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APPEAL from a judgment of the Court of Appeal.

Faiz Musthapha P. C., with *N. M. Saheed* for the Defendant - Appellant - Appellant.
W. Dayaratne, P. C., with *R. Jayawardene* for the Petitioner - Respondent - Respondents.

Cur.adv.vult

October 27th 2010

SALEEM MARSOOF, J.

This appeal arises from an action for declaration of title filed in the District Court of Anuradhapura in December 1989 by the Petitioner-Respondent-Respondents (hereinafter referred to as "Respondents"), who claimed title to the four acre land named "Palugahakumbura" situated in Mahawela (Pahalabaage) in the Pandiyankulama village, in Nachcha Tulana of Ulagalla Korale in Hurulu Palata in Anuradhapura District in the North Central Province of Sri Lanka, more fully described in the schedule to the joint petition filed

by them. They claimed title by virtue of the Deed bearing No. 6165 dated 9th February 1987 (P1) and attested by Lionel P. Dayananda, Notary Public. The said Deed was executed by one Ibrahim Lebbe Noor Lebbai, the purported Attorney for Meydeen Sadakku Mohideen Abdul Cader, under the Power of Attorney bearing No. 7598 dated 30th October 1981 (P7), attested by S. M. M. Hamid Hassan, Advocate & Notary Public in the Ramanathapuram District in Tamil Nadu, India. The Respondents alleged that they had purchased the said property for a sum of Rs. 20,000/-, but the 1st and 2nd Defendant-Appellant-Appellants (hereinafter referred to as the "Appellants") disputed their title and attempted to prevent their *ande* cultivator from working on the said paddy land.The Respondents sought a declaration of title in their favour and a permanent injunction to restrain the Appellants and their servants or agents from disturbing the Respondents, their *ande* cultivators and/or servants or agents from working on the paddy field which formed part of the said land. It is significant that the petition filed by the Respondents in the District Court did not contain a prayer for the ejectment of the Appellants or for damages.

In the joint answer filed in the District Court by the Appellants, it was expressly denied that they disturbed or obstructed the Respondent in the enjoyment of their land or cultivation carried out thereon. From the said answer it appears that while the 2nd Defendant-Appellant-Appellant did not make any claim to the land in question as owner, the 1st Defendant-Appellant-Appellant (hereinafter also referred to as the "1st Appellant") laid claim to a land named "Nilaththu Patti Wayal" in extent 3 acres 2 roods and 26 perches, which was alleged to have been possessed without interruption by the predecessors-in-title to the said Appellant for a period exceeding fifty years. It is also stated therein that although the said property was gifted by the said Appellant to his wife Noor

Nisa, he had continued to be in uninterrupted possession thereof. In their joint answer, the Appellants prayed that the action be dismissed, and a sum of Rs. 22,000/- be awarded as damages for the loss of 200 bushels of paddy, but they have not prayed for a declaration of title to the land claimed by them, or that they be placed in possession thereof.

Although, as already noted, neither the Respondents nor the Appellants had sought any order of ejectment in their respective petition and answer, in paragraph 5 of the replication filed by the Respondents, it was averred as follows:

5. විත්තිකරුවන් විසින් පැමිණිලිකරුවන්ට අයිති කුඹුරු ප්‍රමාණය වැරදි සහගතව සහ නීති විරෝධීව භුක්ති විඳිමින් සිටින හෙයින්, පැමිණිලිකරුවන්ට 1989/90 මහ කන්නය සඳහා රු. 33,000/- ක අලාභයක් සිදුවී ඇති අතර, එකී මුදල සහ පැමිණිලිකරුවන්ට පැමිණිල්ලේ උපලේඛණයේ සඳහන් කුඹුරු ප්‍රමාණය සාමාකාමී භුක්තිය දෙන තුරු සෑම කන්නයකට පවතින අලාභය වශයෙන් රු. 33,000/- ක් විත්තිකරුවන්ගෙන් අයකර ගැනීමට පැමිණිලිකරුවන්ට නඩු නිමිත්තක් උපචය වී ඇත.

On the basis of the above averment, the Respondents have in payers (1) and (2) of the replication prayed for damages in a sum of Rs. 33,000/- for every cultivation season (කන්නය), until the quiet and peaceful possession of the land described in the schedule to the petition is restored to the Respondents. I quote below the relevant prayers (1) and (2) of the replication:

(1) පැමිණිල්ලේ ඉල්ලා ඇති සහනයන් සහ මෙම ප්‍රති උත්තරයේ ඉල්ලා ඇති පරිදි 1989/90 මාස් කන්නය සඳහා රු. 33,000/- ක අලාභයක් විත්තිකරුවන් විසින් සාමූහිකව සහ වෙන්, වෙන්ව පැමිණිලිකරුවන්ට ගෙවන මෙන නඩු තීන්දුවක් ලබාදෙන ලෙසද

