

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRILANKA

CA 908/96 F
DC Colombo 3039/ZL

MENIKGAMA ARACHCHIGE DON
ANANDA,

KELANIMULLA, ANGODA and
another

**SUBSTITUTE-DEFENDANT-
APPELLANT**

VS

KOLLUPITIYE MAHINDA
SANGARAKKITHA THERO,
Viharadhipathi and Trustee,
KELANIYA RAJA MAHA VIHARA,
KELANIYA

**SUBSTITUTE-PLAINTIFF-
RESPONDENT**

Before: A W A Salam J

COUNSEL: Dr SF A Cooray for the defendant-appellant and
G D C Weerasingha for the plaintiff-respondent.

Argued on: 21.07.2010

Written Submissions filed on: 13.09.2010.

Decided on: 23.04.2012.

A W Abdus Salam, J.

This is an appeal from the judgment dated 22.10.1996 of the district judge of Colombo declaring Kelani Raja Maha Vihara as the owner of the subject matter of the action and ejection of the 2nd defendant therefrom.

The plaintiff came to Court as the Chief Incumbent and Trustee of the Kelaniya Raja Maha Vihara and sought to vindicate the title to the subject matter of the action, to wit; the land and premises described in schedule 2 of the plaint, for and on behalf Kelaniya Raja Maha Vihara. As has been pleaded by the plaintiff the land set out in schedule 2 of the plaint is a portion of the land more fully set out in schedule 1.

According to paragraph 3 of the plaint the land called Muttettuwe Kumbura described in the 1st schedule to the plaint was granted and dedicated to the Kelaniya Raja Maha Vihara long time back. Thereafter, Kelaniya Raja Maha Vihara has prescribed to the said land. The land which is the subject matter of this action is more fully set out in schedule 2 of the plaint which is a portion of the larger land described in schedule 1 of the plaint. The 2nd defendant filed answer and admitted certain averments in the plaint while denying the rest.

Quite significantly, on the day fixed for the hearing of the action, the parties agreed as to the question of fact

and of law to be decided between them and they stated them in the form of issues and thereafter the court proceeded to determine the same. Whilst agreeing to the issues to be determined, the plaintiff for reasons best known to him, totally abandoned the claim as to the ownership of the land set out in schedule 2 of the plaint but framed his issues on the basis of leave and licence. It is important to note that in suggesting the issues the plaintiff has refrained from formulating the question as to whether the land described in schedule 2 of the plaint is a portion of the land described in schedule 1. It is well-established principle of law that the pleadings recede to the background once issues are framed under section 146 of the Civil Procedure Code. (Vide Hanaffi Vs Nallamma 1998 1 SLR page 73 at page 77).

The issues suggested by the plaintiff are as follows...

1. Is Kelaniya Raja Maha Vihara the owner of the land described in schedule 1 of the plaint?
2. As described in paragraph 4 of the plaint did the father of the defendant enter the land described in schedule 2 of the plaint, as a licensee with the permission of the Chief Incumbent?
3. Does the defendant wrongfully and unlawfully continue in occupation of the same causing damages to the plaintiff?
4. If the above issues are answered in the affirmative, is the plaintiff entitled to the reliefs sought in the plaint?

From the above issues suggested by the plaintiff, it is quite clear that the plaintiff has not made any attempt

to identify the land described in schedule 2 of the plaint as a portion of the larger land described in schedule 1. It is common knowledge that without establishing title to the larger land described in schedule 1 of the plaint, the plaintiff cannot succeed in establishing his title to the land described in schedule 2 of the plaint. It is of paramount importance in an action of this nature, to identify and establish the identity of the subject matter and the title by adducing clear evidence to obtain a declaration of title and ejectment of the defendant.

As has been contended by the learned counsel for the substituted 1st defendant appellant, there being no issue as to the title of the corpus of the action, namely the land described in schedule 2 of the plaint, it is hardly possible to identify the action as rei vindicatio suit and hence the learned district judge has clearly erred in law in granting a declaration of title to the Kelaniya Raja Maha Vihara.

As regards the alleged admission made by the defendant with regard to the ownership of the subject matter, it must be remembered that the plaintiff did not present his case on the basis that the defendant was an overholding lessee. On the contrary the plaintiff's case was that the defendant was the licensee whose occupation of the property in question had become wrongful by reason of his having asserted

rights to the subject matter. In such an eventuality, it is not possible to resolve the dispute on the basis that the defendant has admitted title.

The Viharadhipathy of a Buddhist temple, can sue for the recovery of temporalities of the temple only if the temple is exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance No 19 of 1931. On the other hand if a particular temple is not exempted from the operation of section 4 (1) then the resulting position would be that the Viharadhipathy of that temple has no right to institute a suit in respect of the temporalities of the temple.

The plaint in this case contains no averments to the effect that the Kelaniya Raja Maha Vihara is or is not exempted from the operation of section 4 (1). The plaintiff has not asserted in the plaint nor is there an admission or an issue that Kelaniya Raja Maha Vihara is exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance. The learned counsel for the plaintiff has submitted a Photostat copy of the book on Kandian Law and Buddhist Ecclesiastical Law written by T B Dissanayaka and A B Collin De Soysa to establish the exemption contemplated under section 4 (1) of the Buddhist Temporalities Ordinance. This in my opinion cannot constitute proof of the exemption.

In the case of *Dias versus Ratnapala Therunnanse* (1938) 40 NLR 41 it was held that an incumbent of a Buddhist temple, which is not exempted from the operation of section 4 (1) of Ordinance No. 19 of 1931, is not entitled to vindicate title to land belonging to the temple.

In terms of section 4 (1) of the Buddhist Temporalities Ordinance which is applicable to the present dispute, the management of the property belongs to a temple shall be vested in the person/persons appointed as trustee, unless the temple is exempted. Under section 4 (2) of the Ordinance, if the management of the property belonging to a temple is exempted from the operation of section 4 (1) but not exempted from the operation of the entire Ordinance, shall be vested in the viharadhipati of such temple. In this matter the plaintiff neither pleaded nor did he put in issue the question relating to the exemption under section 4 of the Ordinance. This being a pure question of law, the learned counsel for the appellant has raised the question as to the maintainability of the plaintiff's action. In my opinion, the objection raised with regard to the maintainability of the plaintiff's action is without substance.

The plaintiff sought a declaration of title and ejectment of the 2nd defendant from the land and premises described in the second schedule to the plaint which is

a portion of the land described in 1st schedule.

It is trite law that the burden in a rei vindicatio action is on the plaintiff to prove ownership to the subject matter of the action. More so, when the defendant is in possession of the corpus.

Recently in the case of Dharmadasa Vs Jayasena 1997 (3) SLR 327 this court was reiterative and persistent in emphasizing that in an action for declaration of title, the burden is always on the plaintiff to establish the ownership as pleaded. It means that the defendant is under no obligation to prove anything in such an action. If the plaintiff fails to discharge the burden of proof as expected of him, his action for the vindication of title deserves no favourable consideration.

As has been pointed out by the learned counsel for the contesting defendant the case for the plaintiff as averred in the plaint was that the land in the 1st schedule belongs to the plaintiff and the land in the 2nd schedule was a part of that land. The plaintiff has failed to prove that the land described in the 1st schedule to the plaint was vested in the plaintiff. He has not even put in issue, or even attempted to prove that the land described in the 2nd schedule (which is the subject matter of the action) is part of the land described in the 1st schedule. He had given no evidence whatsoever to prove it.

Had the learned district judge considered the issues in the light of the above legal principles, he would have had no alternative but to dismiss the plaintiff's action for want of proof of title to the subject matter and competence of the plaintiff to file action. As such this court is bound in law to bring the impugned judgment consistent with the principles of law enunciated hereinbefore. In the circumstances, this appeal is allowed and judgment of the district judge set aside. To avoid a miscarriage of justice taking place, the learned district judge is directed enter a decree of dismissal of the plaintiff's action.

There shall be no costs.

Judge of the court of appeal

Kwk/-