

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

In the matter of an application for Leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provisions) Act as amended by the Act No. 54 of 2006.

SC/APPEAL/118/18

SC/HCCA Application No. 35/2016

CP/HCCA/Kandy 94/2013 (F)

D.C Nuwaraeliya Case No. 1446/9/L

Walpola Liyanage Premarathne,
No. 131/1, Udamadura,
Talawa.

Plaintiff

Vs.

Abeydeera Arachchige Charlotte
Kalamawathie
No. 15,
Nildannahinna

Defendant

AND

Abeydeera Arachchige Charlotte
Kalamawathie
No. 15,
Nildannahinna

Defendant – Appellant

Vs.

Walpola Arachchige Premarathne,
No. 131/1, Udamadura,
Talawa.

Plaintiff – Respondent

AND

Abeydeera Arachchige Charlotte
Kalamawathie
No. 15,
Nildannahinna

Defendant – Appellant - Petitioner

Vs.

Walpola Arachchige Premarathne,
No. 131/1, Udamadura,
Talawa.

Plaintiff – Respondent – Respondent

AND NOW

Abeydeera Arachchige Charlotte
Kalamawathie
No. 15,
Nildannahinna

Defendant – Appellant – Appellant

Vs.

Walpola Arachchige Premarathne,
No. 131/1, Udamadura,
Talawa.

Plaintiff – Respondent - Respondent

(Deceased)

1a. M.M.G. Karunawathie,

1b. W.L. Nandawathie,

1c. W.L. Rupawathie,

1d. W.L. Kamalawathie,

1e. W.L. Ariyawathie

1f. W.L. Gunarathne,

1g. W.L. Thusarika Kumari,

1h. W.L. Chandra Kumari,

1i. W.L. Lalitha Kumari,

1j. W.L. Devika Kumari

All at No. 48, Udamadura,

Talawa,

Nildannahinna.

**1(a) to 1(j) Plaintiff – Respondent –
Respondents**

Before : Sisira J. de Abrew J
Murdu N. B. Fernando, PC J,
E. A. G. R. Amarasekara J

Counsel : Gamini Hettiarachchi for the Defendant – Appellant – Appellant
Bimal Rajapakse with Amrit Rajapakse and Muditha Perera for
the Plaintiff – Respondent - Respondent

Argued on : 24/09/2020

Decided on : 02/06/2021

E. A. G. R. Amarasekara J

The Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as the Plaintiff or the Plaintiff - Respondent) instituted the action no. L1446 in the District Court of Nuwaraeliya by plaint dated 02.07.2009 against the Defendant – Appellant – Appellant (hereinafter sometimes referred to as the Defendant or Defendant - Appellant). This Court observes that even though as per the plaint, name of the defendant is Abeydeera Arachchige Charlotte Kamalawathie, in certain papers filed and in the last amended caption her name is mentioned as Abeydeera Arachchige Violet Kamalawathie. The caption above states the name as appearing in the original plaint.

As per the Plaint;

- The original owner of the land in the schedule to the plaint, namely, Hewawalpitage Madawattegedara Appuhami transferred the said property to one Abeydeera Arachchige John Singho by deed bearing no. 6275 dated 07.05.1946 attested by D.E. Samarasekara, Notary Public.
- Said John Singho departed his life leaving his children Somawathie, Mahindadasa, Nimaladasa and Mithradasa as heirs and the said heirs transferred the said land to Abeydeera Arachchige Charotte Kamalawathie (the Defendant) by deed bearing no. 292 dated 30.09.1980 attested by C.A. Wanigasuriya, Notary Public.

- Thereafter, the defendant transferred the said land to the plaintiff by deed bearing no. 3008 dated 05.05.2008 attested by Edmand S. Rajapakse, Notary Public.
- However, despite the said transfer and requests to handover the possession, the defendant has been in forcible and unlawful possession of the said land since 05.05.2008 without handing it over to the plaintiff causing damages at the rate of Rs.25000.00 per month.

The plaintiff prayed that the defendant be evicted from the land described in the schedule to the plaint and the plaintiff be given the possession of the said land with damages till he is given the possession.

As per the answer dated 12.03.2009 filed by the defendant;

- The defendant denied that she transferred the land in question to the plaintiff by deed No. 3008 as stated in the plaint, and thus, she is not in forcible or unlawful possession of the said land and further, the land belongs to her and no damage is caused to the plaintiff.
- The defendant has stated that she never transferred the said land but only mortgaged it. And also stated that her signature was taken on blank papers at the office of the Notary Public.
- The defendant has further stated that the plaintiff has no right whatsoever over the property in question and no cause of action can be accrued against the defendant.

Thus, the defendant prayed for a dismissal of the plaint, for a declaration that the defendant is the lawful owner of the land described in the schedule to the

answer, a declaration that the defendant is entitled to the possession of the land and to revoke the deed No. 3008 as it was not lawfully executed.

As per the details given in the schedules to the plaint and the answer both schedules describe the same land.

The plaintiff filed a replication on the 16th February 2010 and denied the defendant's cross claim in the answer.

At the commencement of the trial, followings were recorded as admissions, namely;

- The jurisdiction of the court.
- The land in dispute is the land described in the scheduled to the plaint.
- The flow of title from the original owner to the defendant.

The trial proceeded on 10 issues raised by both the parties; first five issues were raised by the plaintiff and the rest by the defendant.

Subsequent to the trial, the learned District Judge delivered her judgment on 31.10.2013 in favour of the plaintiff, granting relief prayed in prayer (a) of the plaint, that is to evict the defendant from the land and to place the plaintiff in possession. The learned District Judge found that the deed no. 3008 was proved by the plaintiff since an attesting witness testified to the execution as well as there was no reiteration of objection to the said deed at the close of the plaintiff's case. As per the issues raised by the defendant, the sale of property by this deed was impeached. Thus, it was necessary to prove this deed as per section 68 of the Evidence Ordinance and the plaintiff has done it by calling one attesting witness who knew the defendant and, even the Notary has mentioned in his attestation that this witness knew the vendor of the said deed, the defendant. The learned District Judge disbelieved the defendant as unreliable due to the contradictory nature of her stances in giving evidence and also with the answer, and due to the other reasons given in the judgment. The learned District judge who had the opportunity to observe the witnesses has given sufficient reasons for not accepting the defendant's story. It is not necessary to analyse the reasons given by the learned District Judge in disbelieving the defendant and accepting the plaintiff's version since the question of law allowed by this court relates to a different matter. With the proof of the aforesaid deed in the backdrop of the

admissions made, the plaintiff's title to the land was proved and as it was an undisputed fact that the defendant was in possession, the plaintiff obtained the judgment in his favour from the District Court.

Being aggrieved by the Judgment of the District Court, the Defendant preferred an appeal to the Civil Appellate High Court of Kandy, and the learned High Court Judges dismissed the appeal by the Judgment on 14.12.2015, stating that the learned District Judge had correctly evaluated the evidence led at the trial.

When the leave to appeal application against the judgment of the High Court was supported before this Court, only one question of law was allowed which reads as follows;

“Whether the learned Judges of the High Court of Civil Appeal erred in law by failing to appreciate that the action filed by the Plaintiff is not an action for a declaration of title and without first praying for a declaration of title the Plaintiff cannot seek for the ejection of a Defendant from land?”

It appears that both the courts below considered this as a rei vindicatio action. In this regard, it can be observed that the learned District judge had referred to the cases of **D. Sarathchandra V Dingirimenike and Others CA 304/93F** and **Luwis Singho and Others V Ponnampereuma (1996) 2 Sri L R 320** and had discussed the burden of proof and related matters in a rei vindicatio action and even the High Court Judges have mentioned the said decision in **Luwis Singho and Others V Ponnampereuma** in relation to the burden of proof and, confirmed the view of the learned District Judge. However, even though the learned District Judge in quoting text in English language relating to the burden of proof in rei vindicatio actions from the above decisions, in Sinhala had used the term “අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්” literally meaning an ‘action for declaration of title’ ” to describe the action filed in the District Court. The term “අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්” or ‘ an action for declaration of title’ ” may not perfectly represent the correct nature of a rei vindicatio action. That is because, even though a prayer for a declaration of title is generally included in a rei vindicatio action, there may be other declaration of title cases which may not fall within rei vindicatio actions in its proper sense, such as a case where declaration of title is pleaded but the defendant is prevented from challenging the title due to estoppel taking place owing to section 116 of the Evidence Ordinance. In such cases, strict proof of title

by the plaintiff is not required like in a proper rei vindicatio action. In **Pathirana V Jayasundara (1955) 58 NLR 169 at 171** it was held that if the essential element of a rei vindicatio action is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule in estoppel should be regarded as a vindicatory action.

Even though, the said question of law contemplates the judgment of the learned High Court Judges, it appears nowhere in the High Court judgment, the learned judges have referred to the action as a declaration of title action but as said before they also have referred to **Luwis Singho and Others V Ponnumperuma** (supra) referred to by the learned District Judge to indicate that in this type of cases burden of proving the case is on the plaintiff. This is an indication that learned High Court judges considered this as a rei vindicatio action.

As per the averment of the plaint, the plaintiff had pleaded the chain of title and as the last deed, the plaintiff had referred to the deed executed by the defendant to transfer the title to him and further averred facts relating to forcible and unlawful possession of the defendant by not handing the possession over to him. Thus, on the face of the plaint there were sufficient material to describe the action as a rei vindicatio action. As said before, the learned High Court Judges have affirmed the District Court Judgment without making any comment on the term used in Sinhala to indicate a rei vindicatio action, namely ‘අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්’ which literally means an action for declaration of title” when there was no relief in the plaint praying for a declaration of title.

It appears that the use of Sinhala words “අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්” or “action for declaration of title” as aforesaid has paved the way for suggesting the above question of law which this court allowed. Nevertheless, as it has been used with quoted English texts from some superior court decisions by the learned District Judge, it is understandable that the said Sinhala phraseology had been used by the learned District Court Judge to mean a rei vindicatio action.

The argument of the counsel for the defendant is that;

- there are two types of actions that corresponds to rei vindicatio actions; namely declaration of title cases and ejectment cases.

- the present case is an ejectment case and not an action for declaration of title.
- in an action for ejectment, title of the plaintiff is not disputed but the right of the defendant to the possession is contested.
- in the instant action the defendant has disputed the title of the plaintiff and an action for ejectment could not be proceeded.

Thus, it appears now he takes up the position that without a prayer for declaration of title the plaintiff could not have proceeded with the case. This stance has not been taken in the original court through issues. It appears that this position was neither taken up in the petition of appeal to the High Court nor in written submissions to the High Court. However, as it is a question of law, this court will consider it later in this judgment.

The counsel for the defendant further submits that requisites of a vindicatory action consist of proof;

- that the plaintiff is the owner of the property
- that the property is in the possession of the defendant.

While referring to **De Silva V Goonetilleke 32 N L R 217**, **Abeykoon Hamine V Appuhamy 52 N LR 49**, **Peeris V Savunhamy 54 N L R 207** , the counsel of the defendant states that in a rei vindicatio action or a declaration of title action, the plaintiff must have title and the initial burden is on the plaintiff to prove his dominium and the defendant is in the possession. It appears that in **Peeris V Savunhamy** (supra) even the superior courts sometimes used the term “action for declaration of title” to a rei vindicatio action, perhaps due to the nature of relief prayed therein.

I do not think that there is anything to disagree with what is said above with regard to the requisites and proof of a rei vindicatio action but nothing is shown on those grounds to blame the Judgments of the lower courts. The aforesaid cases have not addressed the matters raised in the question of law mentioned above. As per the question of law, lower court judgments are challenged on two grounds, namely;

- The judges failed to consider that the plaintiff’s action is not an action for declaration of title.

- Without first praying for a declaration of title, plaintiff could not have asked for the ejectment of the defendant.

As explained above there may be declaration of title cases that may not fall within the scope of a rei vindicatio action in its proper sense. However, a party in a rei vindicatio action, as per its wish, may ask for a declaration of title or ejectment of the defendant or both the relief. One may be able to categorize rei vindicatio actions accordingly as per the prayer, but what is necessary to consider at this moment is the validity and the relevance of the aforementioned two grounds contained in the question of law.

As said before, though the Sinhala term used was ‘අයිතිය ප්‍රකාශ කර ගැනීමේ නඩුවක්’ or ‘action for declaration of title,’ it has been used with certain extracts in English taken from some decided cases, in the context, it appears that the learned District Judge used the said words to mean a rei vindicatio action. Even the judgment of the High Court when consider as a whole, indicates that it considered the case at hand as a rei vindicatio action, even though in confirming the lower court judgment it did not make any comment on the said Sinhala term the lower court used to name the case at hand. On the other hand, even if there is an error in identifying or naming the nature of the action, this court has to see whether it is sufficient to vacate or vary the order since if substantial rights are not affected this court need not interfere. In this regard, now this court will consider whether the court can grant the relief of ejectment without a prayer for declaration of title in a rei vindicatio action, where the title has been disputed but the title is proved at the end.

In **Attanayake V Aladin (1997) 3 Sri L R 386** dismissal of the plaintiff’s action by the district court was confirmed on the ground that there was no declaratory relief prayed as to the title and stating that prayer for ejectment is only a consequential relief to the declaratory relief, but it has not considered the decision of the same court made in **T.B.Jayasinghe V Kiriwanegedara Tikiri Banda (1988) II CALR 24** in coming to the said conclusion which clearly held that where title to the property is proved, mere failure to ask for a declaration of title to the property will not prevent one from claiming relief of ejectment. Even **Dharmasiri V Wickramatunga (2002) 2 Sri L R 218** has held that the absence in the prayer for a declaration of title cause no prejudice, if in the body of the plaint, the title is

pleaded and issues were framed and accepted by the court on the title so pleaded. In the case at hand title has been pleaded in the plaint and there was an admission as to the flow of title from the original owner to the defendant and the first issue was raised to query whether the defendant sold the property to the plaintiff to show that the title at the end came to the plaintiff and the second issue was raised to show that the defendant was in possession of the property. Both those issues were answered in favour of the plaintiff and proved the plaintiff's entitlement for an ejection of the defendant as supported by the decisions in **T.B.Jayasinghe V Kiriwanegedara Tikiri Banda** (supra) and **Dharmasiri V Wickramatunga** (supra).

In **Pathirana V Jayasundara (1955) 58 N L R 169 at 172** Gratian J quoted Maasdorp to state that the plaintiff's ownership of the thing is the very essence of the rei vindicatio. In **Luwis Singho and Others V Ponnampereuma** (supra) 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. Thus, if the title holder is deprived of the possession, he can file a rei vindicatio.

In terms of section 5 of the Civil Procedure Code an action means a proceeding for redress of a wrong. Such an action is constituted when an application to court is made for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise invites its interference.¹ Further a cause of action means the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury². In the case at hand, the plaintiff prayed for a redress of a wrong caused by the possession of the defendant of the land which he states that he is entitled to possess as the owner. In terms of the section 188 of the said Code, after the judgment the court has to enter decree specifying the relief granted or other determinations of the actions, and in terms of section 217(c) and (g), such a decree among other things may include an order of court commanding to yield up possession of immovable property as well as a declaration of a right or status respectively. Each relief under section 217 of the said Code can be given as a separate relief. Thus, once the plaintiff's title to the land is proved and it is established that the possession is

¹ Vide section 6 of the Civil Procedure Code.

² Vide section 5 of the Civil Procedure Code.

with the defendant, plaintiff is entitled to his relief. Mere misnomer, if any, of the action done by a judge, cannot disentitle the plaintiff of his right for the judgment in his favour to evict the defendant when he is successful in proving the necessary requisites of a rei vindicatio action. In my view, **Attanayake V Aladin** (supra) does not represent the correct position of law.

Further, as per **Hanaffi V Nallamma (1998) 1 Sri L R 73** , once the issues are raised the pleadings recede to the background. The issues raised by the plaintiff query whether the defendant sold the land to the plaintiff and whether the defendant is in unlawful possession causing damages. Therefore, what was put in issue by the plaintiff was his right to possession as per the contract of sale of the land between him and the defendant. The plaintiff successfully proved that it was sold to him and the defendant was in possession except the damage caused. The defendant failed in proving her case. Thus, the plaintiff is entitled to the relief given by the district court.

For the foregoing reasons, I answer the question of law in the negative and dismiss the appeal with costs.

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Judge of the Supreme Court