(2) තවද, පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩමේ සාමකාමී සහ නිරවුල් භුක්තිය පැමිණිලිකරුවන්ට ලැබෙනතුරු සෑම කන්නයකටම රු. 33,000/- බැගින් පවතින අලාභය විත්තිකරුවන්ගෙන් පැමිණිලිකරුවන්ට ලබාදෙන ලෙසද,

At the commencement of the trial, no admissions were recorded, and the following five issues were formulated by court, which revealed that there was a dispute regarding the identity of the *corpus.* Accordingly, on the application of the Respondents, court issued a commission on D. M. G. Dissanayake, Licensed Surveyor, to survey the land referred to in the schedule to the petition filed by the Respondents as well as the land described in the schedule to the answer filed by the Appellants, and report whether they were the same. After his Plan bearing No. 1176 dated 10th October 1990 and the accompanying report was furnished to court, at the instance of the Appellants, a further commission was issued on K. V. Somapala, Licensed Surveyor, to survey the land claimed by the two contending parties to the case, and his Plan No. 2025 dated 16.04.1991 was also filed of record. Thereafter, on 12.08.1991, the following further issues were framed by court, issues 6, 7, 13 and 14 on the suggestion of learned Counsel for the Respondents, and issues 8 to 12 as suggested by learned Counsel for the Appellants:-

පැමිණිල්ලෙන්

6. පැමිණිල්ලේ උපලේඛණයේ සහ ඩී. එම්. පී. දිසානායක මානක තැනගේ මැනුම් වාර්තාවේ සවිස්තර කරන ලද ඉඩම් පලගහකුඹුර නැමති ඉඩම වේද?

7. එම ඉඩම පැමිණිලිකරුට සහ ඔහුගේ පෙර උරුමකරුවන්ට හිමිවීද?

විත්තියෙන්

8. විත්තිකරු මෙම නඩුවට අදාළ ඉඩම අවු. 50 කට අධික කාලයක සිට නොකඩවා භුක්ති විඳ තිබේද?

9. එසේ නම් කාල සීමා ආඥා පනතේ විධි විධාන යටතේ වරප්‍රසාද ඔහුට හිමිවේද?

10. පැමිණිලිකරු විසින් විත්තිකරුවන්ට විරුද්ධව වාරණ නියෝගයක් ලබා ගැනීමෙන් විත්තිකරුවන් විසින් වගා කරන ලද මෙම කුඹුර සම්පූර්ණයෙන් විනාශ වූයේද?

11. පැමිණිල්ලෙන් ලබා තිබුන වාරණ නියෝගය මෙම අධිකරණය විසින් විසුරුවා හැර තිබේද?

12. මෙම 10 සහ 11 යන විසඳනාවන්ට විත්තිකරුවන්ගේ වාසියට පිළිතුරු ලැබෙන්නේ නම් උත්තරයෙන් ඉල්ලා ඇති අලාභ විත්තිකරුට අයකර ගත හැක්කේ ද?

<u>පැමිණිල්ලෙන්</u>

13. පැමිණිලිකරුවන්ගේ ප්‍රති උත්තරයේ 5 වෙනි ඡේදයේ ප්‍රකාර විත්තිකරුවන් විසින් පැමිණිලිකරුට අයිති කුඹුරු ප්‍රමාණය වැරදි සහගත ලෙස භුක්ති විඳිමින් සිටින හෙයින් 1989/90 මහා කන්නය සඳහා රු. 33,000/- ක් අලාභයක් සිදුවී ඇත්තේද?

14. පැමිණිලිකරුවන්ට අයිති මෙම ඉඩමේ නිරවුල් භුක්තිය ලැබෙන තුරු පවතින අලාභය වශයෙන් කොපමණ මුදලක් ලැබිය යුතුද?

On behalf of the Respondents, Abdul Majeed Mohamed Mansoor, the 1st Plaintiff-Respondent-Respondent, Mohomad Ibrahim Lebbai Noor Lebbai, the alleged Attorney under Power of Attorney bearing No. 7598 dated 30th October 1981 (P7), Vijitha Ellawala, Provincial Govi Jane Sewa Officer, Anuradhapura, D. M. G. Dissanayake, Licensed Surveyor, and Ranathunga Herath, Grama Seva Officer, Tulana, Nachchaduwa, testified at the trial. For the Appellants, Jamaldeen Abdul Lathif, the 1st Defendant-Appellant-Appellant, Vidana Arachchige Premadasa, a cultivator in an adjoining paddy field, Ulludu Hawage Karunaratne, Registrar of Lands, Anuradhapura, and K. V. Somapala, Licensed Surveyor gave evidence.

On the conclusion of witness testimony, and after considering the submissions made by learned Counsel for

the contending parties, on 5th October 1994 the learned District Judge entered judgement in favour of the Respondents, answering *inter alia* issues 6, 7 and 11 in the affirmative, and issues 8, 9, 10, 12 and 13 in the negative, with the answer to issue 14 being "රු. 15,000 කි" The essence of the decision of the learned District Judge is contained in the following passage of his judgement:-

> පැමිණිල්ල සහ විත්තිකරු ඉදිරිපත් කර ඇති සියලු සාක්ෂි සහ ලේඛන සුපරීක්ෂාකාරීව විශ්ලේෂණය කර බැලුවෙමි. අදාළ විෂය වස්තුව පැමිණිල්ලේ උපලේඛණයේ සඳහන් විෂය වස්තුව හා මානක දිසානායක මහතාගේ වාර්තාවේ සඳහන් විෂය වස්තුව එකක් බව තීරණය කරමි. අදාළ විෂය වස්තුව සඳහා පැමිණිල්ල ඉදිරිපත් කර ඇති ඔප්පුවලට අනුව පැමිණිල්ලේ පැමිණිලිකරුවන් හිමිකම ලබා ඇති බව තීරණය කරමි.

The final order embodied in the judgment of the learned District Judge, if my conjecture be correct, was for the ejectment of the Appellants from the land described in the schedule to the petition, presumably on the basis of a declaration of title to the said land in favour of the Respondents, and damages in a sum of Rs. 15,000 until the quiet and peaceful possession of the land is delivered to the Respondents, with no order for costs, expressed by the learned District Judge in cryptic precision in the following manner:-

> මේ අනුව පැමිණිල්ලට නිරවුල් බුක්තියක් මේ දක්වා කන්නයක් වෙනුවෙන් රු. 15,000/- ක වන්දියක් හිමිවන බව තීන්දු කරමි. නඩු ගාස්තු පැමිණිල්ල සහන ලබන නිසා අවශ්‍ය නැත.
>
> මේ අනුව පැමිණිල්ලේ වාසියට තීන්දු කරමි. තීන්දු ප්‍රකාශය ඇතුළත් කරන්න.

By its judgment dated 1st December 2004, the Court of Appeal has affirmed the aforesaid decision of the District Court, observing that it is "abundantly clear that the land

claimed by the Defendants (Defendant-Appellants-Appellants) is the same land which is described in the schedule to the plaint (petition)". It is important to note that the Court of Appeal concluded as follows:-

> Since this is an action for declaration of title it would be pertinent to consider the decision in *Wanigaratne vs. Juwanis Appuhamy*(1) where in the Supreme Court has held that, "in action *rei vidicatio* the Plaintiff must prove and establish his title". This legal principle has been followed in our Courts right along. In the instant case the learned Judge has duly considered the un-contradicted evidence of the 1st Plaintiff in relation to acquisition of title and has arrived at the finding according to the deeds produced by the 1st Plaintiff, the Plaintiffs had acquired title to the subject matter. I conclude that this is a correct finding on the evidence which had been available before the District Court.

This Court has granted special leave to appeal on several substantial questions of law, but before setting out these questions, it may be useful to mention that in upholding the title of the Respondents to the land described in the schedule to the petition, the District Court and Court of Appeal relied on Deed No. 6165 dated 9th February 1987 (P1) and the prior deeds respectively bearing Deed No. 6024 dated 29th February 1944 (P3), Deed No. 6121 dated 12th May 1944 (P4), Deed No. 6468 dated 10th December 1944 (P5) and Deed No. 7167 dated 8th August 1946 (P6) produced in evidence, which admittedly establish that the ownership of the aforesaid four acre land had been transmitted from the original owner Alavapillei Sanarapillai through some intermediate transferees to one Muhammad Mohideen Cader Saibu Mohideen

Sadakku (hereinafter referred to as Sadakku), who died in 1948. The courts below also relied on the Power of Attorney bearing No. 7598 (P7) dated 30th October 1981, purported to have been executed by Sadakku's son Mohideen Abdul Cader appointing one Mohomed Ibrahim Lebbai Noor Lebbai as his Attorney with power to look after and to alienate the land described in the schedule to the petition. It is by virtue to the power alleged to have been vested in him by the said Power of Attorney that the said Noor Lebbai purported to transfer by Deed No. 6165 (P1) dated 9th February 1987 and attested by Lionel P Dayananda, Notary Public, the entirety of the land described in the schedule to the petition to the Respondents Abdul Majeed Mohomed Mansoor and Abdul Majee Abdul Nizar.

The substantial questions on the basis of which special leave to appeal has been granted by this Court, are set out below:-

1. (a) Is the Power of attorney produced marked P7 proved?

   (b) Does the Deed produced marked P1 operate to convey the title of Mohideen Abdul Cader, to the Respondents?

   (c) If not, was the Court of Appeal in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to the subject matter of the action?

2. Did the Court of Appeal err in failing to consider that the Learned District Judge had not duly evaluated the evidence on the question of prescription?

At the instance of W. Dayaratne, P.C., who appeared for the Respondents the following additional questions were also formulated for the consideration of this Court, which are set out below:-

3. Has the issue regarding the validity of the Power of Attorney marked P7 and the deed produced marked P1, been raised for the first time in the Supreme Court at the stage of application for leave?
4. Are the Appellants entitled to take up the said issue at the stage of application for Special Leave to Appeal?
5. Is it mandatory to read the documents in evidence of the Respondents at the conclusion of the trial?

