

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

In the matter of AN Application for Leave to Appeal from the Judgment dated 03-06-2010 in NCP/HCCA/ARP No. 322/2007(F) in terms of Section 5C (1) of the Act No. 54 of 2006.

SC. Appeal No. 105/10

S.C. HC(CA)LA. Application No.210/10
Fernando
NCP/HCCA/ARP NO. 322/2007(F)
Weerapura, Thambala,
D.C. Polonnaruwa Case No. 8621/L

Bowekumburegedara Dharmasiri
C/o. Sanjeewa Rice Mill
Polonnaruwa.

Plaintiff

Vs

Chandrasena Pathirannehelage Piyaratne Somasiri
240, Centre Road, Palugasdamana

Defendant

And

Chandrasena Pathirannehelage Piyaratne Somasiri
240, Centre Road, Palugasdamana

Defendant-Appellant

Vs.

Bowekumburegedara Dharmasiri
Fernando
C/o. Sanjeewa Rice Mill
Weerapura, Thambala,
Polonnaruwa.

Plaintiff-Respondent

And Now

SC. Appeal No. 105/10

Chandrasena Pathirannehelage Piyaratne Somasiri
240, Centre Road, Palugasdamana

Defendant-Appellant-Petitioner

Vs.

Bowekumburegedara Dharmasiri
Fernando
C/o. Sanjeewa Rice Mill
Weerapura, Thambala,
Polonnaruwa.

Plaintiff-Respondent-Respondent

* * * * *

BEFORE : Amaratunga, J.
P.A. Ratnayake, PC. J.
Imam, J.

COUNSEL : Hemasiri Withanachchi for the Defendant-Appellant-
Appellant.

D.M.G. Dissanayake for the Plaintiff-Respondent-Respondent.

ARGUED ON : 09-01-2012

DECIDED ON : **28-03-2012**

* * * * *

P.A. Ratnayake, J.

This is an appeal made to this Court in terms of Section 5(c)(1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006, from the Civil Appellate High Court of the North Central Province.

Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent") instituted a case against the Defendant-Appellant-Petitioner (hereinafter referred to as the Petitioner) at the District Court of Polonnaruwa to obtain the following reliefs.

- "(i) a declaration that Permit bearing No. 11/4/1/17A dated 12.07.1991 was a lawful valid permit of the Provincial Land Commissioner;
- (ii) a declaration that the Respondent was the owner of the land described in the Schedule to the Plaint upon the said Permit;
- (iii) ejectment of the Appellant and the persons holding under him from the said land and the delivery of the peaceful possession to the Respondent;
- (iv) damages against the Appellant in a sum of Rs.1,000/- per mensem from the date of the action."

The Respondent stated in his plaint that he has been issued with a permit under Land Development Ordinance, dated 12.07.2009 bearing No. 11/4/1/17A in respect of the land described in the schedule to the plaint. He cultivated the said land and laid a foundation for two rooms. The Petitioner has entered this land without his leave and license and continues to be in possession.

The Petitioner in his Answer has taken up the position that the land he is in possession is a different land described as lot 946 of Final Colony Plan po.160 and does not fall within the land described in the permit of the Respondent and with the permission of the authorities he had commenced constructing a house and had initiated steps to obtain a long term lease from the state. He also counter claimed Rs.500,000/- as compensation for the development, made by him if judgment is entered in favour of the Respondent. By way of a replication the Respondent denied the counter claim.

The District Court gave judgment as prayed for by the Plaintiff and the Civil Appellate High Court affirmed the District Court judgment. This Court has given Leave to Appeal on the following Question of law in paragraph 24(i), (ii) and (iii) of the Petition of Appeal which states as follows:-

- "24(i) Whether the Respondent has discharged the burden of establishing the identity of the land described in the schedule to the Plaint in reference to the Plans referred to therein?
- (ii) Did the Civil Appellate High Court and the District Court err in law by not taking into consideration the fact that the Plan FCP. 160 was not referred to in the Permit (පැ.1) although it was in existence at the time of the issuance of the Permit (පැ.1)?
- (iii) Did the Civil Appellate High Court and the District Court err in law by not taking into account that the boundaries and the extent described in the Permit (පැ.1) issued to the Respondent did not tally with the boundaries and the extent described in the Plan (ව.1) in order to properly identify the corpus?"

It is averred in the plaint by the Respondent that the land given to him by the permit annexed in the plaint as 'P1' is described in the schedule to the plaint.

