

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

Pathira Kankanamge Martin Jayasinghe
"Captain Garden", Ihalagoda, Akmeemana.

Plaintiff

Case No. C. A. 1236/2000(F)
D. C. Galle Case No. 12926/L

Vs.

1. Pattiyage Samie
"Castle Hill Estate", Ihalagoda, Akmeemana.
2. Kariyawasam Haputhanthrige Dhanawathie
"Castle Hill Estate", Ihalagoda, Akmeemana.

Defendants

AND NOW

In the matter of an Appeal in terms of Section 754(1)
of the Civil Procedure Code.

Pathira Kankanamge Martin Jayasinghe
"Captain Garden", Ihalagoda, Akmeemana.

Plaintiff-Appellant (Deceased)

1. Pathira Kankanamge Dharshana Shantha
"Captain Garden", Gonamulla Junction, Galle.
2. Pathira Kankanamge Ranjana Sirimal
"Castle Hill", Narawala, Akmeemana.
3. Pathira Kankanamge Deep Dilmini
"Captain Garden", Gonamulla Junction, Galle.
4. Pathira Kankanamge Sujeewa Kithmini
"Captain Garden", Gonamulla Junction, Galle.
5. Pathira Kankanamge Pubudu Sampath
"Captain Garden", Gonamulla Junction, Galle.

Appearing by his Attorney –

Pathira Kankanamge Dharshana Shantha
"Captain Garden", Gonamulla Junction, Galle.

Substituted Plaintiffs-Appellants

Vs.

1. Pattiyage Samie
"Castle Hill Estate", Ihalagoda, Akmeemana.
2. Kariyawasam Haputhanthrige Dhanawathie
"Castle Hill Estate", Ihalagoda, Akmeemana.

Defendants-Respondents

Before: Janak De Silva J.

Counsel:

Sumedha Mahawanniarachchi with Indika Weerasinghe for Substituted Plaintiffs-Appellants

Erusha Kalidasa for Defendants-Respondents

Written Submissions tendered on:

Substituted Plaintiffs-Appellants on 11.10.2017 and 17.06.2019

Defendants-Respondents on 11.09.2014

Argued on: 01.03.2019

Decided on: 09.08.2019

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Galle dated 04.09.2000.

The Plaintiff-Appellant (Plaintiff) filed the above styled action in the District Court of Galle seeking inter alia a declaration of title to the allotment of land marked Lot 2 in Plan No. 1625 (ප්‍ර7) [Appeal Brief page 168] dated 16.04.1984 made by H. Wisumperuma, Licensed Surveyor where the extent is described as A.O-R.1-P.17 (also described as Lot 14 in Plan No. 269 dated 02.1898 made by John De Silva, Licensed Surveyor and Lot A in Plan No. 1701 dated 08.06.1989 (ප්‍ර4) [Appeal Brief page 227] made by D. D. Ranaweera, Licensed Surveyor) situated at Ganegoda in Akmeemana where the extent is said to be A.O-R.1-P.22 in extent.

The Defendants-Respondents (Defendants) filed answer admitting the corpus in dispute to be Lot A in Plan No. 1701 and made a cross-claim for declaration of prescriptive title to the said allotment of land.

After trial, the learned Additional District Judge dismissed the action of the Plaintiff on the basis that the Plaintiff had failed to prove the corpus as the identical land referred to in the plaint and that the Defendants had satisfied the court that they have prescriptive title to Lot A in Plan No. 1701. However, the learned Additional District Judge did not enter judgment as prayed for in the cross-claim. The Plaintiff appealed.

When this matter was taken up for argument on 01.03.2019, both parties agreed that the only issue to be determined is whether it has been established by evidence that Lot 2 in Plan No. 1625 is the same land which the parties have agreed to record as the admitted corpus in the trial court. The learned District Judge has also concluded that the basic question to be decided was whether the admitted corpus is the land described in the deeds produced by the Plaintiff during the trial to establish his title.

