

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

**C.A. Appeal No.575/2000 (F)
D.C. Matale Case No.4007/L**

In the matter of an Appeal to the Court of Appeal of
the Democratic Socialist Republic of Sri Lanka.

K.D.Somapala
Kehelpotuwa Watta
Elkaduwa.

PLAINTIFF

- Vs. -

Saminadan Aiyadurai
Rehelkottuwe Watta
Elkaduwa.

DEFENDANT

AND

Saminadan Aiyadurai (Deceased)
Rehelkottuwe Watta
Elkaduwa.

Saminda Devasayagam
No. ¾ Mahatunnagama, Elkaduwa

SUBSTITUTED-DEFENDANT-APPELLANT

- Vs. -

K.D. Somapala (Deceased)
Kehelkottuwe Watta
Elkaduwa.

1. Swarnamali Tissa Kuttige
2. Tissa Kuttige Dona Shyamali
3. Tissa Kuttige Semali
4. Srimali Tissa Kuttige

All of 124, Arangala, Naththarampotha.

SUBSTITUTED 1st TO 4th DEFENDANTS-RESPONDENTS

Before: Janak De Silva J.
&
N. Bandula Karunarathna J.

Counsel: Upendra Walgampaya for the Substituted – Defendant-Appellant.
Ranjan Suwandarathna, PC with Anil Rajakaruna and Ineka Henawitharana for the Substituted – Plaintiff – Respondent.

Written Submissions: Filed on 18th March 2014, Substituted 1st to 4th Plaintiff-Respondent.
Filed on 6th June 2018, Additional Written Submissions of Substituted-Defendant-Appellant.

Argued on: 20/01/2020.

Judgment on: 16/11/2020.

N. Bandula Karunarathna J.

The Original Plaintiff-Respondent (hereinafter referred to as the 'Plaintiff') by Plaint dated 26.01.1989, instituted this action against the Original Defendant-Appellant (hereinafter referred to as the 'Defendant'). By amended Plaint dated 28.01.1992 the Plaintiff prayed, *inter alia*, for: -

- (a) ejectment of the Defendant, his servants, agents and all those claiming through him from the premises described in the schedule to the Plaint;
- (b) a declaration that the Plaintiff is the owner of the premises described in the schedule to the Plaint;
- (c) damages at Rs. 1,000/- per month from 01.01.1979.

The Plaintiff has pleaded, *inter alia*, in the Amended Plaint that the original owner of the land described in the schedule to the Plaint was one Arumabaduge Dona Mani Gunawardane and that the said Dona Mani Gunawardane after long continued possession, by Deed No.36094 dated 16.01.1969 attested by S.P. Wijayatilake, Notary Public, transferred the land to the Plaintiff. Thereafter the Defendant was employed by the Plaintiff and given a room to live on the said land. The Plaintiff on or about 11.01.1986 terminated the Defendant's employment.

The Plaintiff states that the Defendant was working under him and he permitted the Defendant to occupy the house which is situated in the property in suit.

Thereafter, the Plaintiff terminated the services of the Defendant but he failed to vacate the said building and continued to be in possession. Also used to take the produce of the said property and under those circumstances only the Plaintiff instituted the said action seeking for the aforementioned relief.

Although the Plaintiff terminated the Defendant's employment the Defendant continues to forcibly possess the said premises and enjoyed plantations on the said land. The property which is described in the schedule to the Plaint is described as a property in extent of 7 acres 3 roods and 10 perch which is the land called '*Kehelkotuwa Hena*' depicted in Plan No.1960 dated 9th February 1970, made by R.C.O.D. Lamotte L.S.

The Plaintiff states that although the Defendant alleged that he has prescribed to 1 acre 2 roods and 34 perch of the said property which is described in the Court Commission Plan N.2502 dated 11.7.1990 made by S. Ranchagoda L.S, it is significant to note that this action was instituted on 26th January 1989, and the said plan was prepared through Court, 1 ½ years after the institution of the said action. That makes it clear that the purported area claimed by the Defendant on prescription was not defined by way of a plan even at the time of the institution of the said action.

According to the Plaintiff, the said Plan No.5202 depicts a land in extent of 1 acre 2 roods and 34 perch and the part of the Southern Boundary of the said land which is the area described in the schedule to the answer is mentioned as boundaries are indefinite. The Easter and the part of the Southern Boundaries is the Halmillapitiya Ela which is a natural boundary and the said plan suggests that there is no specific area possessed by the Defendant at any given time for him to claim prescriptive title in relation to a part of the land owned by the Plaintiff.

The defendant moved for the dismissal, of the Plaintiff said action and also moved for a declaration that he is entitled to the property described in the schedule to the answer and alternatively moved for Rs. 25,000/- compensation on the purported improvements.

Thereafter on K.W.H.M.R. Jayaratne Bandara was called to give evidence and the said witnesses father was the owner of the land to the South of the subject matter of the said action and the said witness is personally aware of the said property and mentioned that he is personally aware that the Plaintiff regularly used to come to the land though he is not residing there and also pointed out that the Defendant came into the land around 1979-80 and he came for the purpose of looking after the land owned by the Plaintiff and the Defendant was employed as a watcher.

The Plaintiff states that the said evidence confirmed the fact that the Defendant was working as an employee under the Plaintiff in relation to the Plaintiff's horticulture project.

On 9.3.1999 the Plaintiff testified and produced the gazette notification dated 17.12.1976 as P4 to show that the said property came under the statutory determination gazette in terms

of the Land Reform Law and also produced Plan No.3960 as P5 and produced documents up to P12 to establish his possession and the ownership to the property.

The Plaintiff states that at the beginning of the cross examination of the Defendant admitted that he came to the land under the Plaintiff and the flower plantation project was carried in the said property in order to take flowers to the flower shop the Plaintiff had in Colombo. According to the Plaintiff, those admissions made in cross examination by the Defendant itself goes against his own contention and therefore the Plaintiff emphasizes that the Defendant miserably failed in providing prescriptive right to any portion of the land described in the schedule to the Plaintiff.

On the contrary the Defendant filed his Answer dated 08.02.1991 and prayed, *inter alia*, for

- (a) a declaration that the Defendant is the owner of the land described in the schedule to the Answer;
- (b) if the Plaintiff is declared as the owner of the land described in the schedule to the Answer for an order directing a payment of Rs. 25,000/- to the Defendant for the improvements carried out on the said land;
- (c) dismissal of the Plaintiff's action.

The Defendant pleaded in the Answer, *inter alia*, that the land which the Plaintiff claims originally belonged to one Don David Gunaratne who died a long time ago and his estate was administered in D.C. Matale case No.4094/T. Therefore, the Plaintiff's predecessors had no right to transfer the said land to the Plaintiff. The Defendant has acquired prescriptive rights to the land described in the schedule to the Answer. The Defendant has made improvements to the land at a cost of around Rs. 30,000/-.

The Defendant has filed the present Appeal seeking, *inter alia*, to have the said Judgment of the District Court of Matale, set aside and to obtain the reliefs prayed for in the Answer of the Defendant.

Some of the findings found by the Learned District Court Judge is as follows;

- (i) The Plaintiff has become the owner of the subject matter on Statutory Determination marked 34. Therefore, the burden of proving prescriptive title is on the Defendant,
- (ii) The Defendant has failed to establish that his possession was adverse to that of the Plaintiff,
- (iii) The Plaintiff has not proved damages,

Subsequent to a thorough analysis of the facts, it could be seen that the Plaintiff has failed to prove as to how his predecessor acquire rights in the subject matter. In the original and Amended Plaints there is no pleading as to how the Plaintiff's purported predecessor in title, the said Dona Mani Gunawardane, became entitled to the land described in the schedule to the Plaintiff.

I believe that the Learned Additional District Judge has erred in law in holding that the Plaintiff has acquired title on Gazette 34 when the Plaintiff has not proved the title pleaded and put in issue. It is seen that the previous title of the Plaintiff to agricultural land, including the alleged subject matter which was pleaded and put in issue, is admittedly extinguished by the operation of the Land Reform Law. Therefore, the title pleaded and put in issue by the Plaintiff cannot be the basis on which the Plaintiff becomes the owner of the alleged subject matter.

It is my observation that the Plaintiff has not proved the title which he pleaded but goes on to state that the land vested by operation of law in the Land Reform Commission and the Plaintiff became entitled to the subject matter by Statutory Determination marked 34. The Learned Trial Judge has erred in fact and in law in coming to the conclusion that the Plaintiff has received title on 34 when the Plaintiff has clearly not pleaded 34 and therefore has not proved the title which he pleaded.

It is brought to my attention that once the Plaintiff has pleaded a certain title and framed issues relating to that title, it is not open to the Plaintiff to later claim title by other means which was not pleaded or put in issue. It was held in the case of Loku Menika and Others vs. Gunasekera [1997] 2 Sri L.R. 281 that: -

‘the Plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the Defendant. A Court cannot grant any relief to a Plaintiff except on what he has pleaded and proved to the satisfaction of the Court’.

It was also held in the case of Dharmadasa vs. Jayasena [1997] 3 SLR 327 that ‘*in a rei vindication*’ action the burden is on the Plaintiff to establish the title pleaded and relied on by him. The Defendant need not prove anything.

I further observe that the land granted to the Plaintiff by Statutory Determination marked 34 is not the land described in the schedule to the Plaintiff to which a declaration is sought. The said Statutory Determination refers to Preliminary Plan No. 287, made by the Surveyor-General. There, however, is no reference to the said Plan to the land described in the schedule to the Plaintiff, to which land the Plaintiff seeks a declaration of title. The extent of the land described in the schedule to the Plaintiff and the land described in the said preliminary Plan No. 287 is also completely different.

A further matter for consideration is that the land to which the Plaintiff seeks a declaration is part of the larger land called "*Kehelkotuwa Hena*". The said fact can be ascertained by observing that the boundaries to the North, West and South to the land depicted in the Surveyor General's Plan is also "*Kehelkotuwa Hena*". Therefore, there is a burden on the Plaintiff to show that the land specified in the statutory determination is the land described in the schedule to the Plaint and not some other part of the "*Kehelkotuwa Hena*". The burden is not discharged by the Plaintiff.

It is my observation that there are serious doubts as to the identity of the subject matter. Firstly, the Plaintiff is by Amended Plaint seeking a declaration to a land depicted Plan No.3960 of R.C.C. De La Motte, Licensed Surveyor which is said to be in extent of 7 acres, 3 roods and 10 perches (A.7; R.3; P.10). Although the Plaintiff claims that he became entitled to the purported subject matter on Gazette 4 which refers to a land in extent Acres: 7, Roods:1, Perches: 27, in the Preliminary Plan No. 287, made by the Surveyor-General, there is no reference to Preliminary Plan No. 287, in the schedule to the Plaint, nor is there a superimposition of Preliminary Plan No. 287, on De La Motte's Plan No.3960.

It is to be noted that the Plaintiff has also taken out a commission and prepared Plan Nos. 2502 and 3693 to depict the land possessed by the Defendant. The said Plans have not been brought into the schedule to the Amended Plaint, nor have they been superimposed on Preliminary Plan No. 287 to show that it falls within the land claimed by the Plaintiff.

It is the Defendant's position that the land possessed by the Defendant is not that part of '*Kehelkotuwa hena*' claimed by the Plaintiff.

An analysis of the facts of the case reveal that the Defendant was never an employee of the Plaintiff.

Although Oral submissions were made that the Defendant was an employee of the Plaintiff, it is seen that the Plaintiff has specifically framed issues Nos. 4 and 5 as to the purported employment. The said issues and the Learned Trial Judge's answers thereto read as follows:

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- උ - ඔප්පු කර නැත
- ප්‍ර - මාගේ සේවා කාලය තුළ පදිංචිව සිටීමට පැමිණිලිකරු විසින් මෙම ඉඩම තුළ පිහිටි ලයිම් කාමරය ලබාදුන්නේද?
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It is also pertinent to note that the Plaintiff has not challenged the above findings of the learned Trial Judge by way of a cross appeal. It is also to be noted that in any event there is no proof of the Plaintiff having contributed EPF or ETF, or paid a salary, or the amount of the salary, or nature of employment. The Plaintiff has failed to prove that employment was terminated and that the license of the Defendant to possess has been terminated.

For the aforesaid reasons I will allow the Appeal, set aside the Judgment of the Learned Additional District Judge of Matale dated 25.08.2000, grant the reliefs prayed for in the Answer and dismiss the action of the Plaintiff with costs.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal