

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

**CA.1196/99(F)
DC Matale
Case No.4321/L**

Bowattegedara Don Francis Lional
Wijerathna
Akuramboda Road
Wahakotte.

PLAINTIFF

Vs

1. Kingsley Samarakoon
2. Hyacinth Wijerathna
3. Soma Wagodapola
Akuramboda Road
Wahakotte.

DEFENDANTS

AND BETWEEN

Bowattegedara Don Francis Lional
Wijerathna
Akuramboda Road
Wahakotte.

PLAINTIFF APPELLANT

Vs

1. Kingsley Samarakoon (Deceased)
- 1a. Hyacinth Wijerathna
2. Hyacinth Wijerathna
3. Soma Wagodapola
Akuramboda Road
Wahakotte.

DEFENDANT-RESPONDENTS

Before: Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel: S.A.D.S.Suraweera for the Plaintiff-Appellant

Rohan Sahabandu PC with Chathurika Elvitigala for the 1st and
2nd Defendant – Respondent.

Written Submissions: Plaintiff Appellant filed on 26.11.2018
Defendant – Respondent filed on 03.09.2019.

Argued on: 02/05/2019.

Order on: 18/11/2020

Order

N. Bandula Karunarathna J.

The Plaintiff Appellant (hereinafter sometimes called and referred to as the Appellant) had instituted action for a declaration that the Plaintiff is a co-owner of the land described in the schedule to the Plaint, for the ejectment of the Defendants there from and for costs.

The Plaintiff states that the Defendants have encroached upon a portion of the said land which is described in schedule on or about 03.11.1990 along the Southern Boundary and thus sought an ejectment of the Defendants from the said portion of the land so encroached by the Defendants. Plaintiff sought a declaration of title to the land more-fully described in the schedule to the said Plaint, for the ejectment of the Defendants and also for damages in a sum of Rs.50,000/-and for costs.

The Plaintiff states that the Learned trial Judge had arrived at the conclusion that the strip of land claimed by the Plaintiff had been in possession of the Defendants and their predecessors in title for a long period of time.

As opposed to the aforesaid view of the Plaintiffs, the Defendants state that they have not encroached upon the Plaintiff's land but are in possession of a land called 'Moronthe Pillewe Watte' alias 'Moragahakumburewatte'. They further state that they themselves and their predecessors in title have been in possession of the said land inclusive of the portion of the land alleged to be encroached by them.

Therefore, the Defendants state that they have been using the said portion of the land to gain access to their land from the main road and prayed for

1. a dismissal of the Plaintiff's action and also
2. a claim in reconvention that they be declared entitled to the land more-fully described in the schedule to the amended answer
3. a declaration to the effect that the portion of the land in dispute to be a part of their land.

To the aforementioned argument, the Plaintiff states that it will be observed that the Western Boundary of the Plaintiff's land is the main road and the said boundary had been in existence at least from the year 1925 where the oldest deed of the Plaintiff had been executed.

The evidence of the Plaintiff is to the effect that the predecessor in title of the Defendant was at one time the sub post mistress of the Wahakotte Sub Post Office who conducted the said post office on the Defendants' land.

They further state that at that point of time, since there was no proper access to the Defendants' land, the sister of the Plaintiff had permitted the predecessor in title of the Defendants to gain access to the post office through their land. This is permissive user of the land which will not create a prescriptive title unless the Defendants could establish the change of character of their possession. The Plaintiff further explains the reason for the erecting a fence which is that since there was the post office, there had to be free access to the same and they had to protect the balance part of their land from stray cattle and other intruders.

Furthermore, the Plaintiffs submit that the best evidence to establish the true identity of the Defendant's land was to call their predecessor in title as a witness but they have failed to do so which is a fact which has to be considered adverse to their case.

However, the Defendants introduce a procedural error made by the Plaintiff which is that during the appeal when the Court of Appeal directed to file Written Submissions as final on 12.10.2018, the Counsel for the Plaintiff Appellant and also the Plaintiff were absent. The Counsel for the Defendant Respondents and the Defendants were present before Court.

Due to the absence of the Counsel, the Learned Judge of the Court of Appeal had dismissed the Appeal without Cost. The Counsel for the Appellant had subsequently filed a relisting application and the case was fixed for an inquiry on the relisting application. The Defendants claim that if the attorney, without sufficient cause was absent and the court dismissed the application, the court is entitled to refuse to reinstate the matter.

To this argument of the Defendants, the Plaintiffs state that the non -appearance of Mr. Dilhan (the Counsel on their behalf) was due to an unforeseen and unexpected reason that was beyond his control as he had been held up in traffic near the Panchikawatte Junction and still he had managed to reach the Court Room just as the case had been dismissed. Hence, they submitted that the non-appearance on the part of the Appellant of the said date was not intentional but due to an unexpected and unforeseen circumstances which were beyond the control of the parties.

Therefore, under the said circumstances, the Plaintiff argue that the order for dismissal had been made due to an inadvertence or oversight by this court and this is a fit and proper case where the said Order should be vacated and the Appeal to be considered on its merits and demerits.

It was argued by the Appellant that Non-appearance on the part of the Defendant- Appellant of the said date was not intentional but due to an unexpected and unforeseen circumstances which were beyond the control of the parties. At the time of the dismissal, the parties have already agreed to dispose the Appeal by way of Written Submissions and the case was to be mentioned on 12.10.2018 for the said purpose.

It is important to note that section 769(2) of the Civil Procedure Code.

It reads thus, "If the Appellant does not appear either in person or by an Attorney-at-Law to support his appeal, the court shall consider the appeal and make such order thereon as it thinks fit."

It is settled law that the order to be made under such a situation has to be after the consideration of the merits of the case. In the instant case, this court would have fixed the case for judgment without the Written Submissions of the Appellant if they were not available at the time of the case being called. The order for dismissal had been made due to an inadvertence or oversight by this court and this is a fit and proper case where the said Order should be vacated and the Appeal to be considered on its merits and demerits.

This is a fit and proper case where the said Order should be vacated and the Appeal to be considered on its merits and demerits.

Thus, in consideration of the aforesaid, it is my view that the relisting application needs to be allowed.

The order dated 12.10.2018 made by this court by dismissing this appeal is vacated.

This case be re-fixed for argument.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal