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

Heeralu Pathirannehelage Thilakaratne
of Delgamamedilla, Kumbal-Oluwa, Veyangoda.

Plaintiff-Appellant

Case No. CA 466/1999(F)

Vs.

(Dead) 1. Wickrama Arachchige Jaconis

(Dead) 1a. Wickrama Arachchige Sumana Nona

(Dead) 2. Wickrama Arachchige Wilson

(Dead) 2a. W. A. Jaconis

(Dead) 2b. W. A. Sopinona

(Dead) 2c. W. A. Podinona

(Dead) 3. Wickrama Arachchige Sarath Kumara

3a. Wickrama Arachchige Geethika Nisansalie

3b. Wickrama Arachchige Hasith Kumara
Wickrama Arachchi

3c. Wickrama Arachchige Chathuri Nisansala

4. Wickrama Arachchige Sunil Jayakody

5. Wickrama Arachchige Swarnathilaka

6. Weerakkodi Pathirannahelage Lionel

All of Delgamamedilla, Kumbal-Oluwa,
Veyangoda.

(Dead) 7. Randeni Pidum Wattage Sarnelis Randeni

7a. Randeni Pidum Wattage Karunaratne

7b. Randeni Pidum Wattage Wimalawathie

All of Kumbal-Oluwa, Veyangoda.

Defendant-Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Dr. Sunil Cooray with C. Amarathunga for Plaintiff-Appellant

Udaya Bandara for 5th Defendant-Respondent

Written Submissions tendered on:

Plaintiff-Appellant on 17.09.2019 and 20.11.2019

5th Defendant-Respondent on 18.10.2019 and 18.12.2019

Decided on: 18.11.2020

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Gampaha dated 21.05.1999.

The plaintiff instituted the above styled action in the District Court of Gampaha seeking *inter alia* a declaration of title to the allotment of land marked Lot 3 of Ambagahawatta containing in extent A.0-R.1-P.7.3 morefully described in the schedule to the plaint dated 05.07.1985 [page 55 of the appeal brief].

The plaintiff averred in his plaint that –

1. He became entitled to the land in dispute by virtue of deed No. 2205 dated 24.02.1984 attested by M. K. Wijedasa, Notary Public (පැ1);
2. He and his predecessors have been in undisturbed and uninterrupted possession of the land in dispute for more than 10 years and have acquired the prescriptive title;
3. Since 11.05.1985, the defendants are unlawfully and wrongfully interrupting his peaceful possession causing damages amounting to Rs. 50/- per month.

The 1st – 6th defendants filed their answer on 20.02.1986 [page 57 of the appeal brief] and took up the position that –

1. The plaintiff or his immediate predecessor (i.e. Ramanayake Pathirennehelage Daniel Singho) was never in possession of the land in dispute nor do they have any title, prescriptive or otherwise, to it;

2. The 1st – 6th defendants and their predecessors have been in undisturbed and uninterrupted possession of the land in dispute for more than 10 years and have acquired the prescriptive title;
3. The plaintiff is unlawfully and wrongfully interrupting their peaceful possession and have caused damages amounting to Rs. 5,000/-.

The 1st – 6th defendants sought a dismissal of the action of the plaintiff.

The 7th defendant filed his answer separately on 20.11.1986 [page 59 of the appeal brief] and averred that –

1. The land in dispute is a divided portion of the subject matter of District Court of Gampaha case bearing No. 3931/P which was left unallotted;
2. The co-owners of the said unallotted land portion transferred it to him by several deeds;
3. The 7th defendant and his predecessors have been in undisturbed and uninterrupted possession of the land in dispute for more than 10 years and have acquired the prescriptive title;
4. The plaintiff, the 1st – 6th defendants or their predecessors were never in possession of the land in dispute nor do they have any title, prescriptive or otherwise, to it.

The 7th defendant prayed a declaration of title to the land in dispute in his favor.

At the beginning of the trial, 8 issues [pages 63 and 64 of the appeal brief] were raised. After a lengthy trial, the learned Additional District Judge delivered his judgment on 21.05.1999 [page 148 of the appeal brief].

In his judgment, the learned Additional District Judge raised a new issue (numbered as issue No. 9) regarding the prescriptive title of the defendants in terms of section 149 of the Civil Procedure Code which reads –

> "විත්තිකරුවන් සහ ඔහුගේ පෙර හිමිකරුවන් මෙම දේපළ සහ එහි තුළ පිහිටි සියලු ම වගාවන් දස වසරකට අධික කාලයක් භුක්ති විඳීමෙන් කාලාවරෝධයෙන් දීර්ඝ කාලීන භුක්තිය මත මෙම දේපළ සහ සියලු ම වගාවන් සඳහා හිමිකම් ලබා ඇත් ද?"

The learned Additional District Judge answered the said issue in affirmative. The action was decided in favor of the defendants and the plaint of the plaintiff was dismissed. Being aggrieved, the plaintiff appealed.

In his petition of appeal, the plaintiff contested *inter alia* that the learned Additional District Judge, in raising a new issue whilst delivering the judgment, has misinterpreted the provisions of section 149 of the Civil Procedure Code and has misdirected himself on the law relating to the burden of proof in a *rei vindicatio* action.

It is an established principle of law that ownership of the property claimed in a *rei vindicatio* action is a fundamental condition to its maintainability [*De Silva v. Goonetileke* (32 N.L.R 217), *Pathirana v. Jayasundara* (58 N.L.R 169), *D. A. Wanigaratne v. Juwanis Appuhamy et al* (65 N.L.R 167), *Mansil v. Devaya* (1985) 2 Sri.L.R 46, *Latheef v. Mansoor* (2010) 2 Sri.L.R 333] and the burden is on the plaintiff to establish the title pleaded and relied on by him [*Dharmadasa v. Jayasena* (1997) 3 Sri.L.R 327].

In establishing his title to the land in dispute, the plaintiff relies on 'පැ1' by which one Ramanayake Pathirennehelage Daniel Singho has gifted his prescriptive title to the plaintiff only one year prior to the institution of the instant action. Hence, it's imperative to see whether the said Ramanayake Pathirennehelage Daniel Singho had prescriptive title to the land in dispute in order to convey such title to the plaintiff as the law precludes a transferor from conveying a better title than the one he possesses according to the maxim *nemo dat quod non habet*.

Accordingly, the plaintiff must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in section 3, he has to prove, on a balance of probabilities, that his predecessor had undisturbed and uninterrupted possession for a minimum of ten years and that such possession has been adverse to or independent of the co-owners of the land.

The plaintiff has called Ramanayake Pathirennehelage Daniel Singho to give evidence on his behalf. A careful perusal of his evidence shows that even though he claimed to possess the land in dispute for a period of twenty years, he never was in actual possession of the same. He himself has accepted Kurunegala to be his permanent place of residence. Also, the final decree marked 'පැ2' by which the said Ramanayake Pathirennehelage Daniel Singho claimed to have obtained a declaration of title to the land in dispute shows that the declaration was issued in respect of Lots 2 and 7 of Ambagahawatta and not in respect of Lot 3.

Further, the final decree marked 'පි1' clearly indicates that Lot 3 (i.e. the land in dispute) was a divided portion of the subject matter of District Court of Gampaha case bearing No. 3931/P which was left unallotted. There is no cogent evidence to show when and how the said Ramanayake Pathirennehelage Daniel Singho started possessing the land in dispute against the co-owners of the same.

The plaintiff has attempted to show that his predecessor (i.e. Ramanayake Pathirennehelage Daniel Singho) acquired prescriptive title to the land in dispute through his agent/representative namely the 1st defendant. However, according to 'පි2', what the predecessor of the plaintiff possessed through his agent/representative is Lots 2 and 7 of Ambagahawatta and not Lot 3.

