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

In the matter of an Appeal from the Civil Appellate High Court.

1. Ibrahimkandu Sithy Latheefa
2. Aboobucker Jamaliya Thumma
   Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai.

SC APPEAL 11/2014 **Plaintiffs**

SC / HC/ CA /LA 200/2013
EP/HCCA/KAL/89/2008
D.C. KALMUNAI 1459/L

Vs

1. Kalimuttu Valliammai (deceased)
2. Muttuvel Kamaladevi alias Pooranam,
3. Patrick Vincent alias Anton
4. Muttuvel Thaneledchumi
   All of Valluver Road, Pandirippu-1 Kalmunai.

Defendants

AND THEN BETWEEN

1. Muttuvel Kamaladevi alias Pooranam,
2. Patrick Vincent alias Anton
3. Muttuvel Thaneledchumi
   All of Valluver Road, Pandirippu-1 Kalmunai

Defendant Appellants

Vs

1. Ibrahimkandu Sithy Latheefa
2. Aboobucker Jamaliya Thumma
   Both of Barber Road, (Valluver Road) , Pandirippu 1, Kalmunai.

Plaintiff Respondents

AND NOW BETWEEN

1.Muttuvel Kamaladevi alias Pooranam,
2.Patrick Vincent alias Anton
3.Muttuvel Thaneledchumi
All of Valluver Road, Pandirippu-1
Kalmunai

Defendant Appellant Appellants

Vs

1.Ibrahimkandu Sithy Latheefa
2.Aboobucker Jamaliya Thumma
Both of Barber Road, (Valluver Road) ,
Pandirippu 1, Kalmunai.

Plaintiff Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRASANNA JAYAWARDENA PCJ. &
MURDU FERNANDO PCJ.

Counsel : V. Puvitharan PC with N. Kandeepan
Instructed by M/s Neelakandan &
Neelakandan for the Defendant Appellant
Appellants.

Hejaas Hisbullah for the Plaintiff
Respondent Respondents.

ARGUED ON : 16.07.2018.

DECIDED ON : 17. 09. 2018.

S. EVA WANASUNDERA

This Court has granted leave to appeal to the aggrieved Defendant Respondent Respondents (hereinafter referred to as the Defendants) who have appealed to this Court from a Judgment of the Civil Appellate High Court of Kalmunai which affirmed the Judgment of the District Court of Kalmunai filed by the Plaintiff Respondent Respondents (hereinafter referred to as the Plaintiffs). The subject matter is an allotment of land of an extent of 36.33 Perches according to the Plans available in the brief as I can observe, even though in the Deeds submitted by either party the extent is described in the Schedules to the Deeds, in lengths of fathoms of each side of the rectangular allotments.

Since the Plaintiffs had got judgment in their favour in the District Court, the Defendants had appealed to the Civil Appellate High Court. The Plaintiffs had obtained a writ of execution pending Appeal and the Defendants had been ejected from the land and premises. When the Appeal was concluded, again judgment was against the Defendants and as such they have come before this Court in Appeal against the judgment of the Civil Appellate High Court.

The questions of law on which leave to appeal has been granted are as follows:

1. Did the High Court of Civil Appeals err in overlooking the fact that P1 and P2 have not been duly proved?
2. Did the Plaintiff Respondents fail to identify the land in dispute as required by law?
3. Did the High Court err in law in holding that the Defendant Appellants have failed to prove their alleged prescriptive title to the land in dispute?

The Plaintiffs, I.S.Latheefa and A. Jamaliyathummah are mother and daughter. The Defendants are K. Valliammai (mother), M. Kamaladevi (daughter), Patrick Vincent (son in law) and M. Thaneledchumi (daughter). It was alleged by the Plaintiffs that the land was occupied by the Defendants who are living as one family on the land having built two dwelling houses on the land. The Plaintiffs had prayed for a **declaration of title to the property** and ejectment of the Defendants from the whole land described in the Schedule to the Plaint. The Defendants claimed that they had been occupying the land for a long time and while occupying the same, the mother, Valliammai had purchased the land on **11.08.1976** from the owner, Ahamed Jamaldeen Mohamed Ibrahim by Deed No. **5902** attested by K. Veerakuddy, Notary Public.

