

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

Devapaksha Pedige Ensa,  
Kaudulla,  
Molagoda.

PLAINTIFF

Vs.

1. M. Gunasekera  
General Post Office  
Kegalle.
2. Karunapedige Premasiri  
Kaudulla  
Molagoda.

DEFENDANTS

C.A. No. DCF- 0243/99

D.C. Kegalle No. 3819/L

AND NOW BETWEEN

Devapaksha Pedige Ensa  
(deceased)  
Kaudulla,  
Molagoda.

PLAINTIFF-APPELLANT

Warusamannapedige  
Hemachandra,

“Singhagiri”, Kaudaulla  
Molagoda.

SUBSTITUTED PLAINTIFF  
APPELLANT

Vs.

1. M. Gunasekera  
General Post Office  
Kegalle.

1<sup>ST</sup> DEFENDANT - RESPONDENT

2. Karunapedige Premasiri  
(deceased)  
Kaudaulla  
Molagoda.

2<sup>ND</sup> DEFENDANT -  
RESPONDENT

- 2(a) Karuna Pedige Suresh  
Anuradha
- 2(b) Karuna Pedige Suresh  
Duminda Premasiri
- 2(c) Karuna Pedige Kalum Suranga
- 2(d) Karuna Pedige Tharaka  
Premasiri
- 2(e) Ranhoti Pedige Chandralatha  
All of

Kaudulla

Molagoda.

SUBSTITUTED 2(a) to 2(e)

DEFENDANT-RESPONDENTS

**BEFORE** : Shiran Gooneratne J. &

Dr. Ruwan Fernando J.

**COUNSEL** : D. Jayasinghe for Plaintiff -  
Appellant

Mahinda Nanayakkara with Aruna  
Jayathileke and K.S.K. Mendis for  
the 1<sup>st</sup> Defendant - Respondent

**WRITTEN SUBMISSIONS** : 17.02.2020, 14.06.2019 &  
11.11.2013 (by the Plaintiff -  
Appellant)

07.02.2020, 26.09.2019, 29.08.2017  
& 17.01.2014 (by the 1<sup>st</sup> Defendant-  
Respondent and 2(a) to 2(e)  
Substituted - Defendant-  
Respondents)

**ARGUED ON** : 14.01.2020

**DECIDED ON** : 06.03.2020

## **Dr. Ruwan Fernando, J.**

### **Introduction**

[1] This is an appeal from the judgment of the learned Additional District Judge of Kegalle dated 18.01.1999 dismissing the Plaintiff-Appellant's action. The original Plaintiff-Appellant (hereinafter referred to as the Plaintiff) instituted this action by the Amended Plaintiff dated 31.10.1990 against 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondents (hereinafter referred to as Defendants) praying *inter alia* for:

- (a) A declaration that the Plaintiff is the owner and possessor of the contagious land called 'Delgahamulahena' morefully described in the schedule to the Amended Plaintiff, which is depicted as Lot 1 to 3 in Plan No. K 2469 dated 18.11.1989 made by Mr. M. B. Ranathunga, Licensed Surveyor;
- (b) An order for ejectment of the 2<sup>nd</sup> Defendant from Lot 1 and the 1<sup>st</sup> Defendant from Lot 3 depicted in Plan No. K 2469 dated 18.11.1989 made by Mr. M. B. Ranathunga, Licensed Surveyor;
- (c) Damages in a sum of Rs. 4000/- up to January 1987 and thereafter, additional damages from February 1987 in a sum of Rs. 1000/- monthly until the vacant possession of the said allotments of land is handed over to the Plaintiff; and
- (d) Costs.

### **Background facts**

#### **The summary of the Plaintiff's case**

[2] The Plaintiff averred in her Amended Plaintiff *inter alia*, that:

- a. By Deed No. 6521 dated 30.03.1964 and Deed No. 3633 dated 22.08.1958, the Plaintiff became the owner of the entire land more fully described in the schedule to the Amended Plaintiff;
- b. From the date of the said purchases, the Plaintiff had uninterrupted and adverse possession of lots 1-3 depicted in Plan No. K 2469 dated 18.11.1989 made by Mr. M. B. Ranathunga, Licensed Surveyor and acquired prescriptive title to the same; and
- c. In the middle of 1986, the 1<sup>st</sup> Defendant encroached onto the said land of the Plaintiff by south, which is depicted as lot 3 in the said Plan and the 2<sup>nd</sup> Defendant encroached onto the said land of the Plaintiff by north, which is depicted as lot 1 in the said Plan causing damages to the Plaintiff.

#### **The summary of the Defendants' case**

[3] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their Amended Answer while denying the several averments contained in the Amended Plaintiff, pleaded *inter alia*, that:

- (a) Lots 1 and 3 depicted in Plan No. K 2469 made by M. B. Ranatunga, Licensed Surveyor dated 30.12.1989 correspond to lots 2 and 5 depicted in the Final Partition Plan No. 1176 dated 20.02.1955 made by J. Aluvihare, Licensed Surveyor in the District Court of Kegalle Case No. 8890;
- (b) Lots 2 and 5 depicted in Plan No. 1176 made by J. Aluvihare, Licensed Surveyor correspond with lots 'B' and 'D' depicted in Plan No. 2563 dated 20.07.1991 made by T. N. Cadar, Licensed Surveyor;
- (c) By the Final Decree entered in the said partition action bearing No. 8890/P in the District Court of Kegalle, lot 2 in Plan No. 1176 dated

20.02.1955 made by J. Aluvihare, Licensed Surveyor was granted to one Sethie who was the 1<sup>st</sup> Defendant in the said partition action;

- (d) Upon the demise of the said Sethie, her children, Ukkamma, Piyasiri Alwis, Siripina, Sopiya Gunawathie, Simon, Jayasinghe and Dharmadasa possessed lot 2 in Plan No. 1176 and M. Sirisoma purchased their rights in lot 2 according to the pedigree pleaded in their Amended Answer;
- (e) The 2<sup>nd</sup> Defendant is in possession of lot 2 in Plan No. 1176 as a licensee of the said M. Sirisoma;
- (f) By the said Final Decree entered in the said District Court of Kegalle Case, lot 5 in Plan No. 1176 dated 20.02.1955 made by J. Aluvihare, Licensed Surveyor was allotted to Sedera who was the 1<sup>st</sup> Defendant in the said partition action;
- (g) Upon the demise of the said Sedera, his only child, Sethie became entitled to the said lot 5 and upon the demise of the said Sethie, her children, Ukkamma, Piyasiri Alwis, Siripina, Sopiya, Gunawathie, Simon and Dharmadhasa possessed lot 5 of Plan No. 1176 and thereafter, M. Sirisuriya and K. D. R. Dissanayake purchased the rights of the said Sethie in lot 5 according to the pedigree pleaded in their Amended Answer;
- (h) The 1<sup>st</sup> Defendant is in possession of lot 5 in Plan No. 1176 as a licensee of the said M. Sirisuriya and K. D. R. Dissanayake; and
- (i) The Defendants are in the possession of lots 2 and 5 in Plan No. 1176 (lots B and D of Plan No. 2563 made by T. N. Cadar, Licensed Surveyor dated 15.05.1991) and acquired prescriptive title to the same by long, uninterrupted and adverse possession for more than 10 years.

[4] While praying for the dismissal of the Plaintiff's action on the basis that no cause of action had accrued to the Plaintiff against the Defendants, the Defendants sought a declaration of title to lot 'B' and 'D' in Plan No. 2563 made by T. N. Cadar, Licensed Surveyor dated 15.05.1991.

### **Issues at the Trial**

[5] At the commencement of the trial on 02.04.1992, issues 1-7 were raised on behalf of the Plaintiff and issues 8-16 were raised on behalf of the Defendants. On 01.02.1993, the Counsel for the Defendants moved to withdraw the Defendants' issues 14 and 15 on the basis that they were not relevant for the determination of this action and thus, issue No. 16 was renumbered as issue No. 14. The case proceeded to trial on 14 issues.

[6] During the course of the evidence of the Plaintiff on 04.01.1995, the learned Counsel for the Defendants raised two more issues and the said issues were numbered as issues 15 and 16 and hence, the case further proceeded to trial on 16 issues.

### **Trial**

[7] The Plaintiff testified on her behalf and called Mr. M. B. Ranatunga, Licensed Surveyor and D. P. Gunadasa who is her brother and closed the case reading in evidence documents marked P1-P5. On behalf of the Defendants, T.M. Cadar, Licensed Surveyor, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Sinhala Pedige Ukkumma gave evidence. The Defendants closed their case reading in evidence documents marked V1 to V11.

[8] During the cross examination of Mr. M. B. Ranatunga, the Plan No. 2563 dated 20.07.1991 made by T. M. Cadar, Licensed Surveyor was marked as V1 and the Plan No. 1176 dated 19.02.1955 made by J.

Aluvihare, Licensed Surveyor in partition case bearing No. 8809 in the District Court of Kegalle was marked as V2.

### **Judgment**

[9] At the end of the trial, the learned Additional District Judge of Kegalle by her judgment dated 18.01.1999 dismissed the Plaintiff's action for the following reasons:

- (i) W.M. Allis who was the 3<sup>rd</sup> Defendant in the partition action filed in the District Court of Kegalle bearing No. 8890/P was only entitled to lot 3 in Plan No. 1176 and the Plaintiff by Deed No. 6521 marked P2 became entitled to the said lot 3 depicted in the said Plan and accordingly, the Plaintiff is only entitled to lot 3 of Plan No. 1176;
- (ii) The Plaintiff is only in possession of lot 2 of Plan No. K 2469 made by M.B. Ranatunga, Licensed Surveyor and there was no proof of encroachment on the part of the Defendants onto lots 2 and 5 of Plan No. 1176 or ouster of the Plaintiff by the Defendants and therefore, no cause of action had arisen against the Defendants;
- (iii) There was no credible proof that the Plaintiff and her predecessors-in-title had acquired prescriptive title to lots 1 and 3 depicted in Plan No. K 2469 made by M.B. Ranatunga, Licensed Surveyor (lots 2 and 5 depicted in Plan No. 1176).

### **The Appeal**

[10] Being aggrieved by the said judgment of the learned Additional District Judge of Kegalle, the Plaintiff preferred this appeal to this Court. This Court by judgment dated 06.12.2017 set aside the judgment of the

learned Additional District Judge of Kegalle and allowed the Appeal. The Defendants made an application for Special Leave to Appeal to the Supreme Court against the said judgment of the Court of Appeal and the Supreme Court having granted special leave to appeal, set aside the judgment of the Court of Appeal dated 06.12.2017 and directed the Court of Appeal to re-hear the case (Vide- order of the Supreme Court dated 09.08.2018).

### **Facts not in dispute**

[11] It is not in dispute that there had been an earlier partition action in the District Court of Kegalle bearing No. 8890 and the Final Decree in the said partition action was entered 18.03.1955. As per the Final Partition Decree marked V3 (i), lot 2 of Plan No. 1176 was allotted to Sethie, who was the 1<sup>st</sup> Defendant in the said partition action; (ii) lot 3 of Plan No. 1176 was allotted to Allis who was the 3<sup>rd</sup> Defendant in the said partition action and the husband of the Plaintiff and (iii) lot 5 of Plan No. 1176 was allotted to Sedera who was the Plaintiff in the said partition action.

[12] It is also not in dispute that:

1. Part of the land called 'Delgahamulahena' had already been partitioned by the said partition action and Plan No. 1176 made by J. Aluvihare, Licensed Surveyor was the Final Partition Plan of the said action;
2. Lot 1 in Plan No. K 2469 corresponds with lot 2 in Plan No. 1176 and lot 3 in Plan No. K 2469 corresponds with lot 5 in Plan No. 1176;
3. Lot 3 in Plan No. 1176 is only a portion of lot 2 in Plan No. K 2469 and the said lot 3 corresponds with lot 'C1' in Plan No. 2563 made

- by T.N. Cadar, Licensed Surveyor and the balance portion of lot 2 of Plan No. K 2469 corresponds with lot 'F' of Plan No. 2563;
4. Lots 1 in Plan No. K 2469 corresponds with lot 'B' in Plan No. 2563, lot 3 in Plan No. K 2469 corresponds with lot 'B' in Plan No. 2563 and lot 2 in Plan No. K 2469 corresponds with lots 'C1' and 'E' in Plan No. 2563; and
  5. The Plaintiff is in possession of the lot 2 of Plan No. K 2469, which consists of lots 'C1' and 'E' in Plan No. 2563 made by T.N. Cadar, Licensed Surveyor.

### **The Issues on Appeal**

[13] When this matter was taken up for argument on 14.01.2020, both Counsel made oral submissions in detail and filed further written submissions. This Court is now called upon to decide the following issues in this Appeal:

1. Whether the judgment of the learned Additional District Judge is not dated in violation of section 186 of the Civil Procedure Code?
2. Whether action presented by the Plaintiff constituted a *rei vindicatio* action proper or an action for ejectment of the Defendants or a combination of a *rei vindicatio* action and a possessory action;
3. Whether the failure of the learned Additional District Judge to answer the issue on misjoinder of parties in non-compliance of section 186 of the Civil Procedure Code is a ground to set aside the judgement of the learned Additional District Judge;
4. If the action is a *rei vindicatio* action, whether the learned Additional District Judge has erred in dismissing the action on the basis that the Plaintiff has failed to prove title to lots 1 and 3 in Plan No. K 2469 made by M.B. Ranatunga, Licensed Surveyor;

5. Whether the learned Additional District Judge was wrong in holding that the Plaintiff has failed to establish that the Defendants unlawfully encroached onto lots 1 and 3 in Plan No. K 2469 and dispossessed her from the said disputed portions of land;
6. Whether the learned Additional District Judge has erred in holding that the Plaintiff had not proved that she had acquired prescriptive title to lots 1 and 3 in Plan No. K 2469 by long, uninterrupted and undisturbed possession for more than 10 years;
7. Whether the learned Additional District Judge has failed to consider that the Defendants had failed prove to the title to lots 2 and 5 in Plan No. 1176 and adduce evidence that they occupy the disputed portions of land as licensees; and
8. Whether the learned Additional District Judge was wrong in holding that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had acquired prescriptive title to lots 1 and 3 of Plan No. K 2469 or lots 'B' and 'D' of Plan No. 2563 by long, uninterrupted and adverse possession for more than 10 years;

### **Decision**

#### **Identity of the Subject Matter & Disputed Portions of Land**

[14] The Plaintiff has instituted this action seeking a declaration of title to the land called 'Delgahamulahena' morefully described in the schedule to the Amended Plaintiff and the said land is depicted as lots 1,2 and 3 in Plan No. K 2469 made by M. B. Ranatunga, Licensed Surveyor.

[15] It is not in dispute that the Plaintiff is in possession of lot 2 in Plan No. K 2469 and the possession of the said lot 2 has not been disturbed by the Defendants. The Plaintiff is, however, seeking to eject the Defendants from lots 1 and 3 in the said Plan No. K 2469 on the basis that the Defendants had encroached onto the said lots and dispossessed her from the said lots

in the middle of 1986. Thus, the disputed portions of land in the present case are only lots 1 and 3 in Plan No. K 2469 dated 28.11.1989 made by M. B. Ranatunga, Licensed Surveyor.

#### **Judgment to be dated in terms of Section 186 of the Civil Procedure Code**

[16] Mr. Dharmadeva Jayasinghe, the learned Counsel for the Plaintiff submitted at the hearing that the judgment of the learned Additional District Judge is not dated, which is a violation of section 186 of the Civil Procedure Code. Section 186 of the Civil Procedure Code provides that the judgment shall be in writing and shall be dated and signed by the Judge in open court at the time of pronouncing it. The learned Counsel for the Plaintiff, however, conceded that the learned Additional District Judge of Kegalle before whom the trial was concluded had been transferred to the District Court of Kuliyapitiya at the time of her writing the judgment and that she had sent the judgment to the District Court of Kegalle to be delivered by the District Judge of Kegalle.

[17] It is not in dispute that the Judicial Service Commission by letter dated 30.04.1998, had appointed the learned Judge to deliver the judgment (Vide- pages 404- 405 of the brief) and thereafter, the judgment had been sent to the District Court of Kegalle together with the original case record (Vide- journal entry No. 71 dated 08.10.1998). The journal entry No. 72 dated 18.01.1999 reveals that the judgment had been delivered in open Court by the District Judge of Kegalle. It reads as follows:

1999.01.18 - තින්දුව  
රංජිති කුසුමලතා මිය - පැමිණිලිකාරීය  
එස්. පයසිංහ මයා වත්තිකරු  
  
පෑ. සි.පී. එන්සා  
ව. 1. එම්. ගුණසේකර  
2. කේ.පී. ප්‍රේමසිරී

in open Court on 18.01.1999 has not prejudiced the substantial rights of the Plaintiff or occasioned a failure of justice.

### **The Nature and Character of the Plaintiff's Action**

[21] At the hearing of this appeal, Mr. Jayasinghe submitted that the action filed by the Plaintiff was an action for the ejectment of the Defendants as trespassers who encroached onto lots 1 and 3 in Plan K 2469 and dispossessed the Plaintiff from the said portions of land. It was the position of the Defendants in the District Court (Vide- written submissions filed on behalf of the Defendants at page 260 of the brief) and in this appeal (Vide- paragraph 4 of the written submissions filed on behalf of the Defendants on 20.01.2014) that the action filed by the Plaintiff was a *rei vindicatio* action proper. The learned Counsel for the Defendants, however, submitted on 14.01.2020 that the Plaintiff has disclosed two different causes of action and incorporated reliefs both in a *rei vindicatio* action and a possessory action and thus, the Plaintiff has instituted this action in violation of section 35(1) of the Civil Procedure Code.

[22] The second issue for consideration in this appeal is thus, whether the present action filed by the Plaintiff should be properly treated as a *rei vindicatio* or an action for the ejectment of the Defendants. The related issue is whether the Plaintiff has joined causes of action both in a *rei vindicatio* and a possessory action.

[23] The curious feature of this action is that the Plaintiff is seeking a declaration that she is the owner and possessor of the subject matter of the property, ejectment of the Defendants and damages. Any person who wishes to recover possession of an immovable property has the choice of the following main remedies for the recovery of such property and these

කා.ස. 71 අනුව මුල් නඩු වාර්තාව, තීන්දුව ලැබේ ඇත..  
තීන්දුව සේපේපලේ තබා ඇත.  
තීන්දුව කියවන ලදී

[18] The Counsel for the Plaintiff who filed the Notice of Appeal on 22.01.1999 has sought to set aside the said judgment delivered by the learned District Judge in open Court on 18.01.1999. He has clearly stated in the Notice of Appeal that the judgment was read out by the District Court of Kegalle in open Court on 18.01.1999. (Vide- page 1 of the brief). It reads as follows:

"පැම්ණිලිකාර - අනියාචනාකරු මෙම නඩුවේ පැම්ණිලිකරු වශයෙන් ඔහුගේ අයිතිවාසිකම් තබා ගැනීමට කරන ලද ඉල්ලීම උගෙන් දිකා විනිශ්චරුතුමය විසින් ප්‍රතික්ෂේප කර ඇති බැවින් වර්ෂ 1999.01.18 වෙති දින කියවා දෙන ලද තීන්දුව ඉවත් කොට අනියාචනාකරුගේ ඉල්ලීමට ඉඩ තබා ගැනීම."

[19] It is crystal clear that the judgment written by the learned Additional District Judge before whom the trial concluded had been sent to the District Court of Kegalle and the said judgment had been delivered in open Court by her successor on 18.01.1999. The date of the judgment shall be regarded as the date on which the judgment is delivered. It is the duty of her successor to pronounce the judgment written by his predecessor in open Court and insert the date of the judgment at the time of pronouncing it. Any inadvertent omission on his part not to insert the date of the judgment delivered on 18.01.1999 cannot cause any prejudice to the Plaintiff when it is clearly admitted by the Counsel for the Plaintiff in the Notice of Appeal that the judgment was read out by the District Judge of Kegalle on 18.01.1999.

[20] I hold that under such circumstances, any inadvertent omission on the part of the learned District Judge of Kegalle to insert the date of the judgement written by his predecessor when he pronounced the judgment

remedies are designed and brought for the same purpose of securing the same primary relief of recovery of property.

1. He may proceed to recover property by *rei vindicatio* action on the ground of his title to the property and prove his title as the owner, independent of the right to possession;
2. He may proceed by action for declaration of title and ejectment provided that he can prove that he enjoyed an earlier peaceful possession and that subsequently he was ousted by the Defendant giving rise to a rebuttable presumption of title in his favour where *dominium* (ownership) need not be proved strictly;
3. He may proceed by a possessory remedy and enforce himself to proving his juristic possession viz, actual control over the thing accompanied by the *animus domani*, are fulfilled and take effect.

[24] An owner can institute a *rei vindicatio* action to recover his property from whoever is in possession without the owner's consent, irrespective of whether possession is bona fide or mala fide (Wille's Principles of South African Law, 9th Ed. P. 539). According to Voet, 6.1.22, 6.1.20.24, 6.1.24, 6.1.2 and Wille's Principles of South African Law, at page 539:

*"to succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property....In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name, Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed....Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted".*

[25] In the modern Roman Dutch Law, as applied in Sri Lanka and South Africa, two actions that are analogous to *rei vindicatio* are (i) the action for declaration of title and (ii) the action for ejectment. The action for ejectment is often combined with the action for declaration of title. The *rei vindicatio* action and the action for declaration of title and ejectment are both however, designed and brought for the same purpose of securing the same primary relief of recovery of property.

[26] However, the action for declaration of title and vindictory action are distinct in scope and the declaration of title and ejectment is not the same as an action *rei vindicatio* (*Le Mesurier v. Attorney-General* (1901) 5 NLR 65). In the said case, Lawrie, J. at page 74 compared the two actions and held that the action for the recovery of land in the possession of the Crown corresponds to the prerogative remedy of petition of rights addressed to the King, praying the Court for a declaration of an asserted title to land, of which the Crown is in possession. He stated that 'I do not call that an action *rei vindicatio*".

[27] The cause of action in *rei vindicatio* action is, however, based on the sole ground of the violation of the Plaintiff's rights of ownership, whereas in the action for declaration of title and ejectment, the cause of action is based on the enjoyment of an earlier right of possession and subsequent ouster giving rise to a presumption of title in favour of the Plaintiff.

[28] The difference between the requisite elements of the two actions was considered in several decided cases. In the case of *Pathirana v. Jayasundara* (1955) 58 NLR 169, where the Plaintiff sued the Defendant for ejectment of the Defendant on the basis that the Defendant was an over-holding lessee by attornment and damages. Gratien J. identified the object and purpose of the two actions and observed at page 173 that:

*"The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title is irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation.....*

*Both these forms of actions referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.*

*A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam); in the former case, the declaration is based on proof of ownership, in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner."*

[29] These views were further confirmed by Wigneswaran, J. in the case of Luwis Singho v. Ponnampерuma, (1996) 2 Sri LR 320, at page 325 as follows:

*"But in an action for declaration of title and ejectment, the proof that a plaintiff had enjoyed an earlier peaceful possession of the land and that subsequently, he was ousted by the Defendant would give rise to a rebuttable presumption of title in favour of the Plaintiff and thus, could be classified as an action where dominium need not be proved strictly. It would appear, therefore that the law permits a*

*person who has possessed peacefully, but cannot establish clear title or ownership to be restored to possession and be quieted in possession. The development of the law appears through a vindictory action. Our Courts have always emphasised that the Plaintiff who instituted a vindictory action must prove title (Vide- Wanigaratne v. Juwanis Appuhamy 65 NLR 167)."*

[30] In Dr. Rasiah Jeyarajah and Another v. Yogambihai Thambirajah nee-Renganathan Pillei, S.C. Appeal No. 146/2013 decided on 12.08.2015, the Defendant sued the overholding lessee for a declaration of title, ejectment of the Defendant and damages. It was the position of the Plaintiff that the case is not a *rei vindicatio* action, but an action based on privity of contract as the Defendant was an over-holding lessee and thus, the Defendant is estopped from denying the Plaintiff's title to the premises.