The Schedule to the Plaint is as follows:-

" උතුරු මැද පළාතේ පොළොන්නරුව දිස්ත්‍රික්කයේ, තමන්කඩුව ප්‍රාදේශීය ආදායම් නිලධාරී කොට්ඨාශයේ, මැද පත්තුවේ, පොත්ගුල් පෙදෙස ග්‍රාම සේවා නිලධාරී කොට්ඨාශයේ, පොත්ගුල් පෙදෙස නැමති ගමේ පිහිටා ඇති සර්වේ ජනරාල්වරයා විසින් පිළියෙල කරනු ලැබ ඔහු භාරයේ ඇති අංක දරණ පිඹුරේ 3/28/75 - 368 අංක 81/83 බම් කට්ටිය වශයෙන් නිරූපනය කර ඇති අංක ප.ගු.කේ.ගේ අංක 11/4/1/17 ඒ නවනගරය/2 යටතේ ප්‍රමාණයෙන් අක්කර: නැත, රූඩ්: එකයි, පර්චස්: නැත (අක්කර: 00, රූඩ් :01, පර්චස්:00)ක ඇතැයි ගණන් බලා ඇති ඉඩම් සඳහා සීමාවන්:
උතුරට: පාර

නැගෙනහිරට: වාර මාර්ග ඇල,

දකුණට: අංක 84 ඉඩම.

බටහිරට: පාර

යන මෙකී මායිම් තුළ පිහිටි ඉඩමේ අවසාන පිඹුරේ එපසිපිපො 17 මනිනදොරු
249

දෙපාර්තමේන්තුවෙන් මැන සාදන ලද 1969-10-19 දරණ ජලයෙන් ලොට් අංක 946
වශයෙන් දක්වා ඇති ඉඩම එකී ජලයෙන් සඳහන් පරිදි:

උතුරට: 945 පාර

නැගෙනහිරට: ඇල,

දකුණට: 947 ද,

බටහිරට: අතුරු පාරද,

යන මෙකී මායිම් තුළ පිහිටි ඉඩම වේ. "

The permit marked 'P1' refers only to Surveyor General's plan referred to as 3/28/75 -368. It also refers to allotment 81/83 of the said plan purported to be given to the Respondent. The extent of the land is given as 1 Rood.

Respondent in the plaint refers to allotments of land in two Surveyor General's plans as describing the land given to him on permit 'P1', i.e. plan 3/28/75 - 368 allotment 81/83 and Final Colony Plan PO 17/249 allotment 946. Permit 'P1' refers to only Surveyor General's plan 3/28/75- 368 lot 81/83. This plan was never produced by the Respondent.

The representative of the District Surveyor at page 135 of the District Court proceedings says as follows:-

" අංක 3/28/75 -368 පිඹුරක් සර්වේ ජනරාල් වෙත නැත. එවැනි පිඹුරක් නොමැති බව මට ස්ථිරව කියන්න පුලුවන්. පැ1 දරණ අවසර පත්‍රය මත 3/28/75 -368 දරණ පිඹුරට අදාළ කැබැලි අංක 81 හා 83 දිලා තියෙනවා., 3/28/75 -368 දරණ පිඹුරක් අප දෙපාර්තමේන්තුවේ නොමැති බවට, මෙම ඉඩම කට්ටි සම්බන්ධයෙන් (82 හා 83) සර්වේ ජනරාල්ගේ පිඹුරුවල මෙතෙම අංකයක් සඳහන් කර නැත."

In respect of Final Colony Plan 17/249 Lot 946 the representative of the District Surveyor at page 150 of the proceedings states as follows:-

" ප්‍ර: මෙම එච්.සී.පී.පො.17/249 කියන පිඹුරේ ලොට් අංක 946 න් පෙන්වා තිබෙනවාද?

උ: නැහැ..

ප්‍ර: තමාගේ ස්ථාවරයක් එතෙම නම ව.5ට අනුව එච්.සී.පී.පො.17/249 පිඹුරේ 946 කියලා ලොට් එකක් නැහැ?

උ: නැහැ.

ප්‍ර: තමාට එක ස්ථිර වශයෙන් කියන්න පුලුවන්?

උ: පුලුවන්."

According to his statement there is no Surveyor General's plan bearing No. 3/28/75 - 368 with the Surveyor General and also there is no allotment 946 in FCP Po 17/249. He also says that there are no allotments bearing 81 and 83 in any of the Surveyor General's plans.

The representative of the District Surveyor identifies "V1" which is Final Colony Plan Po.160 lot 946 at page 135 of the proceedings in the following manner.

" ව 1 පෙන්වා සිටි. 'ව1 ලේඛණය අවසාන ජනපද පිඹුර පො. 160 ලෙස කැබලි අංක 946 සඳහා පිඹුරක්. මෙය අපේ දෙපාර්තමේන්තුවේ නිල පිඹුරේ පිටපතකි. මුල් පිටපත මම ප්‍රගත තිබෙනවා. එම නිල පිඹුරට අනුව කැබලි අංක 946 හි තනර මායිම පවතින අන්දම කියන්න පුලුවන්.

උතුරට: අංක 945 දරණ මාර්ගය

නැගෙනහිරට: වාරි මාර්ග ඇල හා එච් සී පී 218

දකුණට: මෙම පිඹුරේ අංක 947 දරණ බිම් කැබැල්ල.

බටහිරට: 945 දරණ මාර්ගය.

මෙම තනර මායිම ඇතුළත ඇති ඉඩමේ විශාලත්වය රූඩ් 2යි පර්චස් 10කි. "

He also states at page 148 of the proceedings that boundaries of land claimed by the Defendant in his Answer tallies with the boundaries given in the Surveyor General's Plan FCP. Po. 160 lot 946. The following evidence which deals with a

comparison of the allotment in the said plan and allotment of land referred to in the Answer clearly demonstrate this position.

"ප්‍ර: එක්තරා උත්තරයේ තිබෙන ලොට් 946 ඉඩමේ උප ලේඛනයේ මායිම වශයෙනුත්, අවසාන ජනපද පිඹුරු අංකයෙනුත් ගැලපෙනවාද?

උ: ගැලපෙනවා."

Further according to the evidence of the representative of the District Survey Office at page 162 of the proceedings FCP Po.160 which was produced as 'V1' was prepared during the period 1969 to 1971. Permit 'P1' issued under the Land Development Ordinance is dated 12.7.1991. Accordingly Plan 'V1' was available when permit 'P1' was issued. If the land given on permit 'P1' was lot 946 of FCP Po. 160 no explanation has been given by the Respondent as to why the permit 'P1' does not make any reference to plan 'V1' . The District Court and the Civil Appellate High Court has committed an error in not considering this aspect.

No connection was established by the Respondent between the Surveyor General's plan 'V1' which is Final Colony Plan Polonnaruwa 160 and plan referred to in permit 'P1' which is plan 3/28/75. Further the land given to the Respondent by 'P1' is 1 rood in extent. But lot 946 of Final Colony Plan Po. 946 is 2 roods 10 perches in extent. The Respondent has not made any effort to explain this difference. At pages 105 and 106 of the proceedings he states as follows:-

" ප්‍ර: මෙම ඉඩමේ ප්‍රමාණය අක්කර 1/2 ක් වනර කිසි ඔබ කීවා? තමා අධිකරණයෙන් ඉල්ලන්නේ අක්කර 1/2 ඉඩමක් ලබා දෙන්න?

උ. ඔව්.

ප්‍ර. 'පැ.1.' ලේඛනය සාක්ෂිකරුව පෙන්වා සිටී. එම ඉඩමේ වශාලත්වය රැඹි 1 ක්. රැඹි 1ක කිසිතේ පර්චස් 40 කි කිසි තමා දන්නවාද?

උ. මට එ ගැන දැනීමක් නැත."

In Palisena v. Perera 56 NLR 407 and Bandaranaike vs. Karunawathie 2003 (3) SLR 295 it has been held that the title of the permit holder is sufficient to maintain a vindicatory action against a trespasser.

In Pieris vs. Savunahamy 54 NLR 207 Dias J held that in a vindicatory action the burden of proof rests upon the Plaintiff to prove his title including the identification of the boundaries.

The impugned permit produced as 'P1' by the Respondent is dated 91-07-12. It is purported to have been signed by the Divisional Secretary and Assistant Government Agent Thamankaduwa.

Jayasooriya Mudiyanseelage Gamini Jayaweera Bandara who was the Divisional Secretary and Assistant Government Agent Thamankaduwa during the relevant period ie. 91-07-12, has given evidence and in his testimony at page 167 of the District Court proceedings he denies that the signature appearing in 'P1' is his signature. When giving evidence he states as follows;-

"මම ප්‍රාදේශීය ලේකම් හා උප දිසාපති තනතුර දැරුවා තමන්කඩුව. (මේ ලේඛණය බලා කියන්න) එහි දැක්වෙන 91-07-12 වකවානුවේ මම රාජකාරී කළා. ඔය දැක්වෙන අත්සර මේ හා සමානව අත්සනක් පෙනෙන තියෙනවාන මේ විදියට මම අත්සන කැපිලා යන විදියට ඉර ගනන්නේ නැහැ. මේ 'පැ.1.' දැක්වෙන අත්සන මගේ අත්සන නොවන බව මම ගරු අධිකරණයට කියා සිටින්නේ. ඊට අමතරව 'පැ.1.' ලේඛණයේ දක්වා තිබෙනවා 91-07-12 කියන ඉලක්කම් ලිවීමේදී, මම ඉලක්කම් ලියන්නේ '9' ඉලක්කම අඩි සඳක් විදියට ලියනවා. 1, 2 අංක මම ලියන ආකාරයටම කියලා තරියට මතක නැහැ "

The proceedings do not reveal any positive action taken by the Respondent to controvert the position of this witness and to prove the genuineness of this document. The District Court or the Civil Appellate High Court had not paid much attention to this important aspect.

Further in a vindicatory action it is necessary to establish the corpus in a clear and unambiguous manner. The Respondent has completely failed to establish the identity of the corpus.

In the circumstances I answer the question of law in paragraph 24(i) of the Petition of Appeal in the negative and paragraphs 24(ii) and 24(iii) in the affirmative. Accordingly I set aside the judgment of the Civil Appellate High Court of the North Central Province dated 03-06-2010, and the judgment of the District Court of Polonnaruwa dated 30.08.2005. I dismiss case No. 8621/L filed by the Plaintiff-Respondent-Respondent at the District Court of Polonnaruwa.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

Amaratunga, J.

I agree

JUDGE OF THE SUPREME COURT

Imam, J.

I agree

JUDGE OF THE SUPREME COURT