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Page

CIVIL PROCEDURE CODE - Section 154(1) - Tender of documents in evidence - How a document marked subject to proof is to be proved. - admissibility of documents - explanation to Section 154 (1) of the Civil Procedure Code - Evidence Ordinance - Section 85 - presumptions as to power of attorney - Sections 67 to 72 - proof of documents which are not required by low to be attested - Sections 45 to 51 opinion of third persons when relevant - Notaries Ordinance - Section 31 and 33. 365

Jamaldeen Abdul Latheef and v. Abdul Majeed Mohamed Mansoor and another

(Continued from Part 12)

and the Respondents have failed to discharge the burden placed on them by law to prove the applicable legal principles and formalities in force in that country at the relevant period.

It is trite law that in terms of Section 45 of the Evidence Ordinance, the law of a foreign country has to be proved through the evidence of experts, or as outlined in the first proviso to Section 60, through other means such as the production in court of treatises on law where the author is dead or whose presence cannot be reasonably procured, an no expert testimony of the law in force India has been tendered in evidence or other material produced in court. The decision of this Court in *Sreenivasaraghava Pyengar v. Jainambeebe Ammal*[28] in this regard should be understood in the light of the fact that at the time of that decision, British India was part of Her Majesty's realm as much as Ceylon was, and was not a foreign country. In that case, the Supreme Court refused to rely on a document purporting to be a "true copy" of the original power of attorney, which has been copied by a registering officer in a book kept under the Indian Registration Act, 1908, and held that this was not in itself sufficient to establish the fact of execution of the original power of attorney. In the case before us, what has been produced is a mere photocopy, with no evidence in regard to how the photocopy was obtained, and in this case too there is no evidence to show that the power of attorney had been registered under the Indian Registration Act, 1908.

It was in these circumstances that Mr. Dayaratne sought to rely on the presumption in Section 85 of the Evidence Ordinance in regard to the Power of Attorney marked P7. In my considered opinion, the Respondents cannot invoke the assistance of this presumption, as the "authentication"

required to attract the said presumption must be clear, specific and decisive. It has been held in *Mohanstet v. Jayashri* AIR[29] that "authentication" for this purpose is something more than execution, and cannot be based on the identification by a third person who is not called to testify in the case, in circumstances where the executant was not personally known to the Magistrate before whom the power of attorney in question was executed. As Desai, J., observed in the course of his judgement at 204 to 205 -

> It is now well settled that authentication is more than mere execution before one of the persons designated in Section 85. . . .
>
> As far as the identity of the executant is concerned, the Magistrate in fact indicates that he is personally unaware of the executants but puts his signature on the basis of identification made by an Advocate. It is true that such identification by the advocate is mentioned in the rubber stamp, and one may presume that it is on the basis of such identification that the Magistrate proceeded to put the rubber stamp. But will this amount to authentication by the Magistrate? Section 85 contains a presumption, a presumption which may operate in favour of the party relying on a document and to the prejudice of the party alleging that the document is not a genuine one. For the purpose of such presumption to operate, particularly in the background of the facts above ascertained, the authentication must be clear, specific and decisive, and bereft of the features which I have indicated earlier. If there is the slightest doubt, then the Court must be loathe to rely on the presumption contained in Section 85 and must be equally loathed in applying such presumption in favour to the party relying on the document.

The case at hand is similar, as it is evident from the attestation clause of P7 that the Notary Public relied on the "information" provided by the two attesting witnesses with regard to the identity of the executant, who was otherwise not known to him. In these circumstances, I am of the opinion that the Respondents have failed to furnish sufficient evidence to satisfy court that the applicable formalities of the law have been complied with in executing the power of attorney, or to show, as contemplated by Section 69 of the Evidence Ordinance, which is applicable to proof of any document executed abroad, that the "attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

It is also pertinent to note that Mr. Berwick had in his judgement in the *Nama Sivaya (supra)* case very correctly analyzed the question of the form of delegation of authority as one filling within the law relating to agents, but it does not appear whether he considered the question as to whether the insertion by Ordinance No. 22 of 1866, of *inter alia* the words "principals and agents" into the Introduction of English Law Ordinance (Civil Law Ordinance) No. 5 of 1852 had the effect of making the English law applicable on this subject applicable in Sri Lanka. Of course, that would not have made any difference to the decision in that case, as Mr. Berwick himself had concluded, as will be seen from sub-paragraph (c) of my summary of the reasoning of Mr. Berwick, that the Statute of Frauds of 1677 did not require attestation for conferment of authority for executing a deed.

However, it is important to note that the relevant provision of the Statute of Frauds have been replaced in the United Kingdom by Section 74(3) to 74(5) and Section 123 to 129 of

the Law of Property Act 1925 (c 20) and Section 219 of the Supreme Court of Judicature (Consolidation) Act 1925 (c 49), which in turn have given way to Section 1 of the Powers of Attorney Act of 1971 (c. 27). The latter Act has been amended by the Law of Property (Miscellaneous Provisions) Act of 1989 (c 34), and as so amended, Section 1(1) of the Powers of Attorney Act of 1971 would read as follows:-

> 1(1) An instrument creating Power of Attorney shall be *executed as a deed,* or by direction and in the presence of, the donor of the power. *(emphasis added).*

It is noteworthy that the Law of Property (Miscellaneous Provisions) Act of 1989 generally abolished the prior law which required a seal for a valid execution of a deed by an individual, and substituted for the words "signed and sealed by "which were found in Section 1(1) of the Powers of Attorney Act of 1971 the words "executed as a deed". Section 1(3) of the 1989 Act also provided that -

An instrument is validly executed as a deed by an individual if, and only if -

(a) *it is signed* -

(i) *by him in the presence of a witness who attests the signature;* or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is *delivered as a deed* by him or a person authorized to do so on his behalf.

A question of some difficulty that could arise in Sri Lanka in view of these developments in the United Kingdom is

whether the above quoted English statutory provisions would become applicable in Sri Lanka through Section 3 of the Introduction of English Law Ordinance which seeks to incorporate into our legal fabric in regard to "principals and agents", and certain other specified subjects, the law that "would be administered in England in the like case, at the corresponding period, if such question of issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereinafter to be enacted." Although there does not appear to be a decision of the Supreme Court on this point, it must be pointed out that the decision of the Court of Appeal in *Wright and Three Others v. People's Bank*[30] would appear to suggest an affirmative response to this question. In that case, the Court of Appeal affirmed the decision of the District Judge that Section 2(1) of the English Factors Act of 1889 was part of our law, and it is noteworthy that in the course of his judgement at 300 G.P.S. de Silva, J., (as he then was) observed that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." The Sri Lankan Powers of Attorney Ordinance No. 4 of 1902, as subsequently amended, may not be a stumbling block to an argument in favour of applying the English provisions relating to the *execution* of a power of attorney by an individual, as the local Powers of Attorney Ordinance is confined, as clearly set out in its preamble, to the "*registration* of written authorities and powers of attorney" and there is no contrary provision in regard to the execution of powers of attorney either in that Ordinance or in the Prevention of Frauds Ordinance.

It is, however, unnecessary for the purpose of this case to express an opinion in regard to this question, since as already noted, the Power of Attorney marked P7 was allegedly executed in India and would attract the Indian law relating to

form, and furthermore, even if it is regarded as a document that does not require attestation as urged by Mr. Dayaratne, the Respondents would still fail. This is mainly because, according to Section 72 of the Evidence Ordinance, "an attested document not required by law to be attested may be proved as if it was unattested", and Section 67 of the same Ordinance provides that -

> *If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.*

Admittedly, P7 does not purport to contain Abdul Cader's handwriting, but it contained a signature which is alleged by the Respondents to be his. It is noteworthy that none of the witnesses who spoke about P7 testified that the signature purporting to be that of Abdul Cader was placed thereon in the presence of such witness, nor was any effort made by the Respondents to show by comparison of other documents that may have contained the signature of Abdul Cader, that the signature on P7 was that of Abdul Cader. The Attorney named in the said Power of Attorney, Noor Lebbai has testified in the case, and has stated that in 1972 Sadakku left Sri Lanka leaving the land in his charge, and that much later and after the demise of Sadakku, his son Abdul Cader who lives in India, executed the Power of Attorney marked P7 authorizing him to look after the land and also to alienate it if the need arises.

Although he has placed reliance on P7, he did not state that he was personally present in India when the executant placed his signature on it, or seek to identify the signature as that of the executant Abdul Cader. He also did not

explain how P7 came into his hands, or why only a photocopy thereof was tendered in evidence. No doubt, as Widham, J., observed in *King v. Peter Nonis*(31) at 17, the so called 'best evidence' rule "has been subjected to whittling down process for over a Century" and it is not always necessary today to produce in court the original of a document on which he relies. However, the non-production of the original document without any explanation as to why the original is not being produced, is certainly a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead. *See,* the observations of L. H. de Alwis, J., in *Vanderbona v. Justin Perera* at 68, and A.R.B. Amarasinghe, J., in *Stella Perera & Others v. Margret Silva* at 173.

It is therefore clear that applying the test of proof of a document that was not required by law to be attested, there was no *prima facie* evidence to prove its authenticity, and the question of its admissibility did not even arise. I am therefore of the opinion that the contention of the learned President's Counsel for the Appellants that the Power of Attorney marked P7 has not been proved as required by law has to be upheld.

There remains, however, one more matter on which learned Counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27th April 1993. This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? There is no provision in the Civil

Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. For instance, in *Sri Lanka Ports Authority and Another v. Jugolinija - Boat East*[34] Samarakoon, CJ., commented on this practice, and ventured to observe at 23 to 24 of his judgement that if no objection to any particular marked documents is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held that this is the *cursus curiae* of the original courts. *See, Silva v. Kingersle*[35]; *Adaicappa Chettiar v. Thomas Cook and Son*[36], *Perera v. Seyed Mohomed* [37]; *Balapitiya Gunananda Thero v. Talalle Methananda Thero* [38]; *Cinemas Limited v. Sounderarajan* [39]; *Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Others* [40].

It would therefore follow that even though the Power of Attorney marked P7 had in fact not been proved as required by law, if the learned Counsel for the Respondents had read in P7 in evidence with the other marked documents at the close of the case for the Respondents without any objection being taken on behalf of the Appellants, P7 would have been deemed to be good evidence for all purposes of the law. However, that is not what actually happened in this case. A photocopy of the power of attorney allegedly granted by Abdul Cader to Noor Lebbai was marked P7 subject to proof, no proof whatsoever was adduced to prove the aforesaid photocopy, and none of the marked documents were read in evidence at the conclusion of the Respondents' case.

For all these reasons, I hold that the Power of Attorney marked P7 has not been duly proved, and cannot be acted upon as evidence. I therefore hold that question 1(a) on which special leave to appeal has been granted in this case, should be answered in the negative.

Title of the Respondents

The other connected substantive question on which leave has been granted, which relate to the title of the Respondents to the land described in the schedule to the petition, has been split up into two sub-questions which are reproduced below:

1. (b) Does the Deed produced marked P1 operate to convey the title of Mohideen Abdul Coder, 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?

Mr. Musthapha has submitted on behalf of the Appellants that Deed No. 6165 (P1) does not operate to convey the title of Mahideen Abdul Cader, to the Respondents. He has contended in so far as the procedure set out in Section 31 of the Notaries Ordinance No. 1 of 1907, as subsequently amended, has not been complied with in respect to the execution of Deed No. 6165 (P1), it is a nullity. The said procedure is found in rule 30, which provides that -

> If he (a notary) attest any deed or instrument executed before him by means of an attorney, he shall preserve a true copy of the power of attorney with his protocol, and shall forward a like copy with the duplicate to the Registrar of Lands

I also note that the Registrar of Land, Anuradhapura, Ulluduhewage Karunaratne, who was called to give evidence on behalf of the Appellants, has stated in his testimony that a copy of P7 has not been forwarded along with the duplicate of the deed marked P1 in compliance with the procedure set out in Section 31 of the Notaries Ordinance. However, in my view this contention cannot be sustained as Section 33 of the Notaries Ordinance clearly enacts that -

> *No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form: provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.*

Mr. Musthapha has further submitted that a plain reading of Deed No. 6165 marked P1 reveals that the alleged attorney Noor Lebbai has purported to convey the land described in its schedule as its owner, and not as the holder of the Power of Attorney mared P7. He has also stressed that the notary before whom the aforesaid deed was executed has not mentioned in his attestation, in what other capacity Noor Lebbai signed the deed in question. Mr. Dayaratne has, in his response, relied very much on the language used in the operative part of the deed, wherein Noor Lebbai refers to the Power of Attorney marked P7, and states that -

> ඉබ්‍රාහිම ලෙබ්බේගේ පුත්, මොහොමඩ් ඉබ්‍රාහිම් ලෙබ්බේ නූර් ලෙබ්බේ වන මට දකුණු ඉන්දියාවේ තමිල්නාඩු ප්‍රාන්තයේ රාමානාතපුරම් දිස්ත්‍රික්කයේ කිලක්කරෙයි උතුරු වීදියේ එස්. එම්. එම්. හමීඩ් හසන් ප්‍රසිද්ධ නොතාරිස් තැන විසින් වර්ෂ 1981 ක් වූ ඔක්තෝම්බර් මස 30 වෙනි දින සහතික කළ මදාර් කනී, මොහොම්මදු මොහිදීන්, කාදර් සායිබු, මොහිදීන් සදක්කු,

මොහිදීන් අබ්දුල් කාදර් යන අයගේ අංක 2633 දරණ ඇටෝර්නි බලපත්‍රයේ අයිතිය පිට අයිතිය නිරවුල්ව බුක්ති විඳ එන මෙහි පහත උපලේඛණයෙහි විස්තර කෙරෙන දේපල ලංකාවේ වලංගු මුදලින් රුපියල් විසිදාහ (රුපි. 20,000.00) කට අංක 01, තක්කියා පාර, තුසව, නාච්චාදූව යන ලිපිනය ඇති අබ්දුල් මජීඩ් අබ්දුල් නිසාර් මහත්මයාද 2. අබ්දුල් මජීඩ් මෙහොමඩ් මන්සූර් මහත්මයාද යන දෙදෙනාට මෙයිනි විකුණා අයිතිය පවරා භාරදී එම මුදල සම්පූර්ණයෙන් ගැන භාරගතිමි.

It is not at all clear from the above quoted words that Noor Lebbai purported to act as an Attorney on behalf of his principal. In fact, in the below quoted words, he even describes himself as the vendor (විකුණුම්කාර), and purports to sell the property in question and also to defend title:-

