

In the Court of Appeal of the Democratic socialist Republic of Sri Lanka

C/A : 408/95 F  
DC Avissawella: 17206/L

Halpayalage Jaya, Meneripitiya,  
Parakaduwa  
Defendant-Appellant  
Vs  
Udage Arachchige Herath  
Parakaduwa  
Plaintiff-Respondent

Before: W L R Silva J and A W A Salam J  
Counsel: Lakshman Perera for the Defendant-Appellant and E M George for the Plaintiff-Respondent  
Argued On: 03.03.2010  
Written Submissions filed on: 03.06.2010  
Decided on: 02.09.2010

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A W Abdus Salam, J.

**B**y amended plaint dated 21st of July 1986, the plaintiff sought a declaration of title and ejectment of the defendant from the subject matter of the action. The disagreement existed at the beginning, as to the extent of the corpus was later put an end to, when the parties admitted the corpus to be in extent of 2 roods and 22.0 perches. There was no issue as to the identity of the corpus either. On a clear chain of title the plaintiff asserted ownership to the subject matter while the defendant preferred a counter claim. The learned district judge granted relief to the plaintiff as prayed for in the plaint. The present appeal has been preferred by the defendant.

It is common ground that Halpayalage Balakira was the owner of the subject matter at one point of time. The plaintiff maintained that on deed No 6431 dated 2 March 1951, Balakira transferred all his rights in the subject matter to Laisa upon whose demise her three daughters sold and transferred the entirety of the subject matter to the plaintiff. The defendant maintained that Balakira, his father gifted the property to him

reserving the life interest on deed No 399 (D1) of October 8, 1975. Balakira died in the year 1980.

Admittedly, the defendant had no right of possession of the subject matter of his own until Balakira departed this life in the year 1980. It was Balakira who had the right of possession, by virtue of the reservation of life interest. Although the defendant claims to have possessed the subject matter for 25 years, the control exercised by him over the subject matter, demonstrably lacks the essential characteristic of possession *ut dominus* for he was a mere licensee under his father until 1975. It is elementary principle that the type of possession necessary to create title by prescription should invariably be possession of one's own right and not the right of another.

In the case of *Maduwanawala vs Ekneligoda* 3 NLR 213 it was held by Bonser CJ that a person, who is let into occupation as a licensee, is deemed to continue to occupy on the same footing on which he was admitted, until he manifests a contrary intention. Besides, no secret intention of the occupier can change the nature of the occupation. The defendant in this case has entered the subject matter as a licensee and remained as such until 1975. As far as the law of prescription is concerned, the benefit of the occupation of a licensee, or an agent can only accrue to the principal and it does not operate vice versa.

On the other hand, even if the defendant had changed his character, he could have done so only after the execution of D3 in 1975. In such an instance, the period commencing from the year 1975 to the date of institution of this action (1983) is hardly sufficient for him to claim benefit of section 3 of the Prescription Ordinance.

A great deal of evidence has gone on record on the disputed question of possession. The plaintiff was very candid about his poor knowledge of the possession of the subject matter. Nevertheless, his witness Ukkiriyage Kiriasanda testified at length as to the possession of the subject matter.

He gave a detailed description of the manner in which Laisa and her children exercised the right of possession over the property. The learned district judge has rightly placed reliance on the evidence of Kirisanda, as she was highly impressed with his sincerity and forthrightness.

The evidence of Kiriasanda was that Laisa and her children possessed the land until they sold their interests to the plaintiff. He categorically stated that the house on the subject matter was built by Laisa. Though the defendant claimed ownership to the house by a right of construction, according to D1 the house has been constructed by his father. Arising from this contradiction on a balance of probability it can safely be concluded that the house on the subject matter could have been constructed by Laisa.

Kiriasanda was very emphatic that Laisa and her daughters from time to time enjoyed the Plantations. This item of evidence has not been seriously controverted by the defendant. In fact he admitted that the daughters of Laisa once in a way took the produce. The plaintiff claimed that the defendant agreed to vacate the house and to quit the subject matter, in the event the plaintiff purchases rights in the subject matter. This item of evidence also was not seriously contested.

In the case of *Leisa vs Simon* 2002 1 SLR page 148, it was held that the court is required to presume the right of the plaintiff to possess the subject matter, upon the proof of title. As the plaintiff has clearly proved title in this matter, the burden has in fact shifted to the defendant to prove that he was in lawful possession of the subject matter.

Turning to the issue regarding prescription, the plaintiff's version needs to be set out briefly. Laisa, who acquired rights way back in 1951, died leaving three daughters. They are Premawathie, Chitralatha and Dayawathie all of whom transferred their rights (1/3 share each) to the

plaintiff. Laisa died in 1957. Immediately thereafter her children came under the protection, custody and care of the grandfather Balakira. The youngest of the three children Dayawathie had born on 25 February 1957 and she remained a minor until 24 February 1975. As this action has been filed on 5 July 1983, the defendant could have set up a prescriptive title against Dayawathie only for the period commencing from 24. 2. 1975 and ending on 5.7.1983 being the date of institution of this action. That is for barely 8 years and 4 months. Thus it would be seen from whichever way the case of the defendant is viewed, acquisition of prescriptive title by him against Laisa or her children is bound to remain as a mere imagination.

It is trite law that the burden in a *rei vindicatio* action is on the plaintiff to prove ownership. More so, when the defendant is in possession of the corpus. A reclaim or *rei vindicatio* action has been defined by Walter Pereira in The Laws of Ceylon Volume II page 199 as follows..

“Reclaim or *Rei vindicatio* is the action which arises under the head of property. It lies for the owner of anything movable or immovable, corporeal or incorporeal, against the possessor or any person who has *malafide* divested him of the possession to deliver it up to the owner with all its fruits then in existence and those which the *malafide* possessor has already enjoyed or might have enjoyed under the deduction, however, of the costs and chargers of the possessor in the thing (V.d.L.1.7.3)<sup>i</sup>

Recently in the case of Dharmadasa Vs Jayasena 1997 (3) SLR 327 this court was reiterative and persistent in emphasizing that in an action for declaration of title, the burden is always on the plaintiff to establish the ownership as pleaded. It means that the defendant is under no obligation to prove anything in such an action. If the plaintiff fails to discharge the burden of proof as expected of him, his action for the vindication of title deserves no favourable consideration.

A perusal of material available in this case demonstrates as to how the plaintiff has established his title by overwhelming evidence (both oral and documentary) commencing from the year 1911 and ending in 1981. According to the plaintiff the original owner of the subject matter by virtue of deed No 1726 (P7) dated 29.10.1911, was one Halpayage Rankira. He died intestate leaving as his sole heir Halpayage Balakira. The estate of Halpayage Rankira was administered in testamentary proceedings No 136 in the district court of Avissawella. The inventory of the list of properties left by the deceased, filed in the testamentary proceedings was produced by the plaintiff marked as P3. It is common ground that item No 15 in the inventory describes the subject matter of this action. Item No 15 in P3 is Polkoratuwa Paranawatta situated at Meneripitiya in extent of 3/4 of an acre. Thereafter by deed No 6431 dated 2.3.1951 (P2) the said Balakira has sold his rights for valuable consideration to his daughter Laisa. She died leaving Premawathie, Chitralatha and Dayawathie who have transferred their interest in the subject matter to the plaintiff under and by virtue of deed No 4738 dated 5 February 1981. From the above facts, it is quite clear that on a chain of title dating from 1911, the plaintiff has purchased rights and thus emerged the sole owner of the subject matter.

In the case of *Luwis Singho And Others vs Ponnampereuma*- 1996 Vol.2, Page No - 320 it was held that in a *Rei Vindicatio* action the cause of action is based on the sole ground of violation of the Right of Ownership, in such an action proof is required that (i) the Plaintiff is the owner of the land in question i.e. he has the dominium and (ii) that the land is in the possession of the Defendant even if an owner never had possession it would not be a bar to a vindicatory action.

The defendant produced only one deed. That is the deed of Rankira to the defendant, executed 25 years after Rankira had parted with all his rights in favour of Laisa. For reasons best known to him Rankira has gifted the

property when he had absolutely no right even to a grain of sand. The defendant being armed with a competing deed from the same source should have raised the benefit of priority of registration, if he wanted to nullify the effects of the deed in favour of the plaintiff, i.e. deed No 4738 (P1) which was prior in time by 25 years.

On a perusal of the deeds produced by the plaintiff, it is to be observed that the first deed in favour of the original owner dated 29 October 1911 has been executed without a prior registration reference for obvious reason. The second deed (No 6431 P2) of the plaintiff bears the prior registration reference as G 13/232 and it is registered in G 60/21. The third deed (No 4738 P1) bears the prior registration No as G 60/21 and is registered at R 15/140. It is interesting to note that the only deed produced by the defendant, being a gift made by Rankira to him (deed No 399 D1) has no prior registration reference and therefore is registered under a new folio probably with no brought forward entry. Observably, the defendant has not availed of the benefit of prior registration for this reason. As a result the irresistible conclusion is that the deed produced by the defendant D1 is not capable of conferring any title on him.

No doubt that in a *rei vindictio* action the burden lies always on the plaintiff to establish his title. Both the Supreme Court and this court have consistently stressed this legal principle. In keeping with this principle, the plaintiff has successfully proved and established his title.

The learned counsel for the plaintiff has argued that the plaintiff did not have *dominium* and moved that the judgment be set aside. For this purpose he relies on a passage from “The Law of Ceylon - by Walter Pereira - page 201, where it is stated as follows...

“The claimant should have acquired dominium before the commencement of the action”. Voet - 6.1.4..”

*Dominium* according to Grotius is the attributes of a thing whereby a person, though not actually in possession of it, **may acquire the same by legal process.** (Grotius 2.3.1)

According to Voet from the right to ownership springs the vindication of a thing, that is to say, an action in *rem* by which we sue for a thing which is ours but in the possession of another. This principle laid down by Voet has been followed in *re Bennett And Green and Bank of Africa Ltd* 22 Natal Law Report 404 at p 411.

It is also useful at this stage to advert to the definition given to the term "dominium" by Voet on the pandects- It reads thus.....

"Ownership, indeed in its broader sense to embrace all rights in re. Thus one who possesses in the person of another is called owner of the possession; and it is clear from the texts cited below that there is ownership of servitude, and that a usufructuary is also included under the word "owner". But understood in a narrower sense ownership is the right by which a thing is ours"- The selective Voet Being the commentary on the Pandects (Paris edition of 1829-by Johannes Voet (1647-1713) 6. 1. 1 page 211.

The defendant has taken serious objection to the impugned judgment on the footing that the plaintiff did not have *dominium* before the commencement of the action. The entire paragraph from which the defendant has extracted a sentence out of context is reproduced below.

"This action, says Voet, arises from the right of dominium. By it, we claim specific recovery of property belonging to us but possessed by someone else (Voet 6. 1. 2). The fact that the plaintiff never had possession of the property is no bar to this action (Voet 6.1.3). *Punchihamy vs Arnolis* 5 SSC 160, nor is it a bar that the plaintiff's vendor had no possession. The execution and delivery of conveyance, if the vendor had title to the land conveyed, transfers the title thereto to the purchaser; and by virtue of merely of the title so created, the purchaser may maintain an action seeking a declaration of

title against a third party in possession without title or under a weaker title (Appuhamy vs. Appuhamy 3 SCC 61). **The claimant should have acquired dominium before the commencement of the action (Voet 6.1.4):** but if he, having dominium at the commencement of the suit, lost it during its progress the defendant is entitled to be absolved” (Voet 6.1.4) - Laws of Ceylon Volume page 211.  
(Emphasis added to indicate the sentence extracted by the defendant to formulate his argument)

In the circumstances, it would be seen that *dominium* is the attributes of a thing whereby a person, though not actually in possession of it, may acquire the same by legal process. As such for reasons stated above, the impugned judgment requires no intervention of this court.

Appeal dismissed subject to costs.

Judge of the Court of Appeal

I agree

W L R Silva, J

Judge of the Court of Appeal

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<sup>i</sup> Vander Linden’s Institute of the Laws of Holland