This being a *rei vindicatio* action it was a paramount duty on the part of the Plaintiff to establish correct boundaries in order to identify the land in dispute [*Peeris v. Savunhamy* (54 N.L.R. 207)]. There is a greater and heavy burden on a plaintiff in a *rei vindicatio* action to prove not only that he has dominium to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title [*Abeykoon Hamine v. Appuhamy* (52 N.L.R. 49)]. To succeed in an action *rei vindicatio*, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment [*Latheef v. Mansoor and another* (2010) 2 Sri.L.R. 333]. In a vindicatory action it is necessary to establish the identity of the corpus in a clear and unambiguous manner and the action must fail upon the failure to do so [*Fernando v. Somasiri* (2012 B.L.R. 121)].

Since the identity of the corpus was a fundamental issue in the trial court, the Plaintiff had executed a commission to prepare a new plan and Plan No. 1951 dated 12.11.1995 was made by G. H. G. A. A. De Silva, Licensed Surveyor in which the disputed corpus is depicted as Lot A. While admitting that he only superimposed the plan he prepared (i. e. Plan No. 1951) on Plan No. 1701 and didn't superimpose the plan he prepared on Plan No. 1625, he had stated that such a superimposition was not needed as the boundaries of the two land portions (Lot A in Plan No. 1951 and Lot 2 in Plan No. 1625) tallied with each other [Appeal Brief page 69].

The learned Additional District Judge held that the oral evidence of G. H. G. A. A. De Silva, Licensed Surveyor cannot be relied upon since he failed to superimpose the said plans which were available to him. I disagree with that finding of the learned Additional District Judge. Identifying a land by its boundaries has been the practice for a long period of time and I am of the view that it can still be considered as a valid method in identifying lands.

In *Ratnayake and Others v. Kumarihamy and Others* [(2005) 1 Sri.L.R. 303 at 307] Udalgama J. held as follows:

“The contention of the learned Counsel for the defendants - appellants on the matter of identity of the corpus sought to be partitioned also appeared to be that the trial court had erred in deciding the matter on evidence ignoring the deeds and that the court ought to have in fact decided the matter on a consideration of the contents of the deeds and not by oral evidence (page 4 of the written submissions of the appellants)

I would disagree with the above submission as oral evidence under oath and subject to cross examination, is equally important to arrive at a finding.”

The next question that arises is whether Lot 2 in Plan No. 1625 is the same land that is depicted as Lot 14 in Plan No. 269. According to Plan No. 1625, Lot 2 is a re-survey of Lot 14 in Plan No. 269. Furthermore, H. K. Alles, Licensed Surveyor, who gave evidence regarding Plan No. 1625 (as H. Wisumperuma, Licensed Surveyor who prepared the said Plan No. 1625 was deceased at the time of the trial), has categorically stated that it is clearly indicated in late H. Wisumperuma, Licensed Surveyor's sketches and notes that he superimposed Lot 14 in Plan No. 269 on Lot 2 in Plan No. 1625 and identified them to be the same land [Appeal Brief pages 87 – 88].

Furthermore, G. H. G. A. A. De Silva, Licensed Surveyor has in his report X1 [Appeal Brief page 166] stated that Lot 2 of plan no. 1625 prepared by H. Wisumperuma, Licensed Surveyor tallies with the land surveyed by him.

Therefore, I hold that Lot 14 in Plan No. 269, Lot 2 in Plan No. 1625, Lot A in Plan No. 1701 and Lot A in Plan No. 1951 is one and the same land.

There is a discrepancy of five (5) perches between lands identified in the plans. However, if the portion of land is clearly described and can be precisely ascertained, a mere inconsistency in extent will not affect the question of identity [*Gabriel Perera v. Agnes Perera* (43 C.L.W. 82), *Yapa v. Dissanayake Sedara* (1989) 1 Sri. L. R. 361]. Since the disputed corpus can clearly be identified by the aforementioned plans as well as by the boundaries (as specified by the parties in their evidence), I hold that inconsistencies/discrepancies of five perches in extent can be disregarded.