එහෙයින් එකී දේපල සහ ඊට අයිති සියලු දේත් ඒ පිළිබඳව එකී විකුණුම්කාර මා සහ උරුම කරුම හිමිකම් හා බලයලත් එකී ගැණුම්කාර අබ්දුල් මජීඩ් අබ්දුල් නිසාර් මහත්මයාද 2. අබ්දුල් මජීඩ් මොහොමඩ් මන්සූර් මහත්මයාද යන දෙදෙනාට සහ ඔවුන්ගේ උරුමක්කාර පෝල්මඃ අද්මිනිස්ත්‍රාසිකාර් බලකාරාදීන්ටත් සදහටම නිරවුල්ව බුක්ති විඳීමට හෝ මනාපයක් කර ගැනීමට පුළුවන් මුළු බලය මෙයින් සලසා දුනිමි. තවද එකී දේපල මෙසේ අන්සතු කිරීමට නීති ප්‍රකාර සම්පූර්ණ බලය මට ඇති බවද එම දේපලවත් ඉන් කොටසක් හෝ ඵල ප්‍රයෝජනාදි කිසිවක් අන් සතුවීමට හේතුවන ක්‍රියාවක් මීට ප්‍රථම නොකල බවටද සහතික වෙමින් මෙම විකුණුම්කරය සියලු අයුරින් සවිකර දීමට හෝ ඊට විරුද්ධව පැමිණෙන යම් ආරවුලක් වේ නම් ඊට වගඋත්තර කියා නිරවුල් කරදීමට මෙය වැඩිදුරටත් ස්ථිර කරගැනීම පිණිස අවශ්‍ය වන්නා වූ මීටම අදාල වෙනයම් ඔප්පු තිරප්පු ආදයක් එකී ගැණුම්කර පක්ෂයේ වියදමෙන් සාදවා දෙන ලෙස එකී ගිනුම්කාරයන් විසින් හෝ ඔවුන්ගේ ඉහත උරුමකාරාදීන් විසින් ඉල්ලා සිටිනු ලැබුවහොත් එසේ කරදීමටද එකී විකුණුම්කාර මම මා වෙනුවනට සහ මගේ උරුමක්කාර පොල්ම. අද්මිනිස්ත්‍රාසිකාර බලකාරාදීන් වෙනුවටත් මෙයින් වැඩිදුරටත් පොරොන්දුව බැඳුනෙමි.

I am of the opinion that in the circumstances, the Deed marked P1 does not purport to be a conveyance of the title

allegedly vested in Abdul Cader through the instrumentality of an alleged agent, and is in effect a purported conveyance of title and possession which Noor Lebbai never enjoyed, and which he cannot in law dispose of.

Apart from this, there is also considerable doubt as to whether Abdul Cader himself had title to the said four acre land, as there is inadequate material before court to conclude that the admitted ownership of Sadakku had devolved on Abdul Cader. I find that the Respondents have failed to establish the devolution of title to Abdul Cader. Although it appears from the testimony of Respondents' witness Mohamed Ibrahim Lebbai Noor Lebbai that there was a testamentary case with respect to the estate of Sadakku, no documentary evidence whatsoever has been produced at the trial in regard to how the ownership of the land described in the schedule to the petition devolved on the heirs of sadakku. It transpires from the testimony of Noor Lebbai, that Sadakku's brother Kachchi Mohideen succeeded to a $2/10^{th}$ share of the land described in the schedule to the petition and that Sadakku's two sons Mohomadu Mohideen and Abdul Cader, also inherited undivided shares in the land, the proportions of which have not been clearly established. Therefore, it is evident from the testimony of the Respondents' witnesses themselves that Abdul Cader was not the *sole* owner of the land described in the schedule to the petition. It follows that, even if the Power of Attorney marked P7 was proved, that evidence led in regard to the devolution of title from Sadakku to Abdul Cader cannot be said to have establish the title Abdul Cader to the entirety of the land on the standard of proof that is required in a *rei vindicatio* action. It is also important to bear in mind that, for the reasons already advanced, in so far as the execution of the Power of Attorney marked P7 has not been duly proved, Noor Lebbai did not have any power or authority to bind Abdul Cader and for

that reason alone, Deed No. 6165 (P1) cannot operate to convey any title to the Respondents.

I therefore have no difficulty in answering the substantive question 1(b) in the negative and holding that the Deed produced marked P1 does not operate to convey the admitted title of Muhammad Mahideen Cader Saibu Mohideen Sadakku, or the alleged title of Mohideen Abdul Cader, to the Respondents.

Sub-question 1(c) was of course intended to be consequential upon question 1(b) being answered in the negative, and requires some attention, because it raises the question, in that event, whether the Court of Appeal was in error in holding that the Learned District Judge has correctly arrived at the finding that the Respondents had established title to the *subject matter of the action.* It is in this case somewhat difficult to fathom what is meant by the words "the subject matter of the action", as there has been a great deal of confusion in this regard. It was in view of this confusion that this Court specifically invited learned Counsel to make submissions on the question of the identity of the *corpus,* even though none of the substantive questions on which special leave had been granted by this Court, directly raised any issue in regard to the identity of subject matter of the action from which this appeal arises.

It is trite law that the identity of the property with respect to which a vindicatory action is instituted is an fundamental to the success of the action as the proof of the ownership (*dominum*) of the owner (*dominus*). The passage from Wille's *Principles of South African Laws* (9th Edition - 2007) at pages 539-540, which I have already quoted in this judgement, stresses that to succeed with an action *rei vindicatio*, which

this case clearly is, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is *clearly identifiable.* It is also essential to show that the defendant is "in possession or detention of the thing at the moment the action is instituted." Wille also observes that the rationale for this "is to ensure that the defendant is in a position to comply with an order for restoration."

The identity of the subject matter is of paramount importance in a *rei vindicatio* action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the *corpus* to be identified with precision.

Doubts in regard to the identity of the land sought to be vindicated in this case arise from the fact that while the Respondents in their petition laid claim to a four care land known as "Palugahakumbura", in Mahawela, Pahalabaage situated in the village of Pandiyankulama in Nachcha

Tulana of Ulagalla Korale in Hurulu Palata of the Anuradhapura District, by virtue of Deed bearing No. 6165 (P1), the 1st Appellant asserted prescriptive title to a land described as "Nilattu Patti Wayal" falling within LD 2 Ela in the village of Pandiyankulama in Nachchadoova Tulane of Ulagalla Korale in Hurulu Palata in extent 3 acres 2 roods and 26 perches.

In the schedule to the petition filed by the Respondents, which closely followed the schedules to the deeds marked P1 to P6, there was no reference to any survey plan and the four acte land claimed by the Respondents was described in the following manner:-

> All that field called Palugaha Kumbura situated in the Pahala Bagaya of the Mahawela at Nachchaduwa Pandinkulama in Nachcha Tulana of Ulagalla Korale in Hurula Palata in the District of Anuradhapura of the North Central Province, bounded on the North by the field of Nawuran Lebbe Mohiyadeen Pitcha and Others, East presently by Welle and the property of Yusoof Lebbe one of the vendors hereof, South by the property of Ali Tamby Lebbe Sharibu and the Others and West presently by the property of Sultan Unus containing in extent Four Acres (4A-0R-0P) more or less together with the paddy crops that are growing now on the land.

In the Schedule to the answer filed by the Appellants, which too made no reference to any survey plan, the land claimed by the 1st Appellant was described as follows:-

> The land known as Nilattu Pitti Wayal, in extent 3 acres, 2 roods and 26 perches (A3-R2-P26) situated within the LD 2 Ela of the village of Pandiyankulama in Nachchadoowa

Tulana of Ulagalla Korale in Hurulu Palate in the District of Anuradhapura of the North Central Province, bounded on the North by the paddy fields belonging to Y. M. Ismail and M. P. Kairun Nisa, on the East by the LD 2 Ela on the South by the paddy field of D.C.M. Wijesinghe and on the West the paddy field of U. Cader Beebee and T. C. M. Munesighe, together with all things from therein.

It was perhaps in view of the differences in extent and description of the lands claimed by the contending parties, and the circumstance that neither the schedule to the petition nor the schedule to the answer described the land in suit by reference to a survey plan, that the District 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. Plan bearing No. 1176 dated 10th October 1990 and the accompanying report prepared by Surveyor Dissanayake after the survey of a land pointed out by the contending parties as the land in dispute, showed that the land which the parties were contending for was only 2 acres, 3 roods and 0.75 perches in extent and was situated in the village of Madawalagame (Final Village Plan 520) within the Nachchadoova GS Division in Kandu Tulana of Kanadara Korale in Nuwaragam Palata, in the Anuradhapura District, which according to the Surveyor Dissanayake, was an altogether different locality from the area where the land described in the respective schedules to the petition and the answer was situated.

It was in these circumstances, that the District Court issued a further Commission on K. V. Somapala, Licensed

Surveyor, to survey the land claimed by the two contending parties to the case. Surveyor Somapala prepared Plan No. 2025 dated 16.04.1991, which revealed that the land surveyed by him, the boundaries of which had also been pointed out by the contending parties, was in extent 2 acres 3 roods and 31 perches and was situated in the village of Pandiyankulama, in Nachchadoova Tulana of Ulagalla Korale in the Hurulu Palata in the Anuradhapura District. Although falling short of the four acres claimed by the Respondents in their petition by approximately 1 acre, 1 rood and 9 perches as well as the land claimed by the 1st Appellant in the answer by 2 roods and 35 perches, the location and boundaries of the land depicted in Plan No. 2025 were somewhat consistent with the description of the land set out in the schedule to the petition of the Respondents as well as the description of the land set out in the schedule to the answer.

It is remarkable that although a comparison of the schedules to the petition and answer filed in this case give the impression that they refer to two distinct and different lands with two different names and dimensions and boundaries having nothing in common except that they were situated in the village of Pandiyankulama in Nachchadoova Tulana of Ulagalla Korale in Hurulu Palata, in the Anuradhapura District, the boundaries of Plan No. 2025 prepared by Surveyor Somapala almost perfectly tally with the boundaries of the land described in the schedule to the answer filed by the Appellant. According to both the aforesaid Plan and the schedule to the answer, on the northern boundary of the land depicted therein are the paddy fields belonging to Y. M. Ismail and M. P. Kairun Nisa, and on the eastern boundary is the LD 2 Ela. The southern boundary of the said Plan and the schedule to the answer, is the paddy field belonging to

D.C.M. Wijesinghe and on the western boundary is the paddy field belonging to U. Cader Beebee and T. C. M. Munasinghe. It is relevant to note that in the aforesaid Plan, Surveyor Somapala has also endeavoured to indicate the names of the previous owners of the paddy fields mentioned above, but he does not in his report or testimony in court, disclose how he got these particulars, and it is a reasonable inference that he had got these particulars from Plan No. 1176 and report prepared by Surveyor Dissanayake, which I shall advert to presently.

It is of some significance that Plan No. 1176 prepared by Surveyor Dissanayake, though placing the surveyed land in a different village called Madawalagama in Kandu Tulana of Kandara Korale in the Nuwaragama Division, shows that the northern and eastern boundaries of the land surveyed by Dissanayake substantially tally with the northern and eastern boundaries of the land described in the schedule to the answer of the Appellants: In Plan No. 1176, the northern boundary is shown as the paddy field previously owned by Nawuran Lebbe Mohiyadeen and presently owned by Y. M. Ismail. No. reference is made to any paddy field belonging to M. P. Kairun Nisa in Plan No. 1176, although in the schedule to the answer that paddy field too is said to be on the northern boundary. Similarly, the eastern boundary of the land depicted in Plan No. 1176 is the irrigation canal and reservation while in the schedule to the answer it is described as LD 2 Ela.

However, it would appear that the southern and western boundaries of Plan No. 1176 are substantially different from the corresponding boundaries of the land described in the schedule to the answer. In Plan No. 1176, the paddy field on the southern boundary is indicated as previously owned by Ana Ali Thambi Lebbe and presently claimed by

D. S. Gunesekera whereas according to the schedule to the answer, the southern boundary consists of the paddy field belonging to D. C. M. Wijesinghe. In Plan No. 1176, the western boundary is shown as the paddy field previously owned by Lebbe Thambi Yusuf and presently claimed by D. S. Gunesekara and P. Nainul Abdeen while in the schedule to the answer, the land described in the schedule to the petition is bounded on the west by the paddy field of U. Cader Beebee and T. C. M. Munesinghe.

It is interesting to note that Surveyor Dissanayake has endeavoured to show the boundaries of Plan No. 1176 in a manner as to be consistent with the boundaries of the land described in the schedule to the petition filed by the Respondents. Thus, the northern boundary of the said land, is the paddy field of Nawuran Lebbe Mohiyadeen Pitcha and others which is sought to be substantiated in Plan No. 1176 by referring to Y. M. Ismail as the claimant to the paddy field on the northern boundary as the successor in title of Nawuran Lebbe Mohiyadeen and others. Similarly, the southern boundary in the aforesaid Plan is described as the paddy field claimed by D. S. Gunasekera and previously owned by Ana Ali Thambi Lebbe, while in the schedule to the petition the corresponding boundary is the paddy field belonging to Ali Thambi Lebbe Sharibu. However, there is some inconsistenc as far as the eastern and western boundary of the land described therein is the "wélle" and the property of (වේල්ල) and the property of Yusoof Lebbe, whereas in the Plan No. 1176 and report, on the eastern boundary of the land is the irrigation canal and reservation, but there is no reference to the property of Yusoof Lebbe. Of course, the "the irrigation canal" on the eastern boundary of the aforesaid plan does not give rise to much of an issue, as the Sinhalese term "wélle" (වේල්ල) refers to an embankment or mound of a canal or a paddy field, but no light was shed by any of the

surveyors or witnesses in regard to the reference to Yousoof Lebbe in the schedule to the petition. Similarly, according to Plan No. 1176 and its report, on the western boundary of the land surveyed is the paddy field claimed by D. S. Gunasekere and C. Jainul Abdeen and originally owned by Lebbe Thambi Yusoof, but the schedule to the petition states that on the western boundary is the property of Sultan Yunoos, which is entirely a different name, and there is no basis on which these boundaries can be said to be consistent.

It is also important to empahsise that neither Surveyor Dissanayake nor any other witness who testified at the trial, including the 1st Petitioner-Respondent-Respondent, the 1st Defendant-Appellant-Appellant and Surveyor Somapala, placed before court any documentary or other evidence to substantiate the alleged succession to title to the fields or paddy fields on the northern and southern boundaries of the land described in the schedule to the petition, which information had been used by Surveyor Dissanayake for the purpose of synchronising the boundaries of the land described in the schedule to the petition with the land depicted in Plan No. 1175 and the accompanying report, and uncritically adopted by Surveyor Somapala in Plan No. 2025 and report annexed thereto. In the absence of such evidence, there is no justification to conclude that the boundaries of the land surveyed by these surveyors as the land in dispute, tally with the land described in the schedule to the petition of the Respondents. To Illustrate this point, the statement in the aforesaid survey plans and reports to the effect that the paddy field situated on the northern boundary of the land subjected to the survey was claimed by one Y. M. Ismail is an empirical fact reported and testified to by both surveyors which they were competent to make, but the statement to the effect that the previous owners of the said paddy

field were Nuwuran Lebbe Mohiyadeen Pitcha and others, is clearly hearsay, in the absence of any documentary or other evidence to substantiate the accuracy of that statement. So also, the statement on the said plans and reports to the effect that the paddy field on the southern boundary originally belonged to one Ali Thambi Lebbe, which substantially tallies with the name of the owner of the property described in the schedule to the petition, namely Ali Thambi Lebbe Sharibu, is at best hearsay, in the absence of any evidence to relate the aforesaid original owner or owners to the respective claimants of the said property at the time of the survey.

Furthermore, despite the superficial similarity between the lands depicted in Plan No. 1175 and Plan No. 2025, particularly, the bifurcation of the land by two canals, one close to the northern boundary and the other almost at the center of the land, the said two plans seek to locate the lands by reference to two distinct villages, tulanas, korales and palatas and even the location and description of the land described in the schedule to the petition does not tally with the village, tulana, korale and palata of Survey or Dissanayake's Plan No. 1175. In any event, this superficial similarity could only be used to show that the lands surveyed by Dissanayake and Somapala were substantially similar, but there is no reference to any such bifurcations of canals in the schedule to the petition.

Despite these obvious differences, the parties did not appear to have any difficulty in identifying the *corpus* at the stage of formulating the issues after the return of the commission to survey the land or lands in dispute. It is unfortunate that neither the learned District Judge, nor the learned Counsel for the contending parties, realized that issue 6 sought to described the land in dispute by reference

to the schedule to the petition of the Respondents as well as Plan No. 1176 and the accompanying report prepared by Surveyor Dissanayake despite their mutual inconsistency in regard to not only the extent of the land but also with respect to the village, the tulana, the Korale and the palata in which the land is situated. It is also significant that issue 8 raised on behalf of the Appellants did not seek to describe the land claimed by them by reference to the schedule to their answer or the plan and report prepared by Surveyor Somapala, and that in the aforesaid issue they had assumed that the bone of contention in the case was one and the same land, which they ventured to describe as "මෙම නඩුවට අදාළ ඉඩම"

It is manifest that issues 6 to 8, thus formulated have only confounded the confusion in regard to the identity of the land in dispute, which the testimony of the two surveyors in this case has in no way helped to reduce. Surveyor Dissanayake was unable to explain the differences in the village name, tulana, korale and palata between the schedule to the petition and his Plan bearing No. 1176, although the name of the land an some of the boundaries specified in the schedule to the petition tallied with his plan. On the other hand, Surveyor Somapala was clear in his testimony that the land surveyed by him could not be the same as the land surveyed by Surveyor Dissanayake as the village, tulana, Korale and palata within which the two lands were situated were different, althought the structure and the bifurcations of the canals on the two plans were similar.

To sum up, from the issues raised by the contending parties as well as the documentation and evidence led in this case, it would appear that despite serious doubts regarding the location of the lands surveyed by the commissioned

surveyors, the Respondents as well as the 1st Appellant were claiming title to substantially the same land. It is also material to note that the extracts of the Register of Agricultural Lands produced by respectively the Respondents marked P2 and the Appellants marked "වි1" describe the land described in the schedule to the petition as "Palugahakumbara" in extent 3 acres, 2 roods and 26 perches, under serial No. 15/353 in Cultivation Officer Division of 42A Tulana up to the year 1987, and in the year 1988 the description of the land was changed to "Nilattu Pattiya" in extent 4 acres, under Serial No. 19/459 in the same Cultivation Officer Division. Of course, the surveys conducted on commissions issued by court disclosed a much smaller land, the earlier plan bearing No. 1176 depicting an extent of 2 acres. 3 roods and 7.5 perches, which was less than the land extent shown in Plan No. 2025 prepared by Surveyor Somapala by approximately 24.5 perches, possibly due to the shifting of the northern boundary due to some encroachments.

In these circumstances, in my opinion, the learned District Judge was justified in concluding that the lands claimed by the contending parties are one and the same and is substantively depicted in the survey plan prepared by Surveyor Dissanayake, a finding which has been affirmed by the Court of Appeal. However, what the lower courts have failed to realize is that this does not necessarily mean that the land depicted by Surveyor Dissanayake, in his Plan No. 1176 is identical with the land described in the schedule to the petition and the title deeds P1 and P3 to P6. Such identification is vital to a vindicatory action such as this in which a declaration of title and ejectment of the Appellants has been sought by the Respondents by virtue of the

said title deeds. It is unfortunate that neither the learned District Judge nor the Court of Appeal has taken into consideration the inconsistencies fully outlined above, that exist in identifying the boundaries of the land described in the schedule to the petition with the land actually surveyed by the two surveyors on commissions issued by the court.

The learned District Judge was not helped by the obvious confusion in issue 6 which, as already noted, sought to describe the land claimed by the Respondents by reference to the schedule to the petition filed by them as well as by reference to Plan No. 1176 depicted by Surveyor Dissanayake. The learned District Judge uncritically answered the issue in the affirmative, causing great ambiguity in identifying the land, with respect to which a declaration of title was sought by the Respondents. The learned District Judge had in his judgement purported to make an express order of ejectment, based no doubt, on an implicit declaration of title to land claimed by the Respondents, ignoring the fact that the schedule to the petition referred to in the said issue 6, placed the land in the village of Pandiankulama in Nachcha Tulana in tha Ulagalla Korale in Hurulu Palata of the Anuradhapura District, while Plan No. 1176 dated 10th October 1990 prepared by Surveyor Dissanayake placed it in the village of Madawalagam in Kandu Tulane within the Kanadara Korale in Nuwaragam Palata of the same District. The learned District Judge has also failed to make any finding pertaining to the extent of the land described in the schedule to the petition, which was four acres according to the schedule to the petition, while it was only 2 acres, 3 roods and 7.5 perches according to Surveyor Dissanayake's Plan No. 1176. He has also not arrived at any finding in regard to which of the two survey plans that had been prepared on commissions

issued by court, depicted the land described in the schedule to the petition accurately, particularly in the context that Plan No. 2025 was more in accord with the location of the land as set in the schedule to the petition, but depicted a slightly larger land in extent 2 acres, 3 roods and 31 perches.

The learned District Judge has come to the conclusion that the bone of contention between the contending parties is the same as the land described in the schedule to the petition of the Respondents as well as the schedules to the title deeds marked P1 and P3 to P6. In doing so, he has totally lost sight of Section 187 of the Civil Procedure Code, which provides that the judgment "shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision….." It is obvious that bare answers to issues without reasons are not in compliance with the requirements of the said provision of the Civil Procedure Code, and the evidence germane to each issue must be reviewed or examined by the Judge, who should evaluate and consider the totality of the evidence. This, the learned District Judge has failed to do, and the Court of Appeal has overlooked in affirming the decision of the District Court.

It is the primary duty of a court deciding a case involving ownership of land, whether it is a partition action or *rei vindicatio* action, to consider carefully whether the relevant land *(corpus)* has been clearly identified. As already stressed, identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment. In order to make a proper finding, it is necessary to formulate the issues in a clear and unambiguous manner to assist the reasoning process of court. In my considered opinion, the learned

District Judge has seriously misdirected himself in the manner in which he formulated issue 6, which makes reference to the schedule to the petition and the plan and report prepared by Surveyor Dissanayake, which differ drastically form each other with respect to the location, boundaries and extent of the land described or depicted therein. By answering the issue in the affirmative without clarifying whether he was going by the schedule to the petition or on the basis of one of the survey plans prepared on the commissions issued by court, and if so which one, the learned District Judge has altogether begged the question of identity of the *corpus* which is so vital to a vindicatory action, which negates the possibility of deciding on the question of title that arises in this case. The resulting judgement, which unfortunately has been affirmed by the Court of Appeal, is fatally flawed, and the finding that title to the land claimed by the Respondents devolved on them by virtue of Deed No. 6165 marked P1 is altogether unfounded.

For all these reasons, I hold that substantive question 1(c) has to be answered in the affirmative, and that the Court of Appeal was indeed in error in affirming the decision of the learned District Judge that the Respondents had established title to the subject matter of the action.

Prescription

In view of my answers to the 3 sub-questions of substantive question 1 on which special leave has been granted by this Court, it is unnecessary to decide question 2, which is whether the Court of Appeal erred in failing to consider that the learned District Judge has not duly evaluated the evidence on the question of prescription. I therefore do not propose to go into this question in depth. In a *rei vindicatio* action, it is not necessary to consider whether

the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated and the action ought to be dismissed without more.

However, I wish to use the opportunity to deal with a submission made by learned President's Counsel for the Respondents before parting with this judgement. He has submitted that in terms of Section 45(3) of the Agrarian Services Act No. 58 of 1979, as subsequently amended, an entry made in the Agricultural Lands Register maintained under that Act is admissible as *prima facie* evidence of the facts stated therein, and that accordingly, the entry made in the Agricultural Land Register, a certified extract from which was produced marked "වි1", in which the names of the Respondents appear as the landlords constitute *prima facie* evidence of their title to the land claimed by them as well as the fact of their possession thereof through a tenant cultivator. It is obvious that Section 45(3) of the said Act was not intended to extend to *title* to agricultural land, and that the presumption arising from the entries in "වි1" with regard to the landlord and description of land is displaced in this case by the overwhelming evidence that the Respondents had never enjoyed possession of the land "Nilaththu Pattiyal" which had been possessed exclusively by the Appellants.

It is the name Hinni Appuhamy that appears in the extract marked "වි1" as tenant cultivator for the ten years from 1979 to 1989, despite the alteration which the Respondents admittedly got done in 1988, by which the name of the 1st Appellant as landlord, and the description of the land as "Nilaththu Pattiyal" in extent 3 acres 2 roods and 26 perches, had been replaced by the names of the Respondents as landlords and description of the land

as "Palugahakumbura" in extent 4 acres. Neither Hinni Appuhamy, nor any other witness, was called by the Respondents to establish that the paddy field cultivated by Hinni Appuhamy was in fact the four acre land to which the deeds P1 and P3 to P6 related, and it is manifest that the alteration to the Agricultural Land Register effected in 1989 was a calculated move by the Respondents to stake a claim to the land possessed by the Appellants on the basis that the said land was the same as what is described in the schedule to the petition and the schedules to the said title deeds, which fact however, the Respondents have failed to establish by evidence.

Conclusion

In all the circumstances of this case, I allow the appeal answering the substantive questions 1, 3, 4 and 5 on which special leave had been granted by this Court, in favour of the Appellants. I do not consider it necessary to answer substantive question 2. I would accordingly set aside the judgments of the District Court and the Court of Appeal, and make order dismissing the action filed by the Respondents in the District Court. I also award costs in a sum of Rs. 25,000/- payable to the Appellants jointly, by the Respondents jointly and severally.

J. A. N. DE SILVA, C.J. - I agree.

RATNAYAKE, J. - I agree.

appeal allowed.