

**DEHIWELA-MT. LAVINIA MUNICIPAL COUNCIL**  
**v**  
**FERNANDO AND OTHERS**

COURT OF APPEAL  
EKANAYAKE, J.  
GOONERATNE, J.  
CA 214/97  
DC 1139/M  
MAY 23, 2007

*Civil Procedure Code – section 154 – Evidence Ordinance section 74– section 83– Presumption that Surveyor General's plans are duly made – Rejecting Surveyor General's plan for non compliance of section 154 – Validity? Ingredients necessary for reception of fresh evidence or a new trial.*

The plaintiff-respondent sought a declaration of title to the land in question. The defendant-appellant's position was that it forms a part of a crown land. The Surveyor General's plan/report was rejected since it was not produced in the proper way. The trial Judge held with the plaintiff-respondent.

**Held:**

- (1) In terms of section 74 of Evidence Ordinance Surveyor General's plan is a public document and section 83 states that, there is a presumption that Survey General's plans are duly made and accurate.
- (2) Court cannot reject the plan and report merely because of non compliance under section 154 of the Civil Procedure Code.
- (3) The presumption under section 83 in favour of such plans/surveys extend to everything necessary to be done in order to make the survey/plan a faithful drawing and manuscript of the land surveyed.
- (4) In a *rei vindicatio* action, plaintiff must prove title and establish his title, as a declaration cannot be granted merely because the defendant's title is poor or not established. Title and identity are important matters to be established to succeed in a *rei vindicatio* action.

*Per* Anil Gooneratne, J.

"It is apparent that, the learned trial Judge has misdirected himself on the plan and report submitted by the Surveyor General. In fact the Surveyor General's

witness (if called) would be an essential witness not to prove title of state as such but to ensure the identity of the land in dispute is considered from the proper perspective, to either exclude state property or include same within the disputed area of land".

#### Held further

(5) In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled.

- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- (2) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.
- (3) The evidence must be such as is presumable to be believed or in other words it must be appropriately credible although it need not be incontrovertible.

The above conditions may not be exhaustive in a way and also not imperative, but certainly could be used to guide Court in cases where a retrial is ordered".

*Per Anil Gooneratne, J.*

"It is my view that the Surveyor General or his authorized representative's evidence both oral and documentary would be appropriately credible and would have an important influence on the result of the case."

**APPEAL** from the judgment of the District Court of Mt. Lavinia.

#### Cases referred to:

- (1) *Surveyor General v Zylva* – 12 NLR 53.
- (2) *In Re Juwanis Appuhamy* – 65 NLR 167.
- (3) *Beatrice Dep v Lalani* – 1997 – 3 Sri LR 379.

*W. Dayaratne* for 1st defendant-appellant.

*Dr. Jayatissa de Costa* with *C. Siriwanasa* and *T. Jayatilake* for respondent.

*Cur.adv.vult.*

July 26, 2007

#### **ANIL GOONERATNE, J.**

This was an action instituted in the District Court of Mt. Lavinia seeking a declaration of title to the premises described in the 3rd schedule to the Amended Plaintiff dated October 1981, and for

ejection of the defendants and damages in a sum of Rs. 100,000/-. The appeal arises from the judgment of the District Court dated 17.02.1997 entered in favour of the plaintiffs.

The plaintiff-respondent supports his case for a declaration of title to the land shown in the 3rd schedule to the amended Plaintiff, according to the chain of title referred to in paragraphs 8 - 20 of the amended Plaintiff. Defendant-appellant's position is that the land described as above by the plaintiff form part of a crown land described as Galkissawatta and the chain of title set out in the amended Plaintiff has no bearing on the said crown land (shown in the schedule to the answer), and at the hearing of this appeal learned Counsel for the appellant *inter alia* contended and emphasized that title and identity of land has not been proved and that the plaintiff was not in possession of divided portion of land.

At the trial before the District Court 11 issues were raised. The plaintiff-respondent contends that he is the owner of the land described in the 3rd schedule to the amended plaintiff (assessment No. 368 Galle Road, Mt. Lavinia) in extent of 0.70 perches and that the 1st and 2nd defendants illegally dispossessed him on 14.10.1979. The position of the defendant-appellant is that the said premises No. 368 referred to in the amended plaintiff is a part of lot 8 to the land described in the schedule to the amended answer called Galkissawatta which is a plot of land acquired by the State by certificate dated 9.2.1919 for the Sanitary Board and successor to the said Board is the 1st defendant (as in paragraphs 11 of the amended Answer). It has been pleaded in the amended Answer that a commission should be issued to a Court Commissioner to ascertain the identity of the land as in paragraph 13.

Trial in this case began with the framing of issues on 21.11.90 and the evidence had been led from time to time with further trial being postponed for several dates with the close of the plaintiff's case on 9.6.94. Further trial for the defendant's case had been put off for 22.9.94 on which date District Judge was on leave. The Journal Entry of 26.1.95 gives an indication that a commission had been moved on the Survey General only on that date. The commission papers of 2.6.95 had been submitted to court and the Survey General had received same on 7.6.95. The Survey General had returned the commission on 24.7.95 and the District Court seal on same is dated

27.7.95. The Survey General's survey plan and report is filed of record (which was marked at the trial as V1 & V1a). It would be necessary to lead oral evidence of the witness of the Survey General's Department. If oral evidence was placed before the Original Court parties could have examined the witness and elicited more details, although V1 & V1a were marked in evidence.

On perusing the Petition of Appeal I find that one of the points urged therein is that the defendant-appellant was deprived of the opportunity of presenting his case more particularly the District Court had not given an opportunity to the defendants to call the Survey General as a witness. (as alleged in paragraph 13 of the Petition of Appeal). Instead compelled the defence lawyer to close the case for the defence, as there were no other witness available for the defendants. However the Journal Entry/proceedings of 22.7.96 does not record the facts alleged as above, and by looking at the record I cannot find any refusal by court, to call the witness from the Survey General's Department on a subsequent date. The learned Counsel for the appellant repeatedly submitted to this Court the difficulty that had to be faced by the defendants of not being able to call the Survey General's representative to give evidence.

Whatever it may be, I wish to observe that in the case in hand, it would be important to ascertain the fact as to whether the disputed area of land is exclusively private property or land which belongs to the crown and by it's available procedure vested with the 1st defendant. In these circumstances the Trial Court Judge's finding on the above point and evidence in the case will have to be examined very closely.

The District Judge's finding are as follows. The learned District Judge concluded that the land in dispute belongs to the plaintiff. The defendant has not been able to produce any document to prove that the land in question was acquired by the State and vested in the 1st defendants, other than by the Survey General's plan and report marked as V1 & V1A. Court observed that according to V1 (plan) the land in dispute is part of lot 8 in p.p. 16821, and that this land is claimed by the State. According to 1D1 assessment No. 368 does not fall within the land in question. It is also observed that the defendant had not called any witness to clarify the above position. To support the title of the plaintiff the learned District Judge refers to evidence of

witnesses who testified to deeds marked 'P4' to 'P10' and plan 'P6' with several other documents. The judgment also refers to the fact that the 1st defendant had been responsible for forceful occupation of the land.

To deal with the evidence very briefly witness Grero for the plaintiff states that her father took the premises on rent from B.J. Perera in 1976 and rent paid to Mr. Perera. She continued to be tenant up to 1979 and the 1st defendant took over the premises and at present continues to do business under the 1st defendant. The other witness Munasinghe from the 1st defendant Council who was Chief Revenue Officer confirms that the 1st defendant Council took over the premises on the direction given by the Mayor. There was no court order to take over the premises and entered the upstairs of these premises by force opening the door. The other witness Fonseka explained to court that his task was to settle the issue relating to these premises and produced marked 'P3' the recommendation to release the premises, but this recommendation was not put into operation. Thereafter the plaintiff gave evidence and produced 'P4' - 'P10'. Plaintiff also produced 'P6' the plan relied upon by him. In cross examination of the Surveyor on 'P6' he admitted 'P6' was prepared without carrying out a survey, without visiting the site and minus the field notes, but relied on a building plan.

The learned Counsel for the plaintiff-respondent contended *inter alia* that plan 'P6' was admitted in evidence without any objection and invited this Court to accept the position of the Surveyor who gave evidence for the plaintiff may be to prove the identity of the land. Since the document was led in evidence without any objection I would accept the position of the learned Counsel for the respondent on that aspect only. It was also submitted that the Survey General's plan and report should be rejected since it was not produced in the proper way in terms of the provisions of the Civil Procedure Code more particularly section 154 of the Code. I wish to observe that in terms of section 74 of the Evidence Ordinance Survey General's plan is a public document and section 83 of the Evidence Ordinance there is a presumption that Survey General's plans are duly made and accurate. In the circumstances I would observe that Court cannot reject the plan and report marked as 'D1' & 'D1A' merely because of non-compliance with section 154 of the Civil Procedure Code.

In *Surveyor General v Zylva*<sup>(1)</sup> the presumption under the section in favour of such plans or surveys extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the land surveyed.

In a *rei vindicatio* action plaintiff must prove and establish his title, and a declaration cannot be granted merely because defendant's title is poor or not established, *Juwanis Appuhamy's case*.<sup>(2)</sup> As such title and identity are important matters to be established to succeed in a *rei vindicatio* action.

In the circumstances having considered all the material placed before the Original Court it is apparent that the learned District Judge has misdirected himself on the plan and report submitted by the Survey General. In fact the Survey General's witness (if called) would be an essential witness not to prove title of State as such but to ensure the identity of the land in dispute is considered from the proper perspective, to either exclude State property or include same within the disputed area of land.

It is my view that reception of fresh evidence is essential to ascertain the truth of the matter. *Beatrice Dep v Lalan*<sup>(3)</sup>.

In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled:

- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.**
- (2) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.**
- (3) The evidence must be such as is presumable to be believed or in other words it must be apparently credible although it need not be incontrovertible.**

The above conditions may not be exhaustive in a way and also not imperative, but certainly could be used to guide court in cases where a re-trial should be ordered. In the present case it is my view that the Survey General or his authorized representatives evidence both oral and documentary would be apparently credible and would have an important influence on the result of the case. In the

circumstances I would set aside the Judgment of the District Court and direct that a re-trial be held. The Registrar of this Court is directed to forward the record in Case No. 1139/M to the District Court of Mount Lavinia.

**EKANAYAKE, J.** - I agree.

*Appeal allowed.*

*Trial de novo ordered.*