In any event the discrepancy of five (5) perches can be explained by the fact that the northern boundary of Lot 2 in plan 1625 is not a straight line while the northern boundary of Lot A in plan 1701 is a straight line [Appeal brief page 63].

In a *rei vindicatio* action as in this case where the Defendants do not admit to be licensees of the Plaintiff, the Plaintiff must strictly prove his title in order to succeed [*Hameed v. Weerasinghe* (1989) 1 Sri.L.R. 217, *Abeykoon Hamine v. Appuhamy* (52 N.L.R. 49), *Peeris v. Savunhamy* (54 N.L.R. 207), *Silva v. Hendrick Appu* (1 N.L.R. 13), *Wanigaratne v. Juwanis Appuhamy* (65 N.L.R. 167), *Pathirana v. Jayasundara* (58 N.L.R. 169), *Loku Menika v. Gunasekare* (1997) 2 Sri.L.R. 281].

During the trial, the Plaintiff has produced 3 documents (P1, P2 and P3) to establish his title. According to Deed of Transfer No. 3058 dated 05.06.1984 (P1), he has purchased Lot 2 in Plan No. 1625 for a consideration of Rs. 300,000/-. The question to be considered is whether the Vendors of P1 had title to the said Lot 2 in Plan No. 1625. It is stated in P1 that the Vendors became entitled to Lot 2 in Plan No. 1625 by virtue of Deed of Partition No. 775 dated 05.06.1984 (P2).

In the Second Schedule of P2, Lot 2 is described referring to its boundaries and extent and it is further stated that Lot 2 is a divided and a defined portion of Castle Hill Estate depicted in Plan No. 269. Moreover, it is stated that Lot 2 is a portion from and out of the amalgamation of the 3 allotments of land fully described in the First Schedule of P2. According to the First Schedule of P2, a defined portion of Castle Hill Estate consists of 3 lands called Mallemadolle Kanda (A.45-R.2-P.0), Mallimodolla Kanda Addara (A.0-R.2-P.22) and undivided $\frac{3}{8}$ of Henahurugodakanda (A.1-R.0-P.4).

It is further stated in the First Schedule of P2 that the divided portion of Henahurugodakanda which forms a portion of Castle Hill Estate is depicted as Lot 14 in Plan No. 269. Also, it can be concluded that the divided $\frac{3}{8}$ of Henahurugodakanda is A.0-R.1-P.21 in extent.

According to P2, the parties therein became entitled to the Castle Hill Estate by virtue of Deed of Transfer No. 3713 dated 29.07.1955 (P3). The Schedule of P3 shows a list of lands which form the entire Castle Hill Estate which is depicted in Plan No. 269. Under Item No. 16, it is stated that undivided $\frac{3}{8}$ of Henahurugodakanda (A.1-R.0-P.4) is a portion of Castle Hill Estate.

Based on this evidence, I hold that Plaintiff has established his title to the land in dispute and is entitled to a declaration of title and eviction and damages as prayed for in the amended plaint. For the sake of completeness, I will advert to the question of prescription as well.

In *Juliana Hamine v. Don Thomas* (59 N.L.R. 546 at page 548) L.W. De Silva A.J. held:

"The paper title being in the 2nd and 3rd defendants, the burden of proving a title by prescription was on the plaintiff. That burden he has failed to discharge. Apart from the use of the word possess, the witnesses called by the plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram C. J. in the Full Bench Case of *Alwis v. Perera* [1 (1919) 21 N. L. R. at 326.]:

" I wish very much that District Judges-I speak not particularly, but generally-when a witness says 'I possessed ' or 'We possessed ' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record. ""

I have given careful consideration to the evidence supporting the claim of prescriptive title of the Defendant. I hold that he has failed to establish his claim.