[31] The District Judge granted relief as prayed for in the Plaintiff but the Civil Appellate High Court reversed the decision of the District Court on the basis that (i) action was a *rei vindicatio* merely because a declaration of title was sought in limb 1 of the prayer to the Plaintiff; (ii) there was not a single issue raised regarding title of the Plaintiffs; and (iii) title was not proved and therefore the Plaintiffs were not entitled to the reliefs prayed for and granted by the District Judge.

[32] Wanasundere J., held that every action where a declaration of title is sought does not automatically become a *rei vindicatio* action and that the present action is not a *rei vindicatio* action but it is an action based on privity of contract. Wanasundere J., observed at page 6 that:

*"In a rei vindicatio action, a Plaintiff comes to Court to get a declaration of title and that would be proof of his title to the land*

*against the whole world. In the instant case, the relief praying for a declaration of title is incidental to the relief prayed on the contractual relationship which was the main relief begged of Court. Apparently, there was no contest on the ownership (page 6).*

*I observe that the action filed by the Plaintiffs in the District Court is not by itself only a *rei vindicatio* action. The action was mainly intended to eject the Defendant who was an over-holding lessee. The main theme of the action and the main theme in the evidence placed before the Court by the lawyer of the Plaintiff-Appellant seems to be “ejection of the over-holding lessee” and nothing else (pp 4-5).*

*Reading the evidence led at the trial it is obvious that the case heard by the District Judge was one of privity of contract. The Plaintiffs had a lease agreement which is a contractual relationship. I am of the view that the observations and conclusion of the District Judge with regard to the evidence given by the 1st Plaintiff and the Defendant should not be disturbed. The District Judge has believed the Plaintiff's evidence. The District Judge decided that the Defendant had no right to stay on, any longer, in the premises and that she should be evicted.” (page 6).*

[33] A decree for a declaration of title may, of course, be obtained by way of an additional relief either in a *rei-vindicatio* action proper (which is in truth an action *in rem*) or in a lessor's action against his over holding tenant (which is an action *in personam*)- Pathirana v. Jayasundara (*Supra*, at 172). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner (*Supra*).

[34] This does not, however, mean that a lessor or landlord is confined to the contractual remedy against an over-holding lessee or tenant or that he cannot sue *in rem* to vindicate his title and recover possession (*Latheef and another v. Mansoor and another* (S.C. Appeal No. 104/05 BALR 189, at p. 196). All it means is that if he chooses the *rei vindicatio* remedy, he cannot succeed just because the over-holding lessee or tenant fails to prove his right to possess or simply rely on the rule of estoppel that a tenant cannot contest the title of his landlord, and must be able to establish his title against the whole world (*Supra*).

[35] The owner is not confined to his remedy in contract and not bound to proceed as if against an overholding lessee where the tie of landlord and tenant has been severed and the lessee has lost his right of occupation and there is no legal basis justifying the tenant's continued occupation (*Senanayake v. Peter de Silva* (1986] 2 Sri L.R. 405). The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property on the proof of title and for ejectment of the person in wrongful occupation where the ownership of the property is the very essence of the action (Maasdorp's Institutes (7th Ed.) Vol. 2, 96). On the contrary, an action for declaration of title and ejectment is an action sought to enforce a mere personal right (*in personam*) against a Defendant or Defendants, which can be founded on many special categories of circumstances.

[36] The classical Roman Law, distinguishes between a proprietary right (real) and a personal right *inter alia*, on the object to which the right pertains as explained by *Groutius* 2.1.58 as follows:

*"Real rights are concerned primarily with the relationship between a person and property, whereas personal rights are concerned with the relationship between two persons. Thus, a real thing binds a particular property, whereas a personal right binds a particular*

*person. A real right establishes a direct relationship between a person and a thing and empowers the holder to control the thing within the limits of the right without the co-operation of another person. A personal right affords a claim only against the particular person who is a party to the agreement and obliges that person to render a particular performance, the performance itself being the object of the right. At most, a personal right establishes only an indirect relationship with the thing in respect of which a performance must be rendered (Willie's Principles of South African Law, 9th Ed. At page 429).*

[37] Thus, proprietary rights flow from juristic facts like transfer, prescription, occupation and accession and are not established by mere agreement between two contracting parties (Willie's Principles of South African Law, *Supra*, p. 430). Thus, a proprietary right establishes a direct relationship between the holder of the right and the property, whereas, a personal right concerns the relationship between parties to a contract or delict or any such obligation of personal nature.

[38] Those who are in actual peaceful possession of property on such obligations or other nexus between the person who is related to the Plaintiff will have all the rights, privileges, entitlements and powers that flow from the mere fact of a right of possession (*ius possessoris*). However, those who are in possession of a property on the basis of such obligation or agreement will not make the action *rei vindicatio*, but would constitute an action for declaration of title and ejectment.

[39] The main distinction between the two types of actions appear to be that in an action for declaration of title and ejectment, the Plaintiff need not sue by right of ownership, but could do so by right of possession and ouster and in such a case, the Plaintiff's claim is a possessory remedy rather

than the vindication of ownership (W. A. Cyril v. H. Sugathadasa, C.A. 857/1999 decided on 06.10.2011).

[40] An action for declaration of title and ejectment can fall into many forms and situations as described, depending on the following special categories of relationships between the persons and property.

1. The action for declaration of title and ejectment can be founded against a Defendant who enjoys possession of the subject matter either on a privity of contract between the parties or otherwise (e.g. lessor and lessee or landlord and tenant or an overholding tenant or lessee) on the basis of breach of contract-Pathirana v Jayasundara and Benjamin Perera v. Gunawardena 1982 (1) S.L.R 214);
2. The action for declaration of title and ejectment can be founded against a Defendant who enjoys possession of the subject matter by any nexus between the person and property arising from any other relationship or arrangement or understanding of personal nature. For example, in Nandasena Wickramasekara Rajapaksha v. Wanniarachchi Kankanamalage Temawathie, S.C APPEAL No. 125/2010, decided on 17.12.2014, a nexus between the State and the persons or his successors who occupied and possessed existed as their father was put into possession of the said land by the State on the basis that he would be issued with a permit in terms of the Land Development Ordinance, although no permit was so far given, but his successors qualified to be in occupation in terms of the provisions of the said Ordinance.
3. The action for declaration of title and ejectment can be founded against a Defendant who enjoys an earlier peaceful possession of the subject matter but he was subsequently ousted by the Defendant. It would give rise to a rebuttable presumption of title in favour of the

Plaintiff obviating the need prove title strictly. Thus, depending of the facts of the case, such an action can only be classified as an action where *dominium* need not be proved strictly as the Plaintiff's claim is only possessory remedy rather than the vindication of ownership (*Lewis Singho v. Ponnamperuma (Supra)*, *Mudalihamy v. Appuhamy* (18910 CLRep. 67 and *Adam Ibraim Rawter and another v. A Ross* (1880) 3 SCC 145);

#### **(a) Type of Action Pleaded and Presented by the Plaintiff**

[41] The question whether the action is to be treated as a *rei vindicatio* or declaration of title and ejectment or even possessory action depends on the choice made by the Plaintiff in his pleadings, including the prayer to such pleadings, which enables the Court to understand the type of the action presented by the Plaintiff.

[42] It is undisputed that the pleadings play an important role in identifying the nature and character of the action presented by a party to the Court. Section 40 (2) (d) of the Civil Procedure Code provides that the Plaintiff shall contain a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Thus, the Plaintiff must choose the nature and character of the action to be presented to the court and such choice shall be exercised by clearly setting out the cause of action upon which the case is founded.

[43] The Plaintiff must set out in his pleadings without any ambiguity as to how his cause of action arises to sue the Defendant and recover possession- whether to vindicate his title or enforce his rights on a privity of contract or any legal obligation or nexus between the person and property or on the basis of a possessory action. The pleadings shall also set out the relief/s

prayed for in such a way so as to enable the Court to grant any one or more of the reliefs provided in section 217 of the Civil Procedure Code.

[44] The determination of this question requires a careful examination of the pleadings in the action and the prayers to such pleadings. The Plaintiff has instituted this action seeking a declaration of title to the land morefully described in the schedule to the Amended Plaintiff and ejectment of the Defendants from the said property and damages. Paragraphs 2 and 3 of the Amended Plaintiff dated 31.10.1990 read as follows:

2. වර්ෂ 1964.03.30 දින වී. රාජපක්ෂ නොතාරිස් මහතා ලියා සහතික කරන ලද අංක 6521 දුරණ විකුණුමිකර ඔප්පුවෙන් සහ වර්ෂ 1958.08.22 ඒ. ගොඩුවන්හි නුවර ප්‍රදේශයේ නොතාරිස් තැන ලියා සහතික කරන ලද අංක 3633 දුරණ විකුණුමිකරයෙන් මලද ගැනීමෙන් ද මෙහි පහත උපලේඛනයේ දැක්වන ඉඩමේ සම්පූර්ණ අධිකාරිය වූයේ මෙම නඩුවේ පැමිණිලිකාරියයි.

3. එකී පැමිණිලිකාරිය එසේ මලද ගත් අවස්ථාවේ සිට වින්තිකරුවන් මෙහි පහත සඳහන් බලහත්කාර සහ අනිත්‍යනුකූල ලෙස ඉඩමේ කොටසකට ඇතුළුවීම සිදු වූ දින දක්වා එම සම්පූර්ණ ඉඩම අඛණ්ඩ හා නිරුවුල් ලෙස භුක්ති විදු ඇති අතර එම ඉඩමට ඒ අනුව පැමිණිලිකාරිය කාලාවරෝධී භුත්කි අධිකිවාසිකම් හිමිකරුගෙන ඇත. පැමිණිලිකාරියගේ භුක්තියට පෙර ඇගේ පෙර හිමිකරුවන් ද මෙම ඉඩම නිරුවුල්ව භුක්ති විදු ඇත.

[45] The main prayer in the Amended Plaintiff is for a declaration of title to the said property and ejectment of the Defendants from lot 1 and 3 depicted in Plan No. K 2469. Prayer (a) of the Amended Plaintiff reads as follows:

"මෙම නඩුවට පහතින් දක්වා ඇති උපලේඛනයේ සඳහන් ඉඩමේ දකුණු දෙසින් 1 වින්තිකරු බලන් අල්ලා ගන්නා ලද අක්කරය හෙවත් විලාස් 8 ක පමණ වන බිම ප්‍රමාණය සහ 2 වින්තිකරු විසින් එකී උපලේඛනයේ දැක්වන ඉඩමේ උතුරු දෙසින් බලන් අල්ලා ගන්නා ලද අක්කරයක හෙවත් විලාස් 8 ක පමණ බිම ප්‍රමාණය පැමිණිලිකාරියට අධිතිව ඇතිව භුක්ති විදින ලද ඉඩමේ කොටස් බවට නින්දු කර එහි අධිතිය පැමිණිලිකාරියට හිමි බවට ප්‍රකාශනයක් කර එහි නිරුවුල්

හුක්මිය පැමිණිලිකාරීයට ලබා දෙමින් විත්තිකරුවන් දෙදෙනාම ඔවුන් දැනට බලෙන් අල්ලාගෙන ඇති පෙර කි බ්‍රිම කොටස්වලින් නෙරපා දුමන ලෙසන් එනම් පෙර කි සැලැස්මේ අංක 1 දුරනු කොටසින් 2 විත්තිකරු ද අංක 3 දුරනු කොටසින් 1 විත්තිකරු ද නෙරපා දුමන ලෙසන්.....”