Certain Preliminary Matters

Before dealing with the substantive questions on which special leave to appeal has been granted by this Court, all of which relate to the title of the contending parties to the land described in the schedule to the petition of the Respondents, it is necessary to dispose of the two preliminary questions 3 and 4 raised by learned President's Counsel for the Respondents when special leave was granted. These questions focus on the alleged belatedness in taking up the positions covered by questions 1(a) and (b) above.

Mr. Dayaratne, has strenuously contended that the aforesaid questions relating to "the validity of the Power of Attorney marked P7 and the deed produced marked P1", have been raised for the first time in the Supreme Court at the stage of application for special leave, and that these being mixed questions of law and fact, they cannot be raised for the first time on appeal. He has invited our attention to the decision of a Five Judge Bench of this Court in

Rev. Pallegama Gnanarathana v. Rev. Galkiriyagama Soratha [(2)] in which is was held that a question which is not a pure question of law, but a mixed question of fact and law, cannot be taken up for the first time on appeal, and stressed that the apex court, which does not have the benefit of the findings and reasoning of a lower court, should not be compelled to go into a question of fact or mixed question of fact and law, raised for the first time on appeal.

Mr. Faisz Mustapha, PC., did not contest the correctness of the proposition of law urged by Mr. Dayaratne, but submitted that that the questions raised are pure questions of law, and that in any event, they had arisen for consideration in the District Court itself. In this connection, it is necessary to observe at the outset that question 1(a) and (b) on which special leave to appeal has been granted in this case, do not raise the question of *validity* of the Power of Attorney marked P7 and the deed produced marked P1 as stated in question 3, but the first of these deals with the *proof* of the said Power of Attorney and second with the *construction* and *legal implications* of the Deed marked P1. It is also necessary to observe that these questions arise from the very first issue raised at the trial, which was as follows:-

1. පැමිණිල්ලේ උපලේඛයේ විස්තර කොට ඇති ඉඩම පැමිණිල්ලේ 2 සිට 10 දක්වා ඡේදයන් ප්‍රකාර පැමිණිලිකරුවනට අයිතිවේද?

It is this issue which was subsequently reformulated as issues 6 and 7 (quoted in full earlier in this judgment) in the light of the plans and reports furnished by the commissioned surveyors.

It is noteworthy that paragraphs 2 to 10 of the petition filed by the Respondents in this case narrate the alleged chain of title of the Respondents, all of which have been denied in

the Answer of the Appellants, and in particular paragraph 7 refers to the Power of Attorney P7 and paragraph 8 to the Deed P1. Furthermore, the Power of Attorney P7 was marked "subject to proof", and Mr. Mustapha, has stressed that it has never been proved, and that therefore the Deed P1 could not have conveyed any title to the Respondents. He has submitted further that the action from which this appeal arises, being an action for declaration of title which has been treated by both the District Court and the Court of Appeal as a *rei vindicatio* action, the onus was clearly on the Respondents to prove the aforesaid instruments and demonstrate how the Respondents derived title to the land described in the schedule to the petition. Mr. Dayaratne, has contended that an action for declaration of title is distinguishable from a *rei vindicatio* action required stricter standards of proof, and that the instant case is only an action for declaration of title in which the Respondents would succeed if the Appellants cannot establish a stronger title or a right to possess.

A curious feature of this case is that it commenced as an action for declaration of title in which ejectment was not prayed for by either of the contending parties in their initial pleadings, and a new prayer was introduced into the replication without any express prayer for ejectment for additional relief by way of damages in a sum of Rs. 33,000/- for every cultivation season (කන්නය) *until the quiet and peaceful possession of the land described in the schedule to the petition is restored to the Respondents.* At the trial, no issue was formulated which could justify an order for ejectment, but the learned District Judge by his judgement dated 5th October 1994 ordered ejectment without any express declaration of title in favour of the Respondents. After the Appellants lodged their appeal to the Court of Appeal, the District Court proceeded to issue writ pending appeal for the ejectment of the Appellants

from the land described in the schedule to the petition, which order and the subsequent orders reissuing writ of possession made by the District Court, have been stayed by the Court of Appeal from time to time in connected revisionary and appellate proceedings.

The affinity between the action for declaration of title and an action *rei vindicatio* has been considered in several landmark decisions in Sri Lanka and South Africa, which seem to suggest that they are both essentially actions for the assertion of ownership, and that the differences that have been noted in decisions such as *Le Mesurier v. Attorney General*[3] are differences without any real distinction. In the aforementioned case, Lawrie, J., at 74 compared an action for the recovery of land in the possession of the Crown to the English prerogative remedy of petition of rights, and observed that -

I call the action one for declaration of title which, I take it, is not the same as an action *rei vindicatio.*

Similary, in *Pathirana v. Juyasundare*[4] where a plaintiff used an over-holdig lessee by attornment for ejectment, and upon the defendant pleading that the land was sold to him by its real owner who was not one of the lessors, the plaintiff moved to amend the plaint to add a prayer for declaration of title, in refusing such relief in circumstances where this could prejudice the claim of the defendant to prescriptive title, Gratiaen, J., observed at 173 that -

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 the over-holding tenant (which is an

action *in personam*). But, in the former case, the declaration is based on proof of ownership; in the latter, on proof of contractual relationship which forbids a denial that the lessor is the true owner.

The above quoted *dictum* does not, of course, 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. All it means is that if he chooses the latter 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.

Clearly, the action for declaration of title is the modern manifestation of the ancient vindicatory action *(vindicatio rei)*, which had its origins in Roman Law. The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property, as opposed to a mere action in *personam*, founded on a contract or other obligation and directed against the defendant or defendants personally, wherein it is sought to enforce a mere personal right (*in personam*), The *vindicatio* form of action had its origin in the *legis actio* procedure which symbolized the claiming of a corporeal thing (*res*) as property by laying the hand on it, and by using solemn words, together with the touching of the thing with the spear or wand, showing how distinctly the early Romans had conceived the idea of individual ownership of property. As Johannes Voet explains in his *Commentary on the Pandects* (6.1.1) "to vindicate is typically to claim for oneself a right in *re*. All actions *in rem* are called vindications, as opposed to personal actions or conductions."

Voet also observes that -

> From the right of 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. (*Pandects* 6.1.2)

It is in this sense that the *rei vindicatio* action is often distinguished from "actions of an analogous nature" (*per* Withers, J., in *Allis Appu v. Edris Hamy*[5] at page 93) for the declaration of title combined with ejectment of a person who is related to the plaintiff by some legal obligation (*obligatio*) arising from contract or otherwise, such as an over-holding tenant (*Pathirana v. Jayasundara (supra)* or an individual who had ousted the plaintiff form possession (*Mudalihamy v. Appuhamy*[6] and *Rawter v. Ross*[7] 3 SCC 145), proof of which circumstances would give rise to a presumption of title in favour of the plaintiff obviating the need for him to establish title aganist the whole world (*in rem*) in such special contexts. These are cases which give effect to special evidentiary principles, such as the rule that the tenant is precluded from contesting the title of his landlord or a person who is unlawfully ousted from possession is entitled to a rebuttable presumption of title in his favour. Burnside CJ., has explained the latter principle in *Mudalihamy v. Appuhamy (supra)* in the following manner -

> Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep the property against the whole world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his *de facto* possession at the time of the ouster.

The action from which this appeal arises is not one falling within these special categories, as admittedly, the Respondents had absolutely no contractual nexus with the Appellants, nor had they at any time enjoyed possession of the land in question. Of course, this is not a circumstance that would deprive the Respondents to this appeal from the right to maintain a vindicatory action, as it is trite law in this country since the decisions of the Supreme Court in *Punchi Hamy v. Arnolis*[8] and *Allis Appu v. Edris Ham*[9] that even an owner with no more than bare paper title *(nuda proprientas)* who has never enjoyed possession could lawfully vindicate his property subject to any lawful defence such as prescription. Nor would the failure to pray for the ejectment of the Appellants (an omission which has been supplied by the learned District Judge by his decision) affect the maintainability of the action for declaration of title (which declaration the learned District Judge has not granted expressly, although he may have done so by way of implication) or change the complexion of the case, which is essentially an *actio rei vindicatio*. The District Court and Court of Appeal, as has been seen, in their respective judgments have correctly assumed that the action from which this appeal arises is an *actio rei vindicatio*. They have also awarded the Respondents relief by way of ejectment despite the absence of a prayer for ejectment in their petition or even in their replication, the correctness of which award is hotly contested by the Appellants.

An important feature of the *actio rei vindicatio* is that it has to necessarily fail if the plaintiff cannot clearly establish his title. Wille's *Principles of South African Laws* (9th Edition - 2007) at pages 539-540 succinctly sets out the essentials of the *rei vindicatio* action in the following manner:-

> To succeed with the *rei vindicatio*, the owner must prove on a balance of probabilities, first, *his or her ownership in the property.* 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. The rationale is to ensure that the defendant is in a position to comply with an order for restoration. *(emphasis added).*

In *Abeykoon Hamine v. Appuhamy*[10] , Dias, SPJ. quoted with approval, the decision of a Bench of our judges in De *Silva v. Goonetileke*[11] where Macdonell, C.J., had occasion to observe that -

> There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindication* plaintiff must have ownership actually vested In him" - 1 Nathan p. 362, S. 593 ..... This action arises from the right of *dominium* ..... The authorities unite in holding that plaintiff must show title to the *corpus* in dispute, and that if he cannot, the action will not lie".

In *Dharmadasa v. Jayasena*[12] De Silva, C.J/. equated an action for declaration of title with the *rei vindicatio* action, and at 330 of his judgement quoted with approval the *dictum* of Heart, J., in *Wanigaratne v. Juwanis Appuhamy* [13] , for the proposition that the burden is on the plaintiff in a *rei vindicatio* action to clearly establish his title to the *corpus*, echoing the following words of Withers, J., in the old case of *Allis Appu v. Endris Hamy (supra)* at 93 -

> In my opinion, if the plaintiff is not entitled to revindicate his property, he is not entitled to a declration of title, ...

> If he cannot compel restoration, which is the object of a *rei vindicatio*, I do not see how he can have a declaration of title. I can find no authority for splitting this action in this way in the Roman-Dutch Law books, or decisions of court governed by the Roman-Dutch Law.

As Ranasinghe, J., pointed out in *Jinawathie v. Emalin Perera*[14] at 142, a plaintiff to a *rei vindicatio* action "can and must succeed only on the strength of his own title, and not upon the weakness of the defence." In *Wanigaratne v. Juwanis Appuhamy, (supra)* at page 168, Heart, J., has stressed that "the defendant in a *rei vindicatio* action need not prove anything, still less his own title." Accordingly, the burden is on the Respondents to this appeal to establish their title to the land described in the schedule to their petition, and they can only succeed by showing that Mohamed Ibrahim Lebbai Noor Lebbai had the power and authority to convey the title *(dominium)* of the said land to the Respondents by executing Deed No. 6165 (P1). It is for this purpose vital to prove the Power of Attorney marked P7 by which, it is claimed, that Sadakku's son Mohideen Abdul Cader appointed Noor Lebbai as Attorney for executing the Deed marked P1 and that the said deed operated to convey the alleged title of Mohideen Abdul Cader to the Respondents. These were clearly not matters raised for the first time at the stage of grant of special leave to appeal, and ought to have engaged the attention of the learned District Judge in view of issue 1, 6 and 7 framed at the commencement of the trial.

For the aforesaid reasons, I am of the opinion that substantive questions 3 and 4 should be answered in favour of the Appellants. Accordingly, I answer question 3 in the negative and question 4 in the affirmative, and hold that

substantive questions 1(a) and (b) have to be addressed in determining this appeal.

Proof of the Power of Attorney

Substantive Question 1(a) on which special leave has been granted by this Court, is whether the Power of Attorney marked P7 has been duly proved. As already noted, this question is of extreme importance for establishing the chain of title of the Respondents, as it is by virtue of the power vested in him by the said power of attorney that the Attorney named therein, Noor Lebbai, purported to execute the Deed marked P1, by which the Respondets claimed to have derived their title to the land described in the schedule to the petition. In this connection, it is relevant to note that when the said Power of Attorney was first mentioned in the course of his testimony on 12th August 1991 by the 1st Petitioner-Respondent-Respondent, Abdul Majeed Mahamed Mansoor, the tender in evidence of a photocopy of the said power of attorney was objected to by learned Counsel for the Appellants, and the said photocopy was marked subject to proof.

When a document is marked subject to proof, it is essential for the said document to be proved through witness testimony. The procedure for tendering a document in evidence in the course of witness testimony is dealt with in Section 154 of the Civil Procedure Code, and what is most relevant to this case is the first sentence of Section 154 (1), which provided that -

> *Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.*

The explanation to this section is very useful in understanding this provision, and in particular understanding how a document marked subject to proof is to be proved. The said explanation is reproduced below, in full:-

> *If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it. If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-*
>
> *Firstly whether the document is authentic - in other words, is what the party tendering it represents it to be; and*
>
> *Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.*

The latter question in general is matter of argument only, but *the first must be supported by such testimony as the party can adduce.* If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *prima facie case of authenticity* and it further of opinion that the authentic *document is evidence admissible against the opposing party*, then it should admit the document as before *(emphasis added).*

The question therefore is whether the authenticity and admissibility of the Power of Attorney (P7), which was marked subject to proof, has been established through subsequent testimony and analytical reasoning.

In Sri Lanka, the rules for the proof of documents are contained in Chapter 5 of the Evidence Ordinance No. 14 of 1895, as subsequently amended. Of particular, relevance to the proof of the Power of Attorney in question are Section 67 to 73 of the Evidence Ordinance. The Power of Attorney marked P7 is alleged to have been executed and attested in India, but the purported executant Mohamed Mohideen Abdul Cader, was not called to testify regarding its execution, nor was any attempt made to show that the signature of the purported executant appearing on P7 was that of Abdul Cader. Sections 68 to 71 of the Evidence Ordinance deal with the proof of documents which are required by law to be attested, while Section 67 and 72 of the Ordinance deal with the proof of documents which are not required by law to be attested. Section 68 of the Ordinance provided that -

> *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. (emphasis added).*

Mr. Faisz Musthapha, P.C., has submitted on behalf of the Appellants that in terms of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840, as subsequently amended, any "sale, purchase, transfer, assignment, or mortgage of land or other immovable property" is of no force or avail in law unless the same is notarially attested. He has further submitted that, just as much as Deed bearing No. 6165 dated 9th February 1987 (P1) was required by the aforesaid provision to be notarially attested, even the Power of Attorney (P7), by virtue of which Mohomad Ibrahim Lebbai Noor Lebbai, the executant of P1, purported to have the authority or power

to make the same, was required by law to be attested. He based this submission on the premise that the conferment of authority or power to another to enter into any sale, purchase, transfer, assignment, or mortgage of land or other immovable property, was a contract or agreement for "establishing any security interest, or incumbrance affecting land" within Section 2 of Ordinance No. 7 of 1840, and was governed by the same formalities. It was Mr. Musthapha's contention that just as much as the Deed marked P1 was required by law to be attested, so was the Power of Attorney marked P7, and at least of attesting witness thereof should have been called for the purpose of proving its execution.

The question as to who is an attesting witness has been considered in several leading judgements of our courts, and the gist of the decisions such as *Kirihanda v. Ukkuwa*(15) *Somanather v. Sinnetamby*(16) and *Seneviratne v. Mendis*(17) is that as a general rule, the witnesses who were present at the time the deed, last will or other instrument was executed are attesting witnesses competent to testify, and even the notary public before whom it was executed is deemed to be an attesting witness *if he knew the executants personally*. However, it is also relevant to note that in *Baronchy Appu v. Poidohamy*(18), *Hilda Jayasinghe v. Francis Samarawickrame* (19) and *Samarawickrema v. Jayasinghe and Another*(20), it has been held that where the execution of such an instrument is challenged *on the ground that it had been signed before it was written,* and at least one of the attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant, is not sufficient and at least one of the attesting witnesses should also be called to testify. Such stringent proof is insisted upon in view of the solemnity that is attached

to such a document and the need to prevent fraud. The Power of Attorney marked P7 was purportedly executed in the Ramanathapuram District of Tamilnadu, India before B.M.M Hamid Hasan, Advocate & Notary Public. It is clear from the certification of the notary in the attestation clause of P7 that the notary did not know the executants Abdul Cader personally and depended on the "information" given by the two attesting witnesses, namely M. Shayeed, son of Mohamed Asanalabai, and V. Ravindran, son of C. Velusamy, both of Ramanathapuram District, India, neither of whom were called to testify in proof of its execution, and no explanation was given for the omission to do so. There was also no evidence in regard to whether or not the aforesaid power of attorney was registered in India in terms of the Indian Registration Act, 1908, and it is clear from the testimony of Ulludu Hawage Karunaratne, Registrar of Lands, Anuradhapura, that the said power of attorney was not registered in Sri Lanka nor was it tendered to the Registry with the second copy of the Deed marked P1 for registration. There is also no evidence to show that P7 was registered in terms of the Notaries Ordinance No. 4 of 1902, as subsequently amended, and what has been produced as P7 is not a certified copy issued under Section 8 of the said Act.

For the Respondents, Mr. Dayaratne has argued with great force that P7 was not a document that required attestation. In particular, he referred to the provisions of the Powers of Attorney Ordinance No. 4 of 1902, as subsequently amended, which provides for the registration of written authorities and powers of attorney. He pointed out that in Section 2 of the said Ordinance, the term "power of attorney" is defined so as to "*include* any written power of authority other than that given to an attorney-at law or law agent, given

by one person to another to perform any work, for any act, or carry on any trade or business, and executed before two witnesses, or executed before or attested by a notary public or by a Justice of the Peace, Registrar, Deputy Registrar, or by any Judge or Magistrate, or Ambassador, High Commissioner or other diplomatic representative of the Republic of Sri Lanka", and relied on this inclusive definition for his contention that the law did not insist that a power of attorney must necessarily be in writing or should be registered. He submitted that a person may be appointed as attorney to deal with immovable property through a video recording, voice mail or telephone communication.

Mr. Dayaratne also submitted that the question whether the power or authority given for a person to execute a deed for dealing with immovable property on behalf of its owner should itself be executed in a similar manner had engaged our courts in the late nineteenth and early twentieth century in several cases, and heavily relied on the decisions in *Meera Saibo v. Paulu Silva*(21), *Sinnathamby v. John Pulle* (22), *Beebee v. Sittambalam*(23) and *Pathumma v. Rahimath*(24), which have held that the grant of authority to execute a notarial document does not itself require notarial execution. Mr. Dayaratne pointed out that in *Sinnathamby v. John Pulle, (supra)* it was argued on the authority of *Hunter v. Parker*(25) that a power of attorney to execute a deed can only be given by an instrument under seal, but Ennis, J., brushed aside this argument stating at 276 that-

> The laws of Ceylon, however, do not provide for the distinction found in English Law between deeds, i.e., documents signed, sealed, and delivered, and documents under hand only. Deeds in the sense in which the word

is used in English Law do not exist in Ceylon, and the English Rule cited applies in England to deeds only.

Mr. Dayaratne also stressed that in *Pathumma v. Rahimath Bertram, (supra)* CJ., at 160 referred to the decision in *Meera Saibo's* case *(supra)* and observed that "that was decided more than 20 years ago, and, I think, it must be taken to be now settled law", a view that has been endorsed by Justice Dr. C. G. Weeramanty, in his *Law of Contracts*, Vol. 1 page 184.

Mr. Musthapha who appears for the Appellants, has submitted that logic and policy demanded a more cautious approach, and contended that a power of attorney by virtue of which a person such as Noor Lebbei claims that he had the power to execute any writing, deed, or instrument for effecting the sale or transfer of any land or other immovable property such as Deed No. 6165 dated 9th February 1987 (P1), should be executed in the same manner in which such writing, deed or instrument is required to be executed. He also drew attention to the decision of the Supreme Court in the case of *Dias v. Fernando*(26) which supported his submission, and I quote below a passage from the judgement of Burnside, C.J., in this case which I consider very pertinent:-

> Now it is manifest that the object of the (Prevention of Frauds) Ordinance was to secure the most solemn proof of the contract, and not to let it depend upon the very fallible proof which parol evidence would, more especially in this country, afford. It would be, in the language of Lord Eldon, the most mischievous evasion of the Ordinance, if, whilst the instrument of lease itself must be of the solemn character prescribed, yet the authority to

> execute it and thus bind a party to it might depend upon the weakest and most unsatisfactory of all proof. The English statue requires a mere writing: our Ordinance requires a most solemn writing, which has all of, and more than, the solemnity of the execution of a deed by English Law, and in this material particular the two enactments differ, and upon the way to a decision based on the well recognized principle of English Law, that the authority to execute a deed must be by deed.

Of course, the opinion of Burnside, C.J., was not followed by the Supreme Court in *Meera Saibo's* case *(supra)* and the subsequent decisions, but the Chief Justice's hindsight in decrying the possibility of authorizing execution of a deed by a non-notarial conferment of power as "the most mischievous evasion" of the Prevention of Frauds Ordinance, can be more readily appreciated in the context of changing circumstances and developments of the law in Sri Lanka and abroad. In particular, it is necessary to consider the rapid increase in land related frauds in Sri Lanka, which have generally contributed to a sense of lawlessness and social instability leading to murder and other serious crimes.

It is necessary to stress that Withers, J., in his judgments in *Meera Saibo*, *(supra)* quoted the above *dictum* of Burnside, C.J., with some concern, but was persuaded to follow the reasoning of Ms. Berwick, the much celebrated and long standing District Judge of Colombo, set out in his judgment in *Nama Sivaya v. Cowasjie Eduljie*[27], which he chose to add as an attachment to his judgement in its entirety and has been reproduced in 4 NLR 232 to 235.

Mr. Berwick's celebrated judgement in the *Nama Sivaya* case, may for convenience summarized as follows:-

(a) Mere "solemnities" (as the Civil law calls them) however essential they may be to give validity to an act, and to whatever extent they may have been devised with a view to better authentication and proof under the English law, have not been introduced in Ceylon by virtue of the introduction of the English Law relating to evidence;

(b) It therefore does not follow that, even if in the English Law a power of attorney to execute an instrument must be evidenced by an instrument of equal solemnity, the same is the Law of Ceylon;

(c) The delegation of authority to enter into a deed is a personal act; the execution of the personal delegation is a "real" act. The latter must, in the present case, be done in conformity with the *lex loci citae;* it may be that the former is to be governed by the law of the place where the delegation is made, viz., England, where the law does not require the conferment of such authority shall be attested either by a notary or by witnesses.

(d) The Roman-Dutch Law authorities are silent as to the necessity of any special solemnities for the valid constitution of the mandate of an attorney, and nowhere in his *Treatise on the Contract of Mandate* does Pothier advert to the necessity for notarial attestation for this purpose;

(e) Van Leeuwen, in his *Censura Foresis (part 1, lib. 4, cap. 24)* divides powers of attorneys into general and special, and also into express and tacit; and while be points out that there are many things which cannot be done under a general power of attorney (among others, sales and alienations), but which require a special power, he indicates no such difference under the further division into express *(Quod expressum verbis sit [ant literis])* and

tacit mandates, which is part of the law relating to agents; and

(f) The contention in the context of Ordinance No. 7 of 1840 that the power of attorney itself establish an "interest affecting land" cannot be sustained because the power of attorney does not establish or convey any interest in land; it only authorizes another person to convey such an interest by all legal form and solemnities which the law of the Island may require.

If we have to apply to this case the principles of the Roman-Dutch law so authoritatively enunciated by Mr. Berwick in the aforesaid judgment, the Respondents will necessarily fail simply because the Power of Attorney marked P7 is not a special power of attorney which is requisite for empowering another to enter into a sale or alienation as explained by Van Leeuwen, in his *Censura Forensis* (part 1, lib 4, cap. 24). I quote below the operative paragraph of P7 which makes it abundantly clear that this was definitely not a special power of attorney:-

5. To superintend, manage and control the aforesaid land or any other landed property which I now or hereafter may become entitled to, possessed of or interested in and to sell and dispose of the said land which now or hereafter I may become entitled to possessed of or interested in by private contract or to enter into any agreement for sale thereof for such price or prices and upon such terms and conditions as my said Attorney shall think fit.

Furthermore, as the distinguished District Judge of Colombo has observed (*vide* sub paragraph (c) of the above summary), the form of delegation is governed by the law of the place where the delegation is made, which in this case is India,