

HARIETTE
V.
PATHMASIRI

SUPREME COURT.
R.N.M. DHEERARATNE, J.
A.S WIJETUNGE, J. AND
S.N. SILVA, J.
S.C. APPEAL 43/95.
S.C. SPL. L/A NO. 299/94.
C.A. NO. 52/89(F).
D.C. COLOMBO 5302 / ZL.
13 AND 28 NOVEMBER, 1995.

Declaration of title- Title to undivided share- Claim to title to entirety-Burden of proof.

Plaintiff produced title deeds to undivided shares in the land but her action being one for declaration of title to the entirety she cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster.

Our law recognises the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejection of the trespasser from the whole land because the owner of the undivided share has an interest in every part and portion of the entire land. But such was not the case formulated by Plaintiff.

Cases referred to:

1. *Rockland Distilleries v. Azeez* 52 NLR 430.
2. *Hevawitharana v. Dangan Rubber Co.Ltd.*, 17 NLR 49, 55.

APPEAL from judgment of the Court of Appeal.

T.B. Dillimuni with *Mr. A. Jayawardena* for Appellant.
P.A.D. Samarasekera, P.C. with *Daya Guruge* for Respondent.

Cur .adv. vult.

January 19, 1996.
S.N. SILVA, J.

This appeal is from the judgment dated 22. 8. 1994 of the Court of Appeal. By that judgment the Court of Appeal reversed the judgment dated 7-3-1989 of the Additional District Judge and dismissed the action of the Plaintiff without costs.

The Plaintiff filed the above action for declaration of title to and for ejection of the Defendant from, the land described in schedule 2 to the plaint. It is to be noted that the Plaintiff has pleaded title to an undivided share of the land described in schedule 1 to the plaint called 'Galpottawatta' alias 'Galabodawatta' in extent about 20 bushels paddy sowing area. Schedule 2 is a description of a portion of this land which is said to be in extent about 2 acres. There is no plan depicting either of the lands described in Schedule 1 or 2. According to the plaint the Defendant entered the land with leave and licence of the Plaintiff on an unspecified date and continued to be in illegal possession after the licence was terminated in 1983. The Defendant denied the title of the Plaintiff and claimed that he was in possession from 1963 and acquired prescriptive title to the land described in the schedule to the answer which is identical with schedule 2 of the plaint. Issues were raised by the parties on the foregoing dispute.

The Court of Appeal upheld the submission of learned President's Counsel for the Defendant that the Plaintiff, at best adduced evidence of paper title to only an undivided share of the land described in schedule 1 and that she cannot maintain an action for declaration of title on

the basis of the evidence thus adduced. The Court observed that the proper course would have been to institute a partition action in respect of the entire land without seeking a declaration of title to an undefined portion. The Court of Appeal also held that the Defendant's evidence of prescriptive possession which is supported by the evidence of the Grama Sevaka has been rejected without any basis by the learned Additional District Judge.

Learned counsel for the Appellant submitted that the Court of Appeal misdirected itself when it took the view that the Plaintiff could not maintain the action for declaration of title and possession upon proof of title to only a share of the land. Further, it was submitted that the Court of Appeal erred when it failed to appreciate that the learned Additional District Judge answered Issues 3 and 4 in favour of the Plaintiff. Issue 3 is that the Defendant came into possession with the leave and licence of the Plaintiff and Issue 4 is that the said licence was terminated in 1983. His submission is that the action could have been decided solely on the basis of the answers to these two issues and possessory relief granted to the Plaintiff as prayed for in prayers (අ) and (ඈ) of the prayers to the plaint. On the other hand learned President's Counsel for the Defendant submitted that the Plaintiff has filed a *rei vindicatio* action with a plea of title and for possessory relief as owner. That title has been denied by the Defendant who claimed prescriptive title to the land in question. Therefore, he submitted that the Plaintiff's action should be dismissed if he failed to establish title to the corpus.

The Plaintiff did not give evidence in the case. A person by the name of Celius Appuhamy claiming to be a relative of the Plaintiff gave evidence as to title. It is to be noted, that this witness informed that he did not have a proper recollection of the matters on which he was testifying (vide note made by the trial judge at page 40 of the record). He stated in evidence that the original owner of the land described in schedule 1 to the plaint was one Alexander Appuhamy whose interests devolved on seven children namely, Carolis, Herath, Baron, Haramanis, Sedonona, Velonona and Sudunona. He produced certified copies of two deeds marked P1 and P2. According to his evidence the Plaintiff inherited 1/56 shares from her mother and purchased 12/56 shares on the two deeds. There is no evidence whatsoever as to

the devolution of title of the shares that were inherited by the other children of Alexander Appuhamy. This witness has not stated that the land described in schedule 2 to the plaint was possessed as a divided entity by the Plaintiff for and in lieu of her interests in the land described in schedule 1. On the other hand, it is clear from his evidence that as far as he was aware the Defendant was residing on the land described in schedule 2 for several years.

Learned counsel for the Appellant has stated in his written submissions that "the Defendant did not contest seriously the Plaintiff's title to the undivided shares". This is not a correct statement of the proceedings in the District Court. It is clear from a perusal of the record that the evidence of Celius Appuhamy as to title of the Plaintiff has been seriously challenged by the Defendant. It is in the context of this challenge that Celius Appuhamy informed Court that he had no proper recollection of the matters on which he was giving evidence.

As correctly submitted by learned President's Counsel for the Defendant the action being one for declaration of title and possession, the burden was on the Plaintiff to establish his title to the land which was in dispute. The action cannot be decided only on answers to issues 3 and 4 which relate only to aspects of possession, as submitted by counsel for the Appellant. The character and scope of a *rei vindicatio* action which involves the question of title and rights pertaining to ownership is distinct from that of a possessory action. The Plaintiff's action as presently constituted should therefore be dismissed if she fails to establish title and the right to possess the *corpus* pursuant to such ownership. The Plaintiff has set out title to an undivided 13/56 share of the land described in schedule 1 to the plaint. Both deeds produced by her relate to the land described in schedule 1 which is said to be an extent of about 20 bushels paddy sowing area. The Plaintiff has not indicated anywhere in evidence the devolution of title to the balance 43/56 share of the said land. She has also not adduced evidence that she possessed the land described in schedule 2 exclusively for and in lieu of her rights in the land described in schedule 1. On the contrary the Defendant adduced uncontradicted evidence that he was residing on the land described in schedule 2 from 1963. He produced marked 'V2' to 'V4' the extracts from the Register of Electors from the year 1967 in which he has been registered as a voter on

the basis of residence on the land described in schedule 2. Furthermore, he also adduced evidence of proceedings instituted by the Plaintiff against him in 1975 before the Conciliation Board complaining of unlawful possession of the land. Thus it is seen that the evidence of the Plaintiff's witness as to the termination of the licence in 1983 cannot be acted upon.

Learned counsel for the Plaintiff relied on the judgment in the case of *Rockland Distilleries v. Azeez*⁽¹⁾ to support the proposition that the Plaintiff should be granted remedies of declaration of title and possession upon proof of her rights to an undivided share of the co-owned property. It is to be noted that the *Rockland Distilleries* case was not a *rei vindicatio* action. It was an action for damages filed by a co-owner to recover the loss caused to his property by the discharge of spent wash from the distillery of the Defendant Company. An objection was raised that the action was bad on account of the non joinder of the other co-owners of the property to which damage was caused. The Supreme Court held that one co-owner can institute an action for damages caused to the common property without joining the other co-owners either as plaintiffs or Defendants. The questions of title and possession were not at issue in that case. However, it has to be borne in mind that our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land. In the case of *Hevawitarana v Dangan Rubber Co. Ltd*⁽²⁾ Pereira, J. stated as follows :-

"I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land".

In this case the Plaintiff is not seeking a declaration of title to her undivided share in the land described in schedule 1 and for the ejectment of the Defendant from that land. She has pleaded that she possessed the land described in schedule 2 for and in lieu of her undivided share and seeks the ejectment of the Defendant from that land. Therefore

the case for the Plaintiff cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2.

The Plaintiff has not given evidence and her witness does not claim that the Plaintiff acquired prescriptive title to the land described in schedule 2. On the contrary the complaint of the Plaintiff made to the Conciliation Board in 1975 clearly shows that the Plaintiff, having acquired paper title to certain undivided shares was attempting to dispossess the Defendant who had been in occupation from about 1963. For these reasons I hold that the Appellant has not established any ground on the basis of which the judgment of the Court of Appeal dismissing the Plaintiff's action could be reversed. The appeal is accordingly dismissed. The Plaintiff-Appellant will pay a sum of Rs 2500/- as costs of this appeal to the Defendant- Respondent.

DHEERARATNE, J. - I agree.

WIJETUNGA, J. - I agree.

Appeal dismissed.