[46] The Plaintiff has raised issues Nos. 1 and 2 on the basis that the Plaintiff is the owner of lots 1-3 depicted in Plan No. K 2469 made by M. B. Ranatunga, Licensed Surveyor upon the purchase of the said portions of land by the Plaintiff on Title Deeds that will be produced at the trial. The said issues are as follows:

1. මෙම නඩුවේ පැමිණිලිකාරීය සිය සංගෝධිත පැමිණිල්ලේ උප ලේඛනයේ සඳහන් කර ඇති නමවලින් සඳහන් දැනට ඒකාබද්ධ ඉඩමන් වශයෙන් සඳහන් වන ඉඩම මිනින්දෝරු එම්. බී. රත්නාෂ්‍රී 1989.11.28 වෙති දින දුරනු සැලැස්මේ කේ/2469 දුරනු සැලැස්මේ කැබලි අංක 1, 2, 3 වශයෙන් පෙන්වා ඇති ඉඩම ද?
2. මම ඉඩමේ අයිතිවාසිකම් පැමිණිලිකාරීයට මෙම නඩුවට ඉදිරිපත් කිරීමට බලාපොරුත්තු වන ඔප්පුවලින් මිලදීගැනීම මත නිම වී තිබේද?

[47] The Plaintiff does not suggest in the Amended Plaintiff that this is a declaratory action where there is a contractual obligation or any other nexus that exists or a possessory action where the proof of title is not required. The present action of the Plaintiff, as has been presented is purely based on the vindication of her title on the basis of the acquisition of the said property on Title Deeds pleaded in paragraph 2 of the Amended Plaintiff and thus, the present action is neither a declaratory action nor possessory action.

[48] Upon the reading of the Plaintiff's Pleadings and the prayer to the Amended Plaintiff, it seems to me that the Plaintiff has clearly set out in his Pleadings without any ambiguity in such a manner to enable the court to

understand the style and character of her action, which is one of *rei vindicatio* proper. Furthermore, the manner in which the Plaintiff raised issues (i.e. the Plaintiff's issue No. 2) and presented the case in evidence clearly indicates that the Plaintiff invited the District Court to hold that the Plaintiff became the owner of the entirety of the property described in the schedule to the Amended Plaintiff and depicted as lots 1 to 3 in Plan No. K 2469 on the basis that the Deed of Transfer No. 6521 dated 30.03.1962 and the Deed of Transfer No. 3633 dated 22.08.1958.

[49] The learned Counsel for the Defendants, however, submitted that the Plaintiff has incorporated in the Amended Plaintiff different causes of action that consists of the elements of both in a *rei vindicatio* action and a possessory action, in violation of section 35(1) of the Civil Procedure Code. In support of his contention, he drew our attention to paragraph 8 of the Amended Plaintiff and submitted that in addition to a declaration of title, the Plaintiff has further prayed for a declaration of possession and damages, which reliefs cannot be sought in one action in violation of section 35 (1) of the Civil Procedure Code. I shall now proceed to consider the question whether the Plaintiff had incorporated reliefs both in a *rei vindicatio* and a possessory action as submitted by the learned Counsel for the Defendants.

[50] Paragraph 8 of the Amended Plaintiff reads as follows:

"இම நிகை பருள்ளிலிகாரியர் வித்திகரைவன் டெட்டேனா பேர் டி சலூகன் கல பரீடி அரசேர் ஓபிமேன் பலேன் அல்லா ஜெனா லட் விமி கோவெஸ் டெகேன் தீம் வித்திகரைவன் னேர்பா லிங் திருவுல் ஹக்கிய பருள்ளிலிகாரியர் லொடீ தீம் விமி கோவெஸ்வல் அதினிய டி பருள்ளிலிகாரியர் பலத் திருக்காரன்ய மதின் பூகாஷநயக் கர்வா கைமலன், 1987 பழவாரீ டக்ஸ் வித்திகரைவன் டெட்டேனா விசின் சிட்டு கர் அதி அலுகாய வந ர். 4,000/- சுதா ஒத்தின் கி பரீடி அலாந மூடலே அம்நரவ 1987 பேரவரவாரீ சிற வித்திகரைவன் லக்கி விமிவல அதினிவாசிகமி கிமேன் சுதா பருள்ளிலிகாரியர் ஆட்டாயமி லவா கைமல னோக்கை வந பரீடி அநவசர ஹக்கி விட்டிமேன் சிட்டுவந அதில்க

අලාභය වන මසකට රු. 4,000/- බැඟින් මෙම ඉඩම් කොටස්වල නිර්වුල් තුක්තිය ලැබෙන තේක් අලාභ ලබා ගැනීමටත්, විත්තිකරුවන් දෙදෙනාට විරැදුෂ්ව මෙම පැමිණිල්ල ඉදිරිපත් කිරීමට නඩු නිමත්තක් මත වී ඇත.”

[51] Section 35 (1) of the Civil Procedure Code reads as follows:

“In an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the court, except

- a) claims in respect of mesne profits or arrears of rent in respect of the property claimed;
- b) damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and
- c) claims by a mortgagee to enforce any of his remedies under the mortgage...”

[52] In my view, the mere pleading possession does not automatically convert a *rei vindicatio* action into a possessory action and in support of this view, I wish to refer to Maarsdorf (Volume 2. p. 27). Maarsdorf has stated that the rights of an owner are comprised under three heads, namely: (a) the right of possession and the right to recover possession; (b) the right of use and enjoyment; and (c) the right of disposition and that “these three factors are all essential to the idea of ownership, but need not all be present in an equal degree at one and the same time”. This statement was recognised by the Privy Council in the case of Attorney General v. Herath (P.C), 62 NLR 145, at 148 that the said statement is applicable to this Country as well. In the case of Graham v. Ridley S.A.L.R. 1931 T.D.P. 476, Greenberg. J. stated

*"One of the rights arising out of ownership is the right of possession; Indeed Grotius, Introd. 2, 3, 4) says that ownership consists in the right to recover lost possession. Prima facie, therefore, proof that the appellant is the owner and that the respondent is in possession entitles the appellant for an order giving him possession, i.e. to an order for ejectment. When an owner sues in ejectment an allegation in his declaration that he has granted the defendant a lease which is terminated is an unnecessary allegation and is merely a convenient way of anticipating the defendant's plea that the latter is in possession by virtue of a lease, which plea would call for a replication that the lease is terminated'*

[53] Wille in his book "Principles of South African Law" (3rd edition) at page 190 discussing the right to possession, states: -

*"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession, he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim or recover the possession from any person in whose possession the thing is found. In a vindictory action, the claimant needs merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant." The *jus vindicandi* or the right to recover possession of one's property is thus considered an important attribute of ownership in the Roman-Dutch Law. Voet (6.1.2) states that "from the right of dominium or ownership strictly so called arises the action called *rei vindicatio*, the action in rem by which we sue for the recovery of a thing that is ours which is in the possession of another."*

[54] It seems to me that the *jus vindicandi* or the right to recover lost possession is considered an important attribute of ownership in the Roman

Dutch Law and the nature and style of the action and the raising of issue No. 2 on behalf of the Plaintiff and the production of title deeds by the Plaintiff in the present case clearly and unambiguously show that the action chosen by the Plaintiff is one of *rei vindicatio* based on the right of ownership which is the very essence of *rei vindicatio* action. The pleading possession and damages in a *rei vindicatio* action by itself would not in my view, convert the action into a possessory action.

[55] The Plaintiff has clearly chosen her cause of action/s and the character of the action in the pleadings and in the prayer and sought a declaration of title and ejectment on the basis of the said Title Deeds. I hold that the mere use of the word ‘title’ and/or ‘possession’ in paragraph 8 of the Amended Plaintiff and the reliefs for a declaration of title and possession in the prayer would not mean that the Plaintiff has incorporated two different causes of action in a *rei vindicatio* action and a possessory action.

**(b) Question of Prior Peaceful Possession and Ouster giving rise to a Presumption of Title**

[56] Mr. Jayasinghe however, stressed that the Plaintiff is entitled to a declaratory remedy as the Plaintiff who had prior peaceful possession was subsequently ousted by the Defendants without any proof of title or title of a third party or their own leave and license to occupy the disputed land in question. In support of his contention, Mr. Jayasinghe submitted that

- (i) Despite the said partition decree, the said Allis who was the husband of the Plaintiff kept on possessing the whole land which was the subject matter of the District Court of Kegalle Case No. 8890 together with another portion of land adjourning to lot 3 towards the east in Plan No. 1176 as the said Sedara and Sethie did not come to possess the said lots; and

- (ii) As the said Sethie and Sedera did not obtain a writ of possession from the District Court of Kegalle in respect of the said lots, the said Allis kept on possessing the said two lots without any obstruction until such time the Defendants encroached upon the said two lots and dispossessed the Plaintiff from the middle of 1986; and
- (iii) The Plaintiff and her husband, Allis possessed the said land for over a period of 10 years and acquired prescriptive title to the same.

[57] The Plaintiff has stated in evidence that (i) her husband, Allis who became entitled to the contagious land called 'Delgahamulahena' morefully described in schedule 1 of the Amended Plaintiff, by Deed No. 32274 dated 20.08.1953 (P3) mortgaged the said land to H. Georgiana, who filed an action against the said Allis in the District Court of Kegalle; (ii) by a decree entered in the District Court, the said land was auctioned and the said H. Georgiana purchased the said property (P4) by a Fiscal Conveyance dated 11.12.1959; (iii) upon a settlement between the parties on 20.09.1962 (P4), the Plaintiff purchased the said property from Georgiana by Deed of Transfer No. 6521 dated 30.03.1964 (P2); (iv) by Deed No. 3633 dated 22.08.1958 (P1), her husband, Allis transferred his rights to her in the whole land described in the 1<sup>st</sup> schedule to the said Deed and lot 3 in Plan No. 1167 made by J. Aluvihare, Licensed Surveyor; and (v) the Plaintiff continued to possess the said land peacefully until such time she was ousted by the Defendants in 1986.

[58] I shall now turn to the question of the claimed 'peaceful possession' of the Plaintiff in lots 1, 2 and 3 in Plan No K 2369 prior to mid-1986 and her 'unlawful dispossession' from the said two lots as claimed by the Plaintiff in her pleadings and evidence. The Plaintiff has raised issues nos.

3 and 4 to indicate this position. The learned Additional District Judge has answered the said two issues on the basis that the Plaintiff had possession only in lot 3 in Plan No. 1176 and the claims of encroachment and ouster were not proved by the Plaintiff to the satisfaction of the Court.

[59] It is trite law that possession comprises both an objective and subjective element, namely physical control (*corpus*) and the intention to possess (*animus possidendi*) (*Scholtz v Failer* 1910 TPD 243 & Wille's Principles of South African Law, (supra), p. 449). The physical element (*corpus*) of possession, generally termed *detentio* (detention), consists of the physical control, custody or occupation of the property, for example, in the case of immovables, a person who occupies or cultivates the land or part thereof, or occupies or keeps the key or places a supervisor in control of a house or building or part thereof, has *detentio* (*Supra*).

[60] The control required for acquisition of possession by occupation is more stringent than that required for acquisition by transfer, for the latter occurs with the consent of the transferor and thus, in order to gain possession by occupation, a person must seize the land or part of the shipwreck publicly (*Voet* 41.2.9, *Supra*).

[61] On the other hand, the physical possession need not be exercised in person, but it may be exercised by an agent on behalf of the principal or a servant on behalf of the master (D 41.2.3.10, Grotius 2.2.4, *Voet* 41,2,1). Apart from the physical control, a person must have the intention or will to possess (*animus possidendi*). This means that legal capacity to possess must exist, the intention must be directed towards exercising control for self and there must be awareness that control is being exercised over specific property (Wille's Principles of South African Law, (*Supra*, p. 450)).

[62] Moreover, for the dispossession to occur, first, the Plaintiff must establish that the necessary physical and mental elements existed and by the unlawful acts of the Defendants, she lost the possession. Mr. Jayasinghe submitted that although the Defendants called S.P. Ukkuamma to establish the title and possession in the disputed portions of land, she has admitted in evidence that after she sold the land to her brother Dharmadasa in 1967, she did not possess the land. He further submitted that the Defendants did not call her brothers or her husband through him, Ukkuamma claimed to have possessed the land as she was living outside the village after marriage.

