasa's land

Accordingly, there appear to be a difference of the Northern and Southern boundaries. The Northern boundary in the Surveyor plan is given as the Southern boundary in the permit and the Southern boundary in the Surveyor plan is given as the Northern boundary in the permit. Prior to the permit 'P1' being issued to the Plaintiff-Respondent, he was issued an annual permit in respect of the same land under the Land Development Ordinance. In that permit the boundaries given are the same as in the Survey plan. This permit has been produced marked 'P2' at the District Court. The District Land Officer who gave evidence at pages 6 and 7 of the proceedings of 28.04.2004 in reexamination states that the permits produced marked as 'P1' and 'P2' have been issued in respect of the same land. He states as follows:-

"නැවත ප්‍රශ්න:- තවම අවලංගු කරලා නැහැ. බලපත්‍ර දෙකම එකම ලෙජර් අංකයක් යටතේ තිබුත් කරපු බලපත්‍ර දෙකක්.

අධිකරණය:- ප්‍ර:- ලෙජරය බලා කියන්න බලපත්‍ර දෙක තිබුත් කරලා තිබෙන්නේ එකම ඉඩමකටද?

උ:- වෘකඳුවල අංක 58371

මායිම:- උතුරට: 100 පාර

නැගෙනහිරට: අතුරු පාර

දකුණට: ඩේවිඩ් පදිංචි ඉඩම

බස්නාහිරට: පියදාසගේ අනවසර ඉඩම

ප්‍ර: ඒ ඉඩමට අදාළ බලපත්‍ර කීයක් තිබුත් කරල තිබෙනවද?

උ: එකයි. එල් එල් 58371

උනවසර ඉඩමක් තමා, නියමානුකූල කිරීම සඳහා බලපත්‍රය දීම තිබෙනවා"

In the circumstances mentioned above, it is clear that a mistake has been made in respect of the Northern and Southern boundaries in the permit 'P1' in that the Southern boundary is given as the Northern boundary and the Northern boundary is given as the Southern boundary. Accordingly in my view this mistake should not affect the identity of the corpus in this case.

As stated above the wrong description of the boundaries in the permit 'P1' can be overlooked. Nevertheless the difference in the extent given in the permit 'P1' and the survey plan X which is a substantial difference in the context of the statement made by the Surveyor during his cross examination to the effect that the land depicted in the plan 'X' may not be the land described in the plaint would certainly amount to a failure in the identification of the corpus.

In S.C. Appeal No. 104/05 decided on 27-10-2010 Hon. Saleem Marsoof J. states as follows:-

"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 (*dominium*) of the owner (*dominus*)..."

"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...."

It is observed that the Appellants (Defendants in the District Court Case) have not done anything meaningful to establish their title to the part of the land presently possessed by them. In my view this fact alone will not assist the Respondent. In Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167 it has been held that the Plaintiff cannot ask for a declaration of title in his favour merely on the strength that the Defendants title is poor or not established.

In the circumstances mentioned above I answer all 3 questions of law on which Leave to Appeal was granted in the affirmative.

I set aside the judgment of the High Court in case No. SP/HCCA/MA/288/2004F of the Southern Province holden at Matara dated 2nd July 2010.

I observe that the Respondent was prevented from obtaining relief at the District Court due to the conduct of the licensed surveyor who functioned as a Court Commissioner. Accordingly, I set aside the judgment of the District Court

of Walasmulla in case No. 579 L dated 05.11.2004 as well, and direct the District Court to rehear the case by adopting the evidence already led and only to lead any further evidence directly or indirectly relating to the identity of the corpus. I also direct that a commission be issued to a Licensed Surveyor by the District Court to re-survey the subject matter. District Court may issue requisite orders on the Surveyor General to forward copies of the relevant state plans to assist the licensed Surveyor in the identification of the subject matter in this case. This case is to be concluded expeditiously. Accordingly the appeal is allowed without costs.

TILAKAWARDANE, J. – I agree.

IMAM, J. - I agree

Appeal allowed without costs. The judgment of the DC and CHC were set aside and the DJ was directed to re-survey the land and rehear the case by adopting the evidence already led and by permitting further evidence as to identification of corpus.