In the Plaint, the Plaintiffs pleaded that the 2nd Plaintiff Jamaliyathummah became the owner of the land described in the Schedule to the Plaint which is 25 fathoms x 14 fathoms , **in 1978** by purchasing the said land from her brother, Ibrahim and that she then transferred the said land to her daughter the 1st Plaintiff, Latheefa. The Defendants filed answer stating that Valliammah , the 1st Defendant is occupying the land along with the other Defendants as members of the same family on the basis of having purchased the land described in the Schedule to the Answer, from Ibrahim by Deed No. **5902** dated 11.08.**1976** as aforementioned. The Defendants also claimed that they themselves and their predecessors had been occupying the said land for well over 10 years and therefore they are claiming the land on prescription as well. I observe that the land described in Deed 5902 is 9 fathoms x 12 fathoms.

The trial commenced with 9 issues; 6 by the Plaintiffs and 3 by the Defendants. On behalf of the Plaintiffs, the 2nd Plaintiff, her brother Mohamed Aboobucker Mohamed Ibrahim and Uthumalebbe Athambawa had given evidence. On behalf of the Defendants, the 1st Defendant Valliammai , Aboobucker Abdul Hameed, Subramanium Nallathamby, Patrick Wilson, Murugappan Thavarajah and Balan Arumugam had given evidence. Documents P1 to P4 was produced by the Plaintiffs. Documents D1 to D3 was produced by the Defendants.

Deeds marked P1 and P2 were marked subject to proof but the **Plaintiff had failed to prove the same** before the end of the trial. **The 2nd Plaintiff** in her evidence had stated that when she bought the land from her brother, in 1978 by Deed P3, the 1st **Defendant Valliammai had been living there for about ten to twelve years**. She

had further stated that neither she nor her brother went into occupation of the land after she bought the land from the brother. I observe from the translated pages of evidence from Tamil language to English language, that the 2nd Plaintiff's evidence by itself stands in favour of the Defendants regarding possession of the land. I further observe that the Deed by which the Defendants' claim the land in the Schedule to the Answer is in 1976 and the Plaintiffs' claim the land in the Schedule to the Plaint only in 1978. Whatever the position is, according to the evidence placed before Court, the **Plaintiff should prove the title to the property** if he seeks a declaration of title to the property.

In the case in hand, the witnesses who had given evidence on behalf of the Defendants have clearly given evidence to the effect that Valliammai had been living in the small thatched house for a long time from around 1968. Specially the evidence of a Grama Niladari who had served the area for a very long time had affirmed that Valliammai and family were living there for many years and the period can be gathered from the evidence as from the year 1968/1969.

Even though the District Judge had issued a Commission to a Surveyor to survey the land, the Plaintiffs had failed to produce the said Plan No. 787 dated 18.06.1998 made by K. Sundaramoorthy Licensed Surveyor through the 2nd Plaintiff or through the Surveyor as he was not called upon to give evidence on behalf of the Plaintiffs. Somehow, at the last minute, when the **1rd Defendant, Valliammai** was giving evidence and the Plaintiffs' lawyer was **cross examining her**, the said Plan was marked through her, instead of properly having marked the same through one of the witnesses of the Plaintiffs. She had mentioned that she does not know anything about that Plan. I wonder whether the Plaintiffs did not call the Surveyor to give evidence on purpose or due to their negligence. Whatever it may be, I observe that the whole purpose of having issued a Commission to the Surveyor and not having made use of it by the Plaintiffs to prove the identity of the corpus is a failure on their part.

The Plaintiffs' Schedule to the Plaint describing the land from which they plead that the Defendants should be ejected from, is obviously different to the Schedule to the Answer filed by the Defendants, when one looks at the boundaries and the extent. That is the very reason why the Plaintiffs should have taken care to identify the land properly, which I find that the Plaintiffs have failed to do. Even then, the

District Judge had this Plan and the Report as part of the record and he should have had a look at them prior to deciding the issues before the District Court.

The Surveyor Sundaramoorthy in the report to the Survey done on 18.06.1998 has written in the report thus in paragraph 5 of the Report at page 225 filed on record with the Plan at page 221 of the Appeal Brief : " I investigated for any old work in and around the disputed area and found that Lots 9309, 9310, 9311 and 9312 in P.P.756 appear to abutt or fall in the disputed area." Then in paragraph 6 of the Report he states thus: " After having done in para 2 hereof, I superimposed on my survey, the plans of the above mentioned Lots (Lots 9309, 9310,9311, and 9312 in P.P.756) and fixed them with the help of available fixation data such as roads, road junctions and old landmarks. The boundaries which do not tally or exist on ground had been transferred and shown in red lines in my said Plan 787 dated 18.06.1998. Thereafter I found the following." As such, having gone through the Plan at page 221, the description of the portions of the land, their boundaries, the extents of each allotment and the Remarks made by the Surveyor on each allotment as marked in the Plan, and stated in pages 222 to 228, I observe that as a Surveyor, he has done quite a good job of the Survey with the Report on the same.

Anyway, within the other paragraphs, he states that the Plaintiffs' Schedule of the Commission submits the land in dispute as "**Lot 9310 in Title Plan 173041**" which is a Surveyor General's Plan. Yet this Surveyor Sundaramoorthy states that Lots 9309 and 9310 in T.P.173041 are falling in the disputed lands. For convenience he had allotted the disputed area as Lots 1 to 5 in his Plan 787. Out of those five Lots, the Surveyor identifies that **Lots 1 and 5 are part of Lot 9309** and Lots **2, 3, and 4 are part of Lot 9310.** Therefore I find that the allotments Lots 1 and 5 are not claimed by the Plaintiffs because these areas do not fall within the area in the Schedule to the Plaint which is Lot 9310 in T.P. 173041. It is clear on record that Lots 1 and 5 , which is of an extent of 6.83 + 9.02 = 15.85 Perches , does not fall within the land claimed by the Plaintiffs in their Schedule to the Plaint. For these matters to be clarified, the Plaintiff should have called the Surveyor to give evidence. The reason for the Plaintiffs not having called the Surveyor to give evidence , is now quite obvious. If he came before court and gave evidence, it would have made the position of the Plaintiffs worse than ever before.

The learned trial judge had totally failed to see this evidence on the document received by court from the Surveyor, on the commission issued by court to the

surveyor, which he had returned after a good survey with a good report done. Under the provisions contained in Section 432(2) of the Civil Procedure Code, the report of the Commissioner should be taken into account as evidence in the trial. Sec. 432(2) reads thus: " The Report of the Commissioner or Commissioners in each case ……and the evidence taken by a commissioner **…….shall be evidence in the action;……".**

There cannot be an Order/ Judgment of the District Court in the case in hand, to eject the Defendants at all, out of the corpus which **includes the said 15.85 Perches** which is not within the land described in the Schedule to the Plaint filed by the Plaintiffs themselves. The learned Judge had gone on a voyage on her own and decided quite wrongfully that the Schedule to the Answer does not come within the corpus according to the commissioner's report and implied that the Defendants are wrongfully occupying the Plaintiffs' land whereas **in fact** the land in the Schedule to the Answer is within the land in the Schedule to the Plaint.

It is unfortunate that the judge had failed to see **the facts on documents**. It is worse to see that the Plaintiffs had not called the surveyor to give evidence. The District Judge in page 174 of the brief in his Judgment **specifically states** thus: " Though there is a burden on the Plaintiff to identify the land in dispute, the Plaintiff has failed to submit the Plan or the Report of the Surveyor and to produce the marked documents in Court and also she has not called the Surveyor to give evidence." **Having said so** within the judgment, the Judge has come to a final finding that the Defendants should be ejected from the land described in the Schedule to the Plaint. The rationale adduced goes contrary to the conclusion arrived at by the District Judge. The identity of the corpus cannot be implied. For a declaration of title to be granted by Court, the Plaintiffs should have well established the title of the land after identifying the same first.

It is trite law substantiated by a plethora of authorities, that in a case where the party claiming a declaration of title must prove title to the corpus in dispute **having identified the corpus** in the first instance. In ***V. de Silva Vs Goonethilake 32 NLR 217,*** it was held that " To bring the action rei vindication plaintiff must have ownership actually vested in him."

In the case of ***Peeris Vs Savunahamy, 54 NLR 207,*** it was held that " Where , in an action for declaration of title to land, the defendant is in possession of the land in dispute, the burden is on the plaintiff to prove that he has dominium." In the same case it was held that " A finding of fact may be reversed on appeal, if the trial judge has demonstrably misjudged the position."

As I have analyzed and demonstrated earlier, even though the trial judge had concluded that the Defendants were possessing the land which belonged to the Plaintiffs, the facts pertinent to the case which was before court as evidence were not taken into account and not analyzed by the trial judge before reaching the conclusion. The trial judge had not seen the fact that the whole land claimed by the Plaintiffs included the land of the Defendants which the 1st Defendant had bought by Deed 5902 as aforementioned.

The **2nd Plaintiff** giving evidence stated as follows at different times:

(i) " I bought this land from my brother. When I bought the property the Defendants were there."
(ii) " I bought it from my brother on 04.11.1978 by Deed marked P3. At that time, the said Defendant Valliammai was living there; the said Valliammai was there for 10/12 years."
(iii) "After I bought the property I did not go into occupation."
(iv) " My brother was not there in the land when I bought the property and that all of us were in Maruthamunai at that time."

Again**, the Plaintiffs' witness** Uthumalebbe Athambawa stated in his evidence that the Defendants had built the house in the said land.

The witnesses of the Defendants , Aboobucker Abdul Hameed, and Balan Arumugam confirmed the stand taken up by the Defendants in their Answer as well as the position taken up by the 1st Defendant, Valliammai which is in summary that the Defendants had come into the land in 1969 and built two houses on the land and occupied the same without any person disturbing them after she bought the land in 1976.

In the case of ***Wanigaratne Vs Juwanis Appuhamy 65 NLR 167***, it was held that, " In an action re vindicatio, the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the Defendant's title is poor or not established." Herat J writing the judgment with Abeysundere J agreeing with him stated within the judgment thus: " It is remarkable that one of the witnesses called by the Plaintiffs, Saudiashamy, in his evidence, stated that the 1st Defendant had been in possession of the paddy field and had been taking a share of the paddy, although the evidence of Saudiashamy does not clearly establish that the 1st Defendant took the paddy or share of paddy for herself, which still shows that she is not just an accidental trespasser, but has been in occupation of some portions of the field for some considerable period of time."

I find that in the same way, in the case in hand , the 2nd Plaintiff's evidence was clearly in favour of the Defendants confirming that the Defendants had been on the land from the year 1969.The title Deed 5902 is proof of the fact that the 1st Defendant is the owner of part of the land described in the Schedule to the Plaintiff.

In the circumstances, I answer the questions of law enumerated above in favour of the Defendant Appellant Appellants and against the Plaintiff Respondent Respondents.

I do hereby set aside both the judgments, namely the judgment of the Civil Appellate High Court of Kalmunai in case No. EP/HCCA/KAL/89/2008 dated 05.04.2013 as well as the judgment of the District Court of Kalmunai in case No. 1459/L dated 25.04.2007.

The Defendant Appellant Appellants are entitled to the reliefs prayed for in the Answer filed by them in the District Court Case No. 1459/L. Furthermore as writ of execution had been done at the end of the trial before the District Court , I make order restoring possession of the part of the land and premises in suit on which

the Defendants had built two houses and had been in possession for over 10 years and holding under Deed 5902 as aforementioned , to the Defendants.

Appeal is allowed with costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ.
I agree.

Judge of the Supreme Court