For all the foregoing reasons, I set aside the judgment of the learned Additional District Judge of Galle dated 04.09.2000 and enter judgment as prayed for in the amended plaint dated 06.03.1996 and answer the issues as follows:

1. 1955 ජූලි 23 සහ නොවැම්බර් 02 දින දරණ අංක. 3713 දරණ විකුණුම්කරය මත සහ උරුමයට අයිතිවීමෙන් සංශෝධිත පැමිණිල්ලේ 02 වැනි ඡේදයේ සඳහන් (අ) මල්ලිමාදොල කන්ද (ආ) මල්ලිමාදොල කන්ද අද්දර (ඇ) හෙනහුරුගොඩකන්දේ අංක. 14 දරණ කැබැල්ල සංශෝධිත පැමිණිල්ලේ 03 වැනි ඡේදයේ සඳහන් පරිදි ඇඩලින් වයලට වීරසිංහ විවාහයට පෙර ආදිහෙට්ටි, එලරි මල්ලිකා වික්‍රමසිංහ, ලුවී ද සිල්වා ආදිහෙට්ටි, හිලික්ස් ලයනල් ආදිහෙට්ටි, බර්ට්‍රම් ජෝන් සෙප්ටිමස් ද සිල්වා අදිහෙට්ටි, බියට්‍රිස් යුල්ටයින් දසනායක, ඔක්ටේවියා ජොසෆින් ස්ටෙෆනි අගයරත්න, ජෝසෆ් ලොයිඩ් බර්ට්‍රම් ද සිල්වා ආදිහෙට්ටි, හිලිමියා බ්‍රිජට් කන්නන්ගර සහ සේන පණ්ඩුකාභය වික්‍රමසිංහ යන 10 දෙනාට හිමි වී ද? ඔව්

2. මෙම නඩුවේ විෂය වස්තුවේ අයිතිය ඔවුන්ගේ හිමිකම් සංශෝධිත පැමිණිල්ලේ පෙන්වා ඇති පරිදි පැමිණිලිකරුට සාරෝපනය වී ද? ඔව්
3. පැමිණිලිකරු සහ ඔහුගේ පූර්වගාමීන් විසින් මෙම නඩුවේ විෂය වස්තුව සහ එහි තුළ පිහිටි සියලුම දේ පිළිබඳව වලංගු කාලාවරෝධී හිමිකම් ලබා ඇද්ද? ඔව්
4. විත්තිකරුවන් එකී ඉඩමේ රැඳී සිටිනුයේ පැමිණිලිකරුගේ පූර්වගාමීන්ගේ සහ ඉන්පසු ව පැමිණිලිකරුගේ අවසරය මත ද? නැත
5. 1985 ජනවාරි 31 දින හෝ ඊට ආසන්න කාලයක සිට විත්තිකරුවන් සාමූහික ව සහ සහවිත්තනයෙන් ක්‍රියාකරමින් මෙම නඩුවේ විෂය වස්තුව වන දේපලට පැමිණිලිකරුගේ හිමිකමට ආරවුල් කරමින් එකී දේපලෙහි නීතිවිරෝධී ලෙසින් සහ බලහත්කාරයෙන් රැඳී සිටින්නේ ද? ඔව්
6. විත්තිකරුවන්ගේ එකී ක්‍රියාව හේතුකොට ගෙන පැමිණිලිකරුට සිදු වූ සහ සිදු වන අලාභය කොපමණ ද? සංශෝධිත පැමිණිල්ලේ අයැද ඇති පරිදි
7. ඉහත සඳහන් විසඳිය යුතු ප්‍රශ්නවලට පිළිතුරු පැමිණිලිකරුගේ වාසියට ලැබෙන්නේ නම් සංශෝධිත පැමිණිල්ලේ අයැද ඇති සහන පැමිණිලිකරුට ලබා ගත හැකි ද? ඔව්
8. පිළිගත් විෂය වස්තුවේ විත්තිකරුවන්ගේ උත්තරයේ සඳහන් කර ඇති පරිදි භුක්ති විඳ කාලාවරෝධී හිමිකම් ලබා ඇද්ද? නැත
9. එසේ නම් පැමිණිලිකරුට මෙම නඩුව පවරා පවත්වාගෙන යා හැකි ද? ඔව්

Appeal allowed with costs.

The learned District Judge of Galle is directed to enter decree accordingly.

Judge of the Court of Appeal