In view of the above, I hold that the learned Additional District Judge has correctly evaluated the evidence led and concluded that the plaintiff has failed to fulfill the burden of proof on him in establishing the prescriptive title of his predecessor.

The next question to be decided is whether that the learned Additional District Judge, in raising a new issue whilst delivering the judgment, has misdirected himself as to the provisions of section 149 of the Civil Procedure Code.

Section 149 of the Civil Procedure Code reads –

> *"The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit."*

A plain reading of section 149 of the Civil Procedure Code suggests that it is open to the court to frames additional issues at any time before passing a decree.

In the case of *Hameed v. Cassim* [(1996) 2 Sri.L.R 30 at 33], Dr. R. B. Ranaraja, J. observed –

> *"Bertram, C. J. in Silva v Obeysekara commenting on the discretion of a judge to allow issues after the commencement of the trial observed, "No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings."*
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> *The provisions of section 149 considered along with the observation of Bertram, C. J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case. It also means that the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."*

In the instant action, the 1st – 6th defendants pleaded prescriptive title to the land in dispute in their answer. Also, it must be noted that the witnesses who gave evidence on behalf of the 1st – 6th defendants were cross-examined with regard to the title claimed by the 1st – 6th defendants and the manner of their possession. As the new issue raised by the learned Additional District Judge is based on the pleadings and the plaintiff had ample opportunity to cross-examine the

witnesses during trial with that regard, I am of the view that the plaintiff was not prejudiced or taken by surprised by the newly framed issue.

Accordingly, I hold that the issue No. 9 falls within the ambit of section 149 of the Civil Procedure Code and the position of the plaintiff that the learned Additional District Judge has misdirected himself as to the provisions contained therein has no merit.

Having said that, it is of vital importance to see whether the learned Additional District Judge was correct in answering the said issue No. 9 in affirmative.

The 1st – 6th defendants claim prescriptive title to the land in dispute. During trial, the 1A, 3rd, 4th and 5th defendants, all being family members, gave evidence stating that they have been in possession of the land in dispute for over twenty years. Even though they have collaborated the evidence led by each other, the only independent witness they called to give evidence on their behalf, has failed to collaborate the evidence led on behalf of the 1st – 6th defendants.

In *Juliana Hamine v. Don Thomas* (59 N.L.R 546 at 548), L. W. De Silva, A. J. observed –

> *"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 NLR at 326]:*
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> > *"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. "*

The land in dispute being an unallotted yet divided portion of a co-owned land, the 1st – 6th defendants have failed to lead any cogent evidence to show when and how they and/or their predecessors started possessing the same. I am also of the opinion that a settlement entered in favour of the 1st – 6th defendant in an action instituted in terms of section 66 of the Primary Courts Procedure Act is not adequate to satisfy the requisites stipulated in section 3 of the Prescription Ordinance.

Since the 1st – 6th defendants have failed to sufficiently explain their manner of possession of the land in dispute, they have failed to discharge the burden of proof in establishing the prescriptive title claimed by them. I hold that the learned Additional District Judge has erred in answering the issues No. 7 and 9 in affirmative. I answer the said two issues as follows –

7. විත්තිකරුවන් පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩම භුක්ති විඳීමෙන් භුක්තියට සවි කරගෙන ඇත් ද? නැත.
9. විත්තිකරුවන් සහ ඔහුගේ පෙර හිමිකරුවන් මෙම දේපළ සහ එහි තුළ පිහිටි සියලු ම වගාවන් දස වසරකට අධික කාලයක් භුක්ති විඳීමෙන් කාලාවරෝධයෙන් දීර්ඝ කාලීන භුක්තිය මත මෙම දේපළ සහ සියලු ම වගාවන් සඳහා හිමිකම් ලබා ඇත් ද? නැත.

For all the foregoing reasons, I allow this appeal partly and vary the judgment of the learned Additional District Judge of Gampaha dated 21.05.1999 to the extent set out above. The learned Additional District Judge of Gampaha is directed to enter decree accordingly.

Parties shall bear their costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal