

LOKU MENIKA AND OTHERS
v.
GUNASEKARE

COURT OF APPEAL.
DR. RANARAJA, J.
C.A. 379/89(F).
D.C. BANDARAWELA 8269/L.
DECEMBER 3, 1996.

Rei-Vindicatio – Burden of Proof – Jus Vindicandi – Proof of Dominium – Ouster – Adverse possession.

The plaintiff-respondent instituted action seeking a declaration of title to the corpus. The defendant-appellant himself claimed title on a chain of title set out in his answer. The District Court held in favour of the plaintiff. At the appeal, it was urged that the learned District Judge had failed to appreciate that in a declaratory action the plaintiff must strictly prove his title.

Held:

- (i) The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant.
- (ii) A Court cannot grant any relief to a plaintiff except on what he has pleaded and proved to the satisfaction of Court.
- (iii) A defendant should not be called upon to meet a new case or a new position taken by the plaintiff after he has already closed his case.

APPEAL from the District Court of Bandarawela.

Cases referred to:

1. *Thiyeendran v. Ramanathan Chettiar*, [1986] 2 Sri L.R. 219 at 222.
2. *Hameed v. Weerasinghe* – [1989] – 1 Sri L.R. 217.
3. *Senanayake v. Silva* – [1986] – 2 Sri L.R. 405.
4. *Pathirana v. Jayasundera* 56 NLR 166 at 172.
5. *Haminey v. Appuhamy* 52 NLR 49.
6. *Peiris v. Savunhamy* 54 NLR 207.
7. *Kathiramathamby v. Arumugam* 38 CLW 27.
8. *Wanigaratne v. Juwanis Appuhamy* 65 NLR 168.
9. *Githohamy v. Karanagoda* 56 NLR 250.
10. *Dias v. Dias* 61 NLR 116.
11. *Simpson v. Omera Lebbe* 48 NLR 112.

N. Mahendra with Noel Fernando and Janaka Rodrigo for substituted-defendants-appellants.

Counsel appears for respondent.

Cur. adv. vult.

December 10, 1996.

DR. RANARAJA, J.

This action was filed on 19.11.1971, by the plaintiff against the defendant, for a declaration of title to the land called Gurukandura, described in the schedule to the plaint, ejectment of the defendant therefrom and damages. By the amended answer dated 5.9.84, the defendant disputed the correctness of the pedigree set out in the plaint. The defendant himself claimed title to the land on the chain of title set out in his amended answer and sought the dismissal of the plaintiff's action. On a date prior to the amended answer being filed, the trial which had commenced on 17 issues, continued on a further issue 18, with the evidence of 14 witnesses being led. Judgment was delivered on 14.8.89, in favour of the plaintiff as prayed for. This appeal is from that judgment.

The main ground of appeal is that, the learned District Judge had failed to appreciate that in a declaratory action the plaintiff must strictly prove his/her title. In other words, the plaintiff came to Court on the basis that she was the sole owner of the land in dispute. The evidence led on her behalf clearly established that, if at all, she was a co-owner of undivided interests. As such, the plaintiff's action was based on a false premise.

An owner of a land has the right of possession of it and hence is entitled to sue for ejectment of a trespasser. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. See *Thievendran v. Ramanathan Chettiar*⁽¹⁾, *Hameed v. Weerasinghe*⁽²⁾. The *jus vindicandi* or the right to recover possession is thus considered an important attribute of ownership in the Roman Dutch

Law (Voet. 6.1.2) – *Senanayake v. Silva*⁽³⁾. The owner of immovable property is entitled, on proof of his title to a decree in his favour for the recovery of property and for the ejectment of the person in wrongful occupation, *Pathirana v. Jayasundera*⁽⁴⁾. Where, in an action for declaration of title to land, the defendant is in possession of the land in dispute, the burden is on the plaintiff to prove that he has dominium. *Abeykoon Haminey v. Appuhamy*⁽⁵⁾, *Peiris v. Savunhamy*⁽⁶⁾. In an action for a declaration of title and for restoration to possession of land from which a plaintiff alleges he has been forcibly ousted, the burden of proving ouster is on the plaintiff. *Kathiramathamby v. Arumugam*⁽⁷⁾. The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant need not prove anything, still less, his own title. *Wanigaratne v. Juwanis Appuhamy*⁽⁸⁾.

The logic of the decisions cited is very simple. A Court cannot grant any relief to a plaintiff except on what he has pleaded and proved to the satisfaction of Court. The plaintiff in the instant case, has pleaded that the original owner of the land called “Gurukandura” died intestate leaving his sons Badderala and Kalu Banda, who amicably partitioned the same, with Badderala getting 2 pelas while Kalu Banda became the owner of the 3 pelas which is the subject matter of the action. However, the plaintiff failed to produce any partition plan or a deed in support of such amicable partition. When a land is allegedly amicably partitioned among co-owners, it is usual to execute cross deeds among themselves or at least all the co-owners should sign a plan of partition. – See *Githohamy v. Karanagoda*⁽⁹⁾. *Dias v. Dias*⁽⁹⁾. Separate possession alone does not constitute adverse possession for the purpose of establishing prescriptive title. See: *Simpson v. Omera Lebbe*⁽¹¹⁾. The basis on which the plaintiff has built her case is faulty.

The plaintiff laid claim to sole ownership of the land described in the schedule to the plaint on inheritance from her deceased parents, Kalu Banda and Punchi Menika and prescriptive possession. However, on the plaintiff's own evidence she had four other siblings.

She in fact had married out in deega. If so, being a Kandyan she would not be entitled to inherit her paternal paraveni property. She had called the children of her sisters, who testified that they, their grandmother or parents possessed the said land at different times. This evidence cuts completely across the plaintiff's pleadings. Midway through the trial on 4.11.88, after the plaintiff's case was closed and a defence witness was giving evidence, a feeble attempt has been made to salvage the plaintiff's case on the basis that the plaintiff was entitled to 1/3 share. In the first place, this issue should not have been allowed to go in, even though the defendant's counsel did not object. The basic principle being that a defendant should not be called upon to meet a new case or a new position taken by the plaintiff after he has already closed his case. Having permitted that issue, the learned District Judge was clearly in error in answering that issue in favour of the plaintiff, in view of the decisions cited above. The defendant has set up title to the land on certificate of sale 523 dated 8.5.1891, upon which Badderalala obtained title to the land referred to in D3. The plaintiff has not pleaded a single deed in her plaint. During the course of the trial, an attempt was made by the plaintiff to prove that the defendant was the Ande cultivator of the said field. It is significant that no mention of the defendant's status as ande cultivator is made in the plaint. The reason is clear. The documents P1, P3, P7 to P12 produced to prove that fact have been issued after the action was filed. The learned District Judge was in error in holding with the plaintiff on a misconception of the Law relating to the burden placed on the plaintiff, who was seeking a declaration of title, to plead and strictly prove her title. The plaintiff has failed to discharge that burden.

The Judgment of the District Judge is accordingly set aside. The plaintiff's action is dismissed with costs.

The appeal is allowed with costs fixed at Rs. 5000/-.