[63] The Defendants had called S. P. Ukkuamma to establish that Sirisuriya and Dissanayake derived the rights of Sethie in lot 2 and Sirisoma derived the rights of Sedara in lot 5 in Plan No. 1176 according to the pedigree pleaded in their Amended Answer. Her evidence that Sethie was her mother and Sedara was her grandfather (father of Sethie) was not challenged by the Plaintiff at the trial. In fact, the Plaintiff has admitted in evidence that Ukkuamma is an heir of the Sethie and thus, her relationship with Sethie and Sedera was not in dispute.

[64] Ukkuamma's evidence was that (i) upon the demise of Sedera, his rights devolved on his daughter Sethie and upon her demise, her rights in lot 2 and 5 devolved on her (Ukkuamma) and her 7 brothers and sisters, namely, Piyasiri Alwis, Sopiya, Gunawathie, Simon, Jayasinghe and Dharmadasa; (ii) she conveyed her undivided rights to her brother, Piyasiri Alwis on Deed No. 12053 dated 04.12.1967 (V1) and thereafter, Sirisoma, Sirisuriya and Dissanayake derived the said rights according to the pedigree pleaded in the Amended Answer. As regards possession in lot 2 and 5 in Plan No. 1176, the testimony of Ukkuamma was that initially, her mother Sethie and father Siripina possessed lot 2 and 5 in Plan No.

1176 and her father Siripina planted trees including coconut trees on the said lots and after their demise, their children possessed the said land and the Plaintiff never possessed the said two lots.

[65] Ukkuamma has further stated in evidence that since she was living outside the village after her marriage, her husband used to visit the land and collect coconut on her behalf and after she sold her shares in lot 2 and 5 by Deed No. 12053 on 04.12.1967 to her brother Alwis, she did not have possession in lot 2 and 5 in Plan No. 1176 after 04.12.1967. It appears, however, that the Defendants claim the remaining shares of her brothers and sisters were sold to Sirisoma, Sirisuriya and Dissanayake in 1985 and 1986 respectively as described by Ukkuamma and the relevant Deeds marked at the trial.

[66] Even if it is assumed that the Defendants did not call the brother and husband of Ukkuamma to establish their possession in lot 2 and 5 in Plan No. 1176 prior to the transfer of their shares, the Plaintiff who asserted that she had prior peaceful possession exclusively in the disputed lots from 1955 irrespective of the fact that the final partition decree was entered in 1955 allotting lots 2 and 5 to Sethie and Sedara, must prove her prior peaceful possession and subsequent ouster from the said lots.

[67] The Plaintiff while giving evidence at the trial has stated that her husband Allis possessed the whole land (lots 1-3 in Plan No. K 2369) even before 1958 and the Defendants having entered into the said land in 1986, erected a fence to separate lot 2 from lot 1 and 3 and ousted her from the said lots in the middle of 1986. P.D. Gunadasa who is the brother of the Plaintiff also stated that he had known about the disputed land for over 30 years and his sister possessed the said lots until she was ousted by the Defendants from the said lots in 1986.

[68] A perusal of the Plan No. 1176 dated 19.02.1955 made by J. Aluvihare, Licensed Surveyor for the partition action reveals that this evidence with regard to the erection of a fence is not credible. The said Plan reveals that there is a rock in lot 2 in Plan No. 1176 and a fixed live wire fence exists between lot 2 and 3 in the said Plan made in 1955. It seems to me that lot 2 in the said Plan No. 1176 dated 19.02.1955 had been separated from the Plaintiff's lot 3 in Plan No. 1176 long time ago and the same fence exists between lots 1 and 2 in Plan No. K 2469 dated 28.11.1989 marked 'X'.

[69] A perusal of Plan made by T.N. Cadar and Mr. Ranatunga (X) also reveals that the Plaintiff's lot (lot 2 in Plan marked 'X' and lot C1 in Plan No. 2563) had been separated from the northern part of the land (lot 1 in Plan marked 'X' and lot 2 in Plan No. 1176). Mr. Ranatunga, Licensed Surveyor has stated in evidence that the said fence was nearly 10-15 years old and the said fence is the same wire fence referred to in Mr. Aluvihare's Plan No. 1176 (page 91 of the brief).

[70] Accordingly, the Plaintiff's lot 3 in Plan No. 1176 had been separated from lot 2 in the said Plan by an old wire fence which had existed prior to the date of the final decree entered in the said partition action on 18.03.1955 (V3). The final partition plan No. 1176 made by Mr. J. Aluvihare does not state that a live wire fence exists between lot 3 and 5. Mr. Ranatunga, who made the Plan marked 'X' in 1989 has, however, stated in his Plan and evidence that a live wire fence existed between lots 1 and 2 and 2 and 3 of his Plan No. K 2469 marked 'X' at the time of his survey. Even it is assumed that there was no live wire fence existed to separate lot 3 from lot 5 in 1955, the question arises is whether that itself establishes that the Plaintiff possessed lot 5 in Plan No. 1176 from 1955 irrespective of the final decree entered in the said partition action allotting

lots 2 and 5 in Plan No. 1176 to Sedera and Sethie as claimed by the Plaintiff in her evidence.

[71] Mr. Jayasinghe submitted that the learned Additional District Judge was wrong in holding that the inquiry held by the Government Agent into the application made by the Plaintiff to obtain an electricity connection over lot 5 in Plan No. 1176 shows that the Plaintiff was not the owner of lot 5 as the inquiry was held in 1993 after the 1<sup>st</sup> Defendant occupied the said lot.

[72] Even if the said inquiry was held after the 1<sup>st</sup> Defendant occupied lot 5 in Plan 1176 as submitted by the learned Counsel for the Plaintiff, the crucial question is as to what was the Plaintiff doing when the Defendants unlawfully encroached onto her land and dispossessed her from lots 1 and 3 in Plan No. K 2469. If it was the position of the Plaintiff that her husband planted trees and possessed the whole land since 1955 without any disturbance from Sethie and Sedara and she was ousted by the Defendants unlawfully, she could have made a complaint to the Police about such unlawful acts of the Defendants.

[73] The Plaintiff has at least failed to produce a single complaint made to the Police or Grama Sevaka Niladhari or any other person in authority to substantiate her claim that she possessed the whole land from 1955 but the Defendants ousted her in the middle of 1986. The evidence of the Plaintiff at page 118 of the brief confirms this position:

- පු: තමා කිවිවේ 1985 අවුරුද්දේ ප්‍රේමසිංහ 1 වෙති වනාවට ඇතුළේ වුනා කියලා.
- සි: මට්.
- පු: එම තැනැත්තා ඇතුළේ වූ බවට තමා පොලීසියට පැමිණිල්ලක් කළා ද?
- සි: නැතැ.
- පු: ගුණයේකර මගතා ඇතුළේ වූ බවට පැමිණිල්ලක් කළා ද?

- C: ඔව්.
- P: ප්‍රේමකිරී ඇඟුල් වූ බවට පැමිණිල්ලක් කලේ නැහැ?
- C: නැහැ.
- P: ඒ බවට පොලිස් උසාවියේ නඩුවක් දැම්මාද?
- C: නැහැ.

[74] Mere statement made by the Plaintiff that ‘I possesses the land from 1955’ or “Allis Planted plantation from 1955” or “I was ousted by the Defendants in 1986” and mere statement of her brother Gunadasa that “The Plaintiff possessed the land from 1955” or “The Plaintiff was ousted by the Defendants” are not sufficient to establish the prior peaceful possession of the Plaintiff and subsequent dispossession by the Defendants in 1986. The Plaintiff and Gunadasa have clearly failed to show the manner in which the Plaintiff and Allis held possession of the disputed land.

[75] Except for said mere oral statements of the Plaintiff and her brother Gunadasa that the owners of lot 2 and 5 in Plan No. 1176 did not take out a writ and obtain possession thereof and that the Plaintiff and her husband possessed the land for 30 years from 1955, the Plaintiff has not adduced credible and independent evidence to establish prior peaceful possession and her subsequent dispossession by the Defendants in the middle of 1986. No independent witnesses such as a Grama Niladhari was called or any credible documentary proof was produced by the Plaintiff as to the way in which the Plaintiff possessed the land and that she had prior peaceful possession from 1955 and thereafter, the Defendants unlawfully erected fences and ousted her from lot 1 and 3 in Plan No. K 2469 (lot 2 and 5 in Plan No. 1176) in 1986.

[76] It is highly improbable and unbelievable that the Plaintiff would have kept silent without making any complaint to a Police Officer or the Grama

Niladhari or any other person in authority if the Plaintiff in fact, possessed the whole land from 1955, reaped the benefits from plantation without any disturbance and was forcibly ousted in 1986 by the Defendants by erecting a fence to separate lot 3 from lot 2 and 5 in Plan No. 1176 as correctly observed by the learned Additional District judge in the judgment.

[77] I hold under such circumstances, that this is not a case in which a presumption of title arises in favour of the Plaintiff in the nature of a possessory remedy where the dominium need not be proved strictly when the Plaintiff has failed to establish by adducing credible and independent evidence that she had prior peaceful possession in lots 1 and 3 in Plan No. K 2469 from 1955 and that the Defendants encroached onto the said lots, erected fences and ousted her from the said lots.

[78] In the present case, the Plaintiff has absolutely no contractual nexus with the Defendants arising from a contract or otherwise (overholding lessee or tenant- Pathirana v Jayasundere & Dr. Rasiah Jeyarajah and another v. Yogambihai Thambirajah nee- Renganathan Pillei) or any other nexus arising from any legal obligation between the land and a party (Nandasena Wickramasekara Rajapaksha v. Wanniarachchi Kankanamalage Temawathie) or a presumption of title arises in favour of the Plaintiff where the Plaintiff had earlier peaceful possession but subsequently, she was ousted by the Defendant (Luwis Singho and Others vs. Ponnamperuma (*Supra*) and Adam Ibraim Rawter and another v. A. Ross (1880) 3 SCC 145 & Latheef and another v. Mansoof and another (*upra*).

[79] In my view, this action, cannot be treated as an action for the declaration of title and ejectment on the basis that the Plaintiff was ousted from prior peaceful possession, giving rise to a presumption of title in her

favour obviating the need for her to establish title against the whole world (*in rem*) in such special circumstances.

[80] Under such circumstances, the District Court has correctly assumed that the type of the action chosen by the Plaintiff is one of *rei vindicatio* and the cause of action arises on the basis of the sole ground of violation of the right of ownership. For those reasons, I hold that the action filed by the Plaintiff is based on a *rei vindicatio* action and the Plaintiff has not incorporated two different causes of action in a *rei vindicatio* action and possessory action in violation of section 35 (2) of the Civil Procedure Code.

#### **Title to Lot 1 and 3 depicted in Plan No. K 2469**

[81] It is settled law that a Plaintiff who is seeking a declaratory relief in a *rei vindicatio* action must prove and establish his title to the land in dispute. In the case of Wanigaratne v. Juwanis Appuhamy reported in 65 NLR 167, the Supreme Court stated that (i) in an action *rei vindicatio*, the Plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the Defendant in the action; and (ii) it is imperative for the Plaintiff to prove that the Plaintiff is the owner of the land in question and the Defendant is in possession of the land in question. Thus, a *rei vindicatio* action arises from the right of dominium and it is an action *in rem* (founded on ownership) and therefore, the Plaintiff's ownership of the thing is the very essence of *rei vindicatio* action where the main issue that arises for the adjudication is the Plaintiff's ownership of the property.

[82] It is also important at this stage to consider the defences open to a Defendant in an action *rei vindicatio*. In Allis Appu v. Endris Hamy and others (1894) 3 SCR 87, Withers J. referring to the authority of Maynz Vol.

1 page 786 said that a Defendant in a *rei vindicatio* action can defend himself (i) by denying Plaintiff's title, which must be strictly proved; (ii) by setting up his own title and establishing a title superior to that of the Plaintiff; (iii) prescription of the action; (iv) the plea of *res judicata*; (v) right of tenure under the Plaintiff's as for *usufruct*, pledge, lease, loan, etc. (vi) right to retain possession subject to indemnity from the Plaintiff under peculiar conditions; *jus retentionis*; (vii) The plea of exception *rei venditae et traditae*, that is, by the Plaintiff or his qualified agent, to him-the Defendant-in possession; and (viii) the *jus tertii* (the title of third parties-one having a superior title to the Plaintiff).

[83] The Plaintiff, however, strongly relied on Title Deeds No. 6521 dated 30.03.1964 (P2) and No. 3633 dated 22.08.1958 (P1) to establish her title to the land described in the schedule to the Amended Plaintiff. The Defendants have denied the Plaintiff's title and possession in lots 2 and 5 of Plan No. 1176 (lot 1 and 3 in Plan No. K 2469) on the ground that by the final decree of the partition action No. 8890, the said lots were allotted to Sethie and Sedera and upon their demise, their rights devolved on Sirisoma, Sirisuriya and Dissanayake according to the averments contained in their Amended Answer. At the hearing, Mr. Jayasinghe conceded that the Plaintiff's husband Allis was declared only entitled to lot 3 of Plan No. 1176 and lot 2 was declared entitled to Sethie and lot 5 was declared entitled to Sedera in 1955 (V3).

[84] It is common ground that the Plan No. 1176 made by J. Aluvihare, Licensed Surveyor is the Final Partition Plan in the District Court of Kegalle partition action bearing No. 8890 (V2). By the Final Decree of the said partition action dated 18.03.1955 (V3), the Plaintiff's husband, Allis became entitled only to lot 3 in the said Plan, which is only a portion of lot

2 in Plan No. K 2469. Lot 2 in the said Plan was allotted to Sethie and lot 5 in the said Plan was allotted to Sedera.

[85] The land called 'Delagahamulanahena' morefully described in the schedule to the Amended Plaintiff is about 42 lahas of paddy whereas the extent of the land surveyed and depicted in Plan marked 'X' is only 3 acres 3 roods and 13.50 perches. The entirety of 'Delagahamulanahena' in extent of 42 lahas of paddy morefully described in schedule 1 of the Amended Plaintiff had been included in the Mortgage Bond 32274 dated 20.08.1953 (P3), Fiscal Conveyance No. 8967 dated 12.1959 (P4), title deed No. 6521 dated 30.03.1964 (P2) and the first schedule to the Deed No. 3633 dated 22.08.1958 (P1). However, the 2nd schedule to the Deed No. 3633 (P1) is only lot 3 in Plan No. 1176 (V2), which is the lot allotted to Allis by the said Final Decree and it has no reference whatsoever, to lots 2 and 5 depicted in Plan No. 1176 dated 19.02.1955 (V2)

[86] Although the boundaries in the said Deeds, except the 2nd schedule to the Deed No. 3633 (P1) refer to the entirety of the land called 'Delagahamulanahena' and tally with the boundaries with the Plan No. K 2469 marked 'X', a portion of the said land, namely, lots 2,3 and 5 in Plan No. 1176 had been included in the earlier partition action No. 8890/P. The husband of the Plaintiff was only entitled to lot 3 in Plan No. 1176, which is a portion of lot 2 in Plan No. K 2469 marked 'X'.

[87] The Plaintiff has not disclosed that her husband was only entitled to lot 3 in Plan No. 1176 in her pleadings and she had attempted to deny the existence of the said partition action in her evidence at page 94 of the brief). The Final Partition Decree entered in the said partition action on 18.03.1955 (V3) is a decree *in rem* and is final and conclusive in terms of

section 48 of the Partition Law and binds the whole world, including the Plaintiff and her husband, Allis who was a party to the said partition action

[88] It is crystal clear that although the Plaintiff's Deed No. 6521 marked P2 and Deed No. 3633 refer to the entirety of the land called 'Delagahamulanahena', all these Deeds had been executed long after the date of the final decree entered on **18.03.1955**. By the said final decree, the Plaintiff was only entitled to lot 3 in Plan No. 1176 marked V2 and the Plaintiff has not produced the single Deed to establish that she has title to lot 2 and 5 in Plan No. 1176 (V2) after the final decree in the said partition action was entered in the said District Court on **18.03.1955**.

[89] The Plaintiff is only entitled to lot 3 in Plan No. 1176 which is only a portion of Plan No. K 2469 marked 'X' as correctly decided by the learned Additional District Judge in her judgment dated 18.01.1999. On the other hand, the said Sethie was entitled to lot 2 in Plan No. 1176 which corresponds to lot 1 in Plan No. K 2469 and Sedera was entitled to lot 5 in Plan No. 1176 which corresponds to lot 3 in Plan No. K 2469 as correctly observed by the learned Additional District Judge in the said judgment. Under such circumstances, the Plaintiff has no title to lots 2 and 5 in Plan No. 1176 or lots 1 and 3 in Plan No. K 2469 as correctly held by the learned Additional District Judge in her judgment dated 18.01.1999. Hence, I am of the view that the Plaintiff's *rei vindicatio* action fails.

### The Question of Prescriptive Possession of the Plaintiff

[90] I shall now turn to the prescriptive rights claimed by the Plaintiff as indicated in her issue No. 7. As stated earlier, mere statements of the Plaintiff and her brother Gunadasa that the Plaintiff possessed lots 1 and 3

in Plan No. K 2469 for 30 long years from 1955 is insufficient to prove prescriptive rights of the Plaintiff in the said lots. Apart from the mere statements of the Plaintiff and her brother Gunadasa, the Plaintiff has failed to adduce credible evidence to prove that she had undisturbed, uninterrupted and adverse possession in lot 1 and 3 in Plan No. K 2469 for a period of 10 years as correctly held by the learned Additional District Judge in her judgment dated 18.01.1999.

**The Failure of the learned Additional District Judge to answer Issues Nos. 15 and 16 raised on behalf of the Defendants**

[91] At the hearing, Mr. Jajasinghe strenuously submitted that although the learned Additional District Judge was bound to answer all the issues, she has failed to answer the issues 15 and 16 raised by the Defendants in the judgment and therefore, the impugned judgment is a judgment pronounced in violation of the provisions of section 187 of the Civil Procedure Code. The learned Counsel for the Plaintiff further submitted that such failure is a fatal error on the part of the learned Additional District Judge and thus, the judgment delivered by the learned Additional District Judge is a nullity. He invited us to set aside the judgment dated 18.01.1999 on that ground alone and enter judgment in favour of the Plaintiff.

[92] In support of his contention, Mr. Jajasinghe relied on the decisions reported in Muthukrishna v. Gomes and others 1994 (3) Sri LR 101, Fernando v. Ramanathan 16 NLR 337, Ramani Karunanayake v. Girlie Wimalaratne (2001) 3 Sri LR 56, The Finance Company Limited v. P.K. Kusumawathie and 2 others (BALJ (2008) Vo. XIV 211, Karuketiya v. Karuketiya CA 419, 420, 421/94F dated 04.09.209) and De Silva v. Jellan Beebe (1909) 5 ACR 52.

[93] The said issues 15 and 16 are to the following effect:

15. පැමිතිලිකාරීයගේ සාක්ෂි මතම මෙම නඩුවේ පැමිතිල්ලේ නඩු නිමිත්ත සඳහා පාර්ශවකරු සාවද්‍ය ලෙස සම්බන්ධ කර ඇත්ද?
16. එසේ නම් පැමිතිල්ල ඉදිරියට පවත්වාගෙන යා නැතිද?

[94] A perusal of the judgment dated 18.01.1999 reveals that the learned Additional District Judge has proceeded to answer all the issues except issues 15 and 16 raised on behalf of the Defendants at the trial. The said issues 15 and 16 revolve around ‘misjoinder of parties’ on the basis that the Plaintiff had wrongly made the Defendants, party to the action instead of the owners of lots 1 and 3 depicted in Plan No. K 2469 marked ‘X’.

[95] Section 187 of the Civil Procedure Code reads as follows:

*“The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.”*

[96] The general object of section 187 of the Civil Procedure Code is that in suits in which issues have been framed, the Court shall state its finding or decisions, with the reasons therefor, upon each separate issue raised on behalf of the parties. The two cases, namely, Muthukrishna v. Gomes and others and Ramani Karunanayake v. Girlie Wimalaratne (supra) cited by the learned Counsel for the Plaintiff were decided, however, on section 147 of the Civil Procedure Code as the question that arose for consideration was whether an issue requiring the recording of evidence can be regarded as a preliminary issue which can be dealt with under section 147 of the Civil Procedure Code. In that context, the Court of Appeal held in both cases that the judges of the original courts should, as far as

practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case.

[97] In the case of De Silva v. Jellam Beebee (1909) ACR 52 decided on 20.08.1909, the three Defendants were sued on a number of promissory notes alleged to have been made by them in favour of one Hadjiar, deceased. The 1<sup>st</sup> Defendant denied the making of the notes and pleaded that they had been materially altered while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants admitted having signed the notes, but pleaded that they were minors at that time and that certain part payments had been made by them. The first two issues were with regard to the signature of the 1<sup>st</sup> Defendant and the material alteration pleaded by her. The other issues were directed to the question of the alleged minority of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the part payments relied on. After some evidence was led on the 1<sup>st</sup> and 2<sup>nd</sup> issues, the trial judge entered judgment against the 1<sup>st</sup> Defendant and fixed the case for trial on the other issues for a later date. Under such circumstance, the Court of Appeal held that:

*"I think the judge ought not, even with the consent of the parties, to have given a separate judgment on the first two issues. He ought to have tried all the issues and given one judgment in the whole case. It is very inconvenient to try a case piecemeal and as in the present case, it causes delay in the final judgment of the case, when that is an appeal against the judgment on one or more of the issues before the others are tried".*

[98] The principle emerging from the provision of section 187 Civil Procedure Code and the decided cases is that the Court would generally try all issues and pronounce judgment on all such issues except where a

pure question of law touching upon either the jurisdiction of the Court or the creation of any bar to the suit by any law arises and in such case, the case can be disposed of without evidence being led under section 147 of the Civil Procedure Code.

[99] There is no doubt that the learned Additional District Judge has failed to answer the issues 15 and 16 raised on behalf of the Defendants at the trial and pronounced the judgment on other issues in dismissing the Plaintiff's action. It is imperative for the Judges of the original courts to answer all the substantive issues which relate to the rights and interests of the parties as no complete and effective judgment can be passed without deciding the interests of the parties indicated in such issues unless they are certain that a pure question of law can be disposed of without evidence being led under section 147 of the Civil Procedure Code.

[100] The pivotal question that has to be determined in this appeal, however, is whether the Plaintiff's action ought to be dismissed on the simple ground of the failure to answer the issues 15 and 16 of misjoinder of the parties and the judgment ought to be entered in favour of the Plaintiff for the solitary reason of such failure to answer the said two issues.

### **The nature of the Issues 15-16 raised by the Defendants**

[101] Mr. Nanayakkara, the learned Counsel for the Defendants, however, submitted that the failure to answer issues 15 and 16 was not a ground to set aside the judgment and enter judgment for the Plaintiff as the Plaintiff had failed to establish the ingredients in a *rei vindicatio* action. In view of the above discussion, it is important to consider the nature and the basis of the issues 15-16 raised on behalf of the Defendants. The issues 15-16 had

been raised mainly on the basis that the Defendants are only licensees of the owners of lots 1 and 3 depicted in Plan No. K 2469 marked 'X' and thus, the Plaintiff cannot maintain the action without making the owners of the land as necessary parties to the action (Vide- paragraphs 6, 16 and 17 of the Amended Answer).

[102] The Plaintiff's position at the trial was that there is no evidence whatsoever, to establish that the Defendants were the licensees of the owners of lots 1 and 3 depicted in Plan marked 'X' and thus, the Plaintiff correctly instituted this action against the persons who are in unlawful possession of lots 1 and 3 in the said Plan.

[103] It will be therefore useful to refer to the relevant provisions of the Civil Procedure Code, relating to misjoinder of parties and consider whether the failure to answer the issues 15 and 16 on misjoinder is a ground to regard the judgment a nullity as submitted by the learned Counsel for the Plaintiff. It seems to me that section 11 of the Civil Procedure Code permits all persons in whom the right to relief claimed is alleged to exist jointly, severally or in the alternative, in respect of the same cause of action, to be joined as Plaintiffs, subject to the other provisions of the Civil Procedure Code. Similarly, section 14 of the Civil Procedure Code permits all persons against whom the right to any relief is alleged to exist, jointly, severally or in the alternative in the same cause of action to be joined as Defendants. Section 18 permits Courts on or before the hearing upon application of either party to strike out the name of any party improperly joined as Plaintiff or Defendant or order that any Plaintiff be made Defendant or that any Defendant be made a Plaintiff and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order

to enable the court to effectively and completely to adjudicate upon and settle all the questions involved in that action, be added.

[104] With regard to the procedure to be followed in raising the objections to the misjoinder of parties, section 22 provides as follows:

*"All objections for want of parties, or for joinder of parties who have no interest in the action, or for the misjoinder of co-plaintiffs or co-defendants, shall be taken at the earliest opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant."*

[105] The failure to follow these steps by the party who seeks an objection, by itself, was sufficient ground to refuse him permission to frame an issue on misjoinder, let alone answer the issue in the affirmative (Adlin Fernando and Another v. Lionel Fernando and Others (1995) 2 Sri LR 25, at 29). It appears, therefore, that if any objection to misjoinder of parties is raised by a Defendant, it has to be done before the hearing and it is not open to a Defendant to await the framing of issues by the parties (Adlin Fernando and Another v. Lionel Fernando and Others (Supra, at 28)). The rationale behind these provisions is that the Court should not be called upon to embark upon an inquiry into whether there was a misjoinder of parties or causes of action, after the trial proper has commenced, and thereby side-track the Court from deciding the substantial issues in the case, into deciding questions of procedure. (Supra).

[106] It is important to refer to the following statement made by Ranaraja J. at page 27 in the case of Adlin Fernando and Another v. Lionel Fernando and Others (supra):

*"What is important, however, is, that the provisions of the Civil Procedure Code relating to the joinder of parties are rules of procedure and not substantive law and hence, Courts should adopt a commonsense approach in deciding questions of misjoinder or non-joinder."*

[107] In the present case, the Defendants pleaded in the Amended Answer that the action cannot be maintained insofar as there is a failure to join the necessary parties (vide-paragraph 17). The Defendants did not raise such objection of non-joinder of necessary parties for a determination of Court before the hearing of the action and the issues in question were raised during the course of the evidence of the Plaintiff. The parties, however, continued with the trial, leaving the trial judge to deal with the issue of misjoinder so far as regards the rights and interests of the parties actually before it along with the substantive issues.

[108] Section 17 of the Civil Procedure Code however, enjoys a judge not to dismiss an action for misjoinder or non-joinder of parties and in such event, the wrong party should be struck off and the necessary amendments to the pleadings made (Waharaka *alias* Moratota Thero Sobitha Thero v. Amunugama Ratnapala Thero 1981 (1) Sri LR 201). Further, section 17 provides:

*"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it....."*

[109] It is settled that there is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed by reason of misjoinder

of parties without giving an opportunity to the Plaintiff to amend the Plaintiff so that the Plaintiff can proceed against the other Defendant/s. (Dingiri Appuhamy v. Talakolawewe Pangnananda Thero 67 NLR 89) and Ranasinghe v. Fernando 69 NLR 115).

[110] In my view, section 17 gives wide powers to the Court to remedy misjoinder or non-joinder of parties by striking out unnecessary or adding parties and thus, a misjoinder or non-joinder of parties is not a fatal to a suit provided that the suit is of such a nature that the rights and interests of the parties before the Court can be effectively disposed of against the other parties either by striking out unnecessary or adding necessary parties (Sarkar, Code of Civil Procedure Vol. 1.

[111] It seems to me that section 17 is a rule of procedure and not substantive law as observed by Ranaraja J. in the case of Adlin Fernando and Another v. Lionel Fernando and Others (*supra*) and hence, section 17 will have no application where, under the substantive law, the rights and interests of the parties before Court cannot be effectively determined and judgment can be entered. On the other hand, the rule in section 17 will not have any application when a party whose presence is essential for the continuation of the action and in whose absence, no effective judgment can be entered as such a party ought to have been joined in the action.

[112] In other words, the rule that ‘no suit shall be defeated for misjoinder or non-joinder of parties’ will have no application where the parties who are not joined are essentially necessary parties to the suit and in whose absence, no effective judgment can be passed. In such case, the misjoinder or non-joinder of such a party may be fatal to the suit. On the other hand, non-joinder of a necessary party may be fatal to the suit, if the Defendant succeeds in showing that the Plaintiff had no cause of action against the

Defendants (Ramnath Exports Private Ltd vs Chairman, Air India, AIR 2003 Del. 461, 466) and a judgment passed in such circumstances would be a nullity.

[113] It is pertinent to consider a situation where a judgment is passed without answering some issues which relate to the rights and interests of the parties or real issues between the parties and no complete and effective judgment can be passed without deciding the interests of the parties indicated in such issues are not answered by the Court. For example, in the case of The Finance Company Limited v. P. Kusumawathie (*supra*), the case proceeded to trial against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants upon issues 1 to 6 and 7 to 15 raised on behalf of the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The District Court proceeded to answer issues 1 to 6 of the Plaintiff and 14 and 15 out of the issues raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and dismissed the action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

[114] The action was dismissed on the basis that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were the guarantors to the Plaintiff for the payment of all moneys which the 1<sup>st</sup> Defendant might become due and owing under the hire purchase agreement were not parties to the settlement between the 1<sup>st</sup> Defendant and a third party marked 'X' and the subsequent settlement between the Plaintiff and the 1<sup>st</sup> Defendant based on the said settlement marked 'X' and hence, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not liable for the violation of the terms embodied in the said agreement marked 'X'. However, the Defendants' position that their liabilities under the hire purchase agreement ended with the agreement that had existed between the 1<sup>st</sup> Defendant and the third party as indicated in the Defendants' issues 7-13 were not answered by the learned District Judge.

[115] The Court of Appeal held that the failure to answer the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' issues, whether the liabilities of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ended with the agreement that existed between the 1<sup>st</sup> Defendant and a third party prejudiced the substantial rights of the parties. The Court of Appeal further held that the failure to answer the said issues was not in compliance with the requirements in section 187 of the Civil Procedure Code and hence, the case was sent back for a re-trial.

[116] It seems to me that in the said case, the question whether the liabilities of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants under the hire purchase agreement ended with the agreement marked 'X' was a crucial issue that related to the rights and interests of the parties under the substantive law. The judgment could not have been pronounced in dismissing the Plaintiff's action without answering the said crucial issues and therefore, the failure to answer the said issues definitely prejudiced the substantial rights and interests of the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

[117] The learned Counsel for the Plaintiff further relied on the decision of the Court of Appeal in Karuketiya v. Karuketiya CA 420-421/94 decided 04.09.2009. The said decision was a partition case in which the parties originally raised 9 points of the contest and the Attorney-General who was added to the case raised points of contest Nos. 10 -13. The Plaintiff raised one more issue numbered 14. The learned District Judge answered 12 points of the contest but failed to answer the other points of the contest. The appellants in their statements of claim stated that the corpus of the action should be limited to lot 3 in Plan No. 3335 and prayed for the exclusion of lots 1 and 2 in Plan No. 335 on the basis that those lots are State Lands and the same had been given to the 2<sup>nd</sup> to 4<sup>th</sup> Defendants on an annual permit. The added Defendant sought to exclude

State Lands and produced the notices issued under section 38 of the Land Acquisition Act. The District Judge, however, wrongly held that the land in question is no longer a State Land. Under such circumstances, the Court of Appeal held that the failure of the trial judge to answer all the substantial points of contest related to the rights and interests of the parties makes the judgment not to be in conformity with the provision in section 187 of the Civil Procedure Code.

[118] The pertinent question that arises under such circumstances is whether the mere failure to answer issues 15 and 16 related to the misjoinder or non-joinder of the Defendants would prejudice the rights and interests of the parties currently before Court if a complete and effective judgment under the substantive law could have been passed without answering the sole issue of misjoinder or non-joinder.

[119] If the rights and interests of the parties before Court cannot be completely and effectively determined and complete and effective reliefs cannot be obtained against a party under the substantive law in the absence of a necessary party, the judgment passed in such situation is fatal to the suit or is a nullity. On the other hand, when the rights and interests of the parties actually before court can be completely and effectively determined and judgment can be passed, it is not necessary to join any other party and the misjoinder or non-joinder of parties is not fatal to the suit.

[120] The facts of the present case are, however, completely different from the said cases relied on by Mr. Jayasinghe. In the present case, the issue in question was only related to a misjoinder or non-joinder of parties and the interests of the parties crystallised in other issues could be completely and effectively determined without the need for the joining of other parties and

thus, the said decision can be distinguished from the facts of the present case.

[121] In the present case, the Plaintiff has instituted a *rei vindicatio* action against the Defendants who are said to be in unlawful possession of the disputed lots 1 and 3 in Plan No. K 2469 marked 'X'. The Defendants have claimed that they are in possession of the said lots as the licensees of the owners of the said lots. *Prima facie*, there was no misjoinder of the Defendants in the present case as the case has been instituted against the persons who are said to be in unlawful possession of the disputed lots depicted in Plan marked 'X'.

[122] The substantive issues between the parties in the present case are: (i) whether the Plaintiff has title to the disputed portions of land; (ii) if so, whether the Defendants are in possession of the said property; (iii) if so, whether the Defendants could succeed in any of the defences available to them in a *rei vindicatio* action as indicated in their pleadings; and (iv) whether the Plaintiffs or Defendants have prescribed to the land in question. The rights and interests of the Plaintiffs and the Defendants currently before the Court are crystallised in other issues raised by the parties and such issues could be completely and effectively determined without the need for the joining of other parties.

[123] For those reasons, I hold that the failure to answer the issues 15 and 16 raised by the Defendants on 04.01.1995 had not prejudiced the substantive rights and interests of the parties currently before the Court and the rights and interests of the parties as crystallised in other issues could be completely and effectively determined by the learned District Judge and judgment pronounced without any necessity to join any other party in the

present action. Hence, the submission of the learned Counsel for the Plaintiff fails.

### **Weaknesses of the Defendants' case**

[124] Mr. Jayasinghe strenuously argued that although Defendants had failed to prove that Sirisoma, Sirisuriya and Dissanayake had title to lots 2 and 5 in Plan No. 1176 or that they entered into the disputed portions of land as licensees of Sirisoma, Sirisuriya and Dissanayake, the learned Additional District Judge erred in answering the Defendants' issues numbers 9-13 in their favour for the following reasons:

- a. the Defendants admitted in their Amended Answer that they had no title whatsoever, to the disputed land and that they are only licensees of claimed owners of the land;
- b. the Defendants did not call the said Sirisoma, Sirisuriya and Dissanayake to establish that they had title or that the Defendants entered into the disputed land with their leave and license;
- c. the Deed No. 827 dated 13.11.1986 produced by the Defendants at the trial had not been pleaded in the Amended Answer and it was produced fraudulently to establish that Ukkumma possessed lot 5 in Plan No. 1176;
- d. the Defendants have pleaded in the Amended Answer that the seller of Deed No. 827 was Piyasiri Alwis whereas the seller was, in fact, Ukkumma;
- e. although the 1<sup>st</sup> Defendant stated in evidence that Piyasiri Alwis sold his rights to Ukkumma, it was not pleaded in the Amended Answer;
- f. although the 1<sup>st</sup> Defendant stated in evidence that after Ukkumma sold her rights in lot 5 to Piyasiri Alwis by Deed No.

12053 (V4), the said Piyasiri Alwis with his brothers and sisters transferred their shares back to Ukkamma by Deed No. 123, the Deed was not produced by the Defendants at the trial.

[125] As described, there is no issue that lot 2 in Plan No. 1176 (lot 1 in Plan No. K 2369) was allotted to Sedera and lot 5 in Plan No. 1167 (lot 3 in Plan No. K 2369) was allotted to Sethie. It was not challenged at the trial that the rights of Sedra devolved on Sethie and upon the demise of Sethie, her rights devolved on Ukkamma, Piyasiri Alwis, Sopiya, Simon, Jayasinghe, Gunawathie and Dharmadasa.

[126] A perusal of the Deed No. 12053 marked V1 reveals that the said Ukkamma had transferred her rights inherited from her mother Sethie to Piyasiri Alwis in lot 2 and 5 depicted in Plan No. 1176. The 1st Defendant has stated in evidence that Piyasiri Alwis who got rights from Ukkamma in lot 5 on Deed No. 12053 V4 re-transferred her rights to Ukkamma on Deed No. 123. The said Deed was not however, produced by the Defendants at the trial. If the said Piyasiri Alwis together with his brothers and sisters had re-transferred his rights to Ukkamma on Deed No. 123, the 1<sup>st</sup> Defendant should have produced the said Deed No. 123 to establish the chain of title emanating from Sethie to Sirisuriya and Dissanayake as claimed by him in his evidence. The 1<sup>st</sup> Defendant has failed to produce the said Deed at the trial.

[127] A perusal of the Deed No. 26321 marked V8 however, reveals that the said Piyasiri Alwis who got rights on Deed No. 12053 (V1), together with Dharmadasa, Sopiya, Gunawathie, Simon, Jayasinghe and Siripina (who got rights from his wife, Sethie) had transferred their rights in lot 5 to Somawathie. The said Somawathie by Deed No. 455 marked V7 had transferred her rights to the said Alwis who by Deed No. 827 marked V6

had transferred his rights to Ukkuamma who by Deed No. 1082 marked V5 had transferred his rights to Sirisuriya and Dissanayake. The Defendants have however, not mentioned the Deed No. 827 dated 13.11.1986 in the Amended Answer and the said Deed was produced by the Defendants for the first time at the trial.

[128] If the said Piyasiri Alwis, together with his brothers and sisters transferred their rights to Ukkuamma on Deed No. 123 as claimed by the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant should have either produced the said Deed or at least explained as to how the said Piyasiri Alwis together with his brothers and sisters could have transferred their rights to Somawathie on Deed No. 26321. The 1st Defendant has failed to do so.

[129] Although it is stated in the said Deed No. 1082 dated 13.11.1986 that the said Sirisuriya and Dissanayake had purchased the rights of Ukkuamma in lot 5, the Defendants have not called the said Sirisuriya and Dissanayake at the trial to establish that they having purchased the said rights in lot 5 from Ukkuamma, continue to own lot 5 in Plan No. 1176 as at the date of the institution of the action. For those reasons, I am of the view that the Defendants have not satisfied that Sirisuriya and Dissanayake were entitled to rights in lot 5 as pleaded in their pedigree. Hence, the learned Additional District Judge should have, in my view answered the issue number 11 as follows:

#### 11- Not proved

[130] The said Ukkuamma who inherited Sethie's rights had transferred her rights in lot 2 to Piyasiri Alwis on Deed No. 12053 marked V1. The Defendants have pleaded that the Dharmadasa along with his brothers and sisters transferred their rights to Dharmadasa on Deed No. 26317. The said Dharmadasa by Deed No. 3064 marked 3V2 is said to have

transferred his rights to Sirisoma. It seems to me, however, that the said Deed No. 26317 had not been produced by the Defendants at the trial. (Vide- page 205 of the brief).

[131] Although Dharmadasa could have transferred his undivided rights inherited from his mother Sethie as stated in Deed No. 3064 marked V10, there is no proof whatsoever, that his other brothers and sisters transferred their rights to Dharmadasa on Deed No. 26317. Even if it is assumed that Sirisoma was entitled to Dharmadasa's undivided rights in lot 2 of Plan No. 1176 on Deed No. 3064 marked V10, the said Sirisoma is not entitled to the entirety of lot 2 in Plan No. 1176. For those reasons, I am of the view that the learned Additional District Judge could not have held that Sirisoma was entitled to the entirety of lot 2 in Plan No. 1176 marked V2 and she should have answered the said issue No. 9 as follows:

9- Not proved

#### **Prescriptive Rights of the Defendants and Status of Licensee**

[132] The learned Counsel for the Plaintiff further argued that the Defendants have failed to adduce evidence to prove that (i) they entered into the disputed land on leave and license of Sirisoma, Sirisuriya and Dissanayake and (ii) they had acquired prescriptive title to the disputed land as they have admitted in their own pleadings that they are only licensees of Sirisoma, Sirisuriya and Dissanayake. He submitted that accordingly, the findings of the learned Additional District Judge to the Defendants' issues Nos. 10 (leave and license) 12 (leave and license) and 13 (prescription) in their favour are erroneous.

[133] The Defendants have admitted in their Amended Answer that they possess the disputed land as licensees of Sirisoma, Sirisuriya and

Dissanayake and raised issues Nos. 10 and 12 at the trial to indicate the said position. However, they had not called Sirisoma, Sirisuriya and Dissanayake to substantiate their position at the trial. I of the view that the issues Nos. 10 and 12 should have been answered by the learned Additional District judge as follows:

10- Not proved

12- Not proved

[134] The Defendants' issue No. 13 relates to the prescriptive rights of the Defendants. It reads as follows:

"රී.ඒන්. කාදර් බලය ලත් මෙනින්දෝරු නැවගේ අංක 2563 දරණ පිළුවේ අංක (බේ) සහ (ඩී) දරණ කැබලි වින්තිකරුගේ සංගෝධීත උත්තරයේ සඳහන් සිරිසේම සහ සිරිපූරිය සහ දියානායක යන අයගේ තුක්තිය පවරා ගැනීමෙන් ද පැමිණිලිකාරිය සහ අන් සැමට විරුද්ධව අඛණ්ඩව සහ නිරවුල්ව 10 වසරකට අධික කාලයක් තුක්ති විද කාලාවරෝධී හිමිකම් ලබා තිබේ ද?..."

[135] The said issue has been formulated on the basis that the Defendants having entered into the possession of the disputed portions of land on behalf of Sirisoma, Sirisuriya and Dissanayake acquired prescriptive title by uninterrupted, undisturbed and adverse possession in the said land for over a period of 10 years.

[136] The Defendants have claimed that they entered into the disputed land on behalf of Sirisoma, Sirisuriya and Dissanayake in 1985 and 1986 respectively as their licensees. On their own pleadings, the Defendants could not have succeeded in acquiring prescriptive title to the disputed portions of land and thus, the learned Additional District Judge should have answered issue No. 13 in the negative as follows:

**Effect of Findings to Issues Nos. 9, 10, 11, 12 and 13 on the Dismissal of the Plaintiff's Action**

[137] The learned Counsel for the Plaintiff strenuously argued that since the Defendants have failed to adduce evidence to establish their own legal title or title of their Masters or their own prescriptive title, or their lawful right to possess the subject matter, the learned Additional District Judge was bound to enter judgment in favour of the Plaintiff.

[138] The final question to be considered is whether the wrong findings of the learned Additional District Judge to the said Defendants' issues numbers 9, 10, 11, 12 and 13 by themselves will vitiate judgment of the learned Additional District Judge when the action was dismissed on the basis that the Plaintiff has failed to establish title to the disputed portions of land. In the present case, the learned Additional District Judge has not granted a declaration of title in favour of the Defendants as prayed for in paragraph (b) of the Amended Answer and the Plaintiff's action was dismissed on the sole basis that the Plaintiff has failed to prove her title to the disputed portions of land (lot 1 and 3 in Plan No. K 2469 marked 'X').

[139] The point is that this is a *rei vindicatio* action and the burden is clearly on the Plaintiff to establish the title pleaded and relied on by her in her pleadings. As described, a Defendant in a *rei vindicatio* action can defend himself *inter alia*, by denying the Plaintiff's title, which must be strictly proved by the Plaintiff (Allis Appu v. Endris Hamy and others (Supra) referring to the authority of Maynz (Supra)). The Plaintiff cannot ask for a declaration of title in her favour merely on the strength that the Defendants' title is poor or not established. This principle was lucidly

stated by Herat J., in Wanigaratne vs. Juwanis Appuhamy 65 NLR 167, at 168 in the following terms

*"It has been laid down now by this Court that in an action rei vindication, the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title." [emphasis added]*

[140] This statement of Herat J. in Wanigaratne v. Juwanis Appuhamy (supra) was quoted with approval by G.P.S. de Silva J. in Dharmadasa v. Jayasena 1997 (3) Sri LR 327 (SC) at page 330. Thus, it is settled law that in a *rei vindicatio* action, the Plaintiff must prove his title and in establishing her title, the Plaintiff cannot rely on the weaknesses of the Defendant's title. In Samarapala v. Jagoda (1986) 1 Sri LR 378 also it was held that (i) in a vindictory suit, the Plaintiff must prove his title and having failed to prove his own title, he cannot rely on the weaknesses of the Defendant's title; and (ii) whatever the strength of the Defendant's case, if the Plaintiff fails to establish his title, the Plaintiff's case must necessarily fail.

[141] It is settled law that in a *rei vindicatio* action, the initial burden of proof rests upon the Plaintiff to prove his title including identification of the boundaries and once the title become undisputed or proved by the Plaintiff, the burden shifts to the Defendant to prove that he was in lawful possession of the subject matter (Leisa and Another v. Simon and Another (2002)1 Sri LR 148, at page 151).

[142] Therefore, it is imperative in this case for the Plaintiff to prove that the Plaintiff is the owner of lots 1 and 3 in Plain No. K 2469 and when the Plaintiff fails to prove her title as pleaded, the Defendants are under no obligation to prove anything in such an action. The Plaintiff has overlooked the fact that whatever may be the demerits of the Defendants' case and even if the Defendants' case is demonstrably false, the onus was on the Plaintiff to prove that she has title to lots 1 and 3 in Plan No. K 2469 marked 'X'.

[143] If the Plaintiff fails to discharge the burden of proof as expected of her, her action fails and she cannot ask for a declaration of title and ejectment in her favour merely on the strength that the Defendants' title is poor or not established or that the Defendants failed to prove that they were in lawful possession of the subject matter.

[144] The Plaintiff has failed to prove her title to lots 1 and 3 in Plan No. K 2469 (lots 2 and 5 in Plan No. 1176) and the learned Additional District Judge has given cogent reasons for her conclusions and dismissal of the Plaintiff's action for the failure of the Plaintiff to prove her title to lots 1 and 3 in Plain No. K 2469. The Plaintiff cannot rely on the weaknesses of the Defendants' case and the wrong findings of the learned Additional District judge in respect of the Defendants' issues No. 9, 10, 11, 12 and 13, to establish her own title pleaded and relied on by her in her pleadings. Hence, the Plaintiff's action fails as correctly concluded by the learned Additional District Judge.

## Conclusion

[145] For those reasons, I hold that the conclusion reached by the learned Additional District Judge in dismissing the Plaintiff's action on the basis

that the Plaintiff has failed to establish title to lots 1 and 3 in Plan No. K 2469 (lot 2 and 5 in Plan No. 1176) is correct. Subject to variation with regard to the answers to Defendants' issues Nos. 9, 10, 11, 12 and 13, the judgment of the learned Additional District Judge of Kegalle is affirmed.

[146] Subject to the above-mentioned variation, the Appeal filed by the Plaintiff is dismissed with costs.

**JUDGE OF THE COURT OF APPEAL**

Shiran Gooneratne J.

I Agree.

**JUDGE OF THE COURT OF APPEAL**