

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal from the
Judgement of the High Court of Civil
Appeal of the Western Province holden in
Gampaha.

Pannala Appuhamilage Kosala Surin
Wickramasinghe
Appearing by his next friend Panapola
Kankanamlage Seetha Kumarihamy of
Nawathalwatte, Thalwatte.

Plaintiff

Vs

SC Appeal: 11/2013
SC/HCCA/LA: 213/2012
WP/HCCA/GPH/32/2008
DC Gampaha: 40625/P

1. Pannala Appuhamilage Sumanaweera
Wickramasinghe
2. Pannala Appuhamilage Karunaratne
Wickramasinghe
3. Pannala Appuhamilage Subadra
Wickramasinghe
4. Pannala Appuhamilage Vinusha Lakmal
Wickramasinghe
5. Samarasinghe Arachchige Somadasa
6. H.P. Rathnawathi
7. Praveen Wickramasinghe
All of Thalangama, Ambepussa.

Defendants

AND

Samarasinghe Arachchige Somadasa
Thalangama, Ambepussa.

5th Defendant-Appellant

Vs

Pannala Appuhamilage Kosala Surin
Wickramasinghe

Appearing by his next friend Panapola
Kankanamlage Seetha Kumarihamy of
Nawathalwatte, Thalwatte.

Plaintiff-Respondent

1. Pannala Appuhamilage Sumanaweera
Wickramasinghe
 2. Pannala Appuhamilage Karunaratne
Wickramasinghe
 3. Pannala Appuhamilage Subadra
Wickramasinghe
 4. Pannala Appuhamilage Vinusha Lakmal
Wickramasinghe
 6. H.P. Rathnawathi
 7. Praveen Wickramasinghe
- All of Thalangama, Ambepussa.

Defendants-Respondents

AND NOW BETWEEN

Samarasinghe Arachchige Somadasa
Thalangama, Ambepussa.

**5th Defendant-Appellant-Petitioner/
Appellant**

Vs

Pannala Appuhamilage Kosala Surin
Wickramasinghe

Appearing by his next friend Panapola
Kankanamlage Seetha Kumarihamy of
Nawathalwatte, Thalwatte.

Plaintiff-Respondent-Respondent

1. Pannala Appuhamilage Sumanaweera
Wickramasinghe (deceased)

1(a) Gamaralage Sumanawathie

1(b) Kapila Rathnaweera

1(c) Thamara Kumari Rathnaweera

2. Pannala Appuhamilage Karunaratne
Wickramasinghe (deceased)

2(a) Anoj Indika Wickramasinghe

3. Pannala Appuhamilage Subadra
Wickramasinghe

4. Pannala Appuhamilage Vinusha Lakmal
Wickramasinghe

6. H.P. Rathnawathi

8. Praveen Wickramasinghe

All of Thalangama, Ambepussa.

Defendants-Respondents-Respondents

Before: Buwaneka Aluwihare, PC. J.,
Murdu N.B.Fernando, PC. J. and
Yasantha Kodagoda, PC. J.

Counsel: S.N. Vijithsingh for the 5th Defendant-Appellant-Appellant.
Dr. Sunil Cooray for Plaintiff-Respondent-Respondent and 1st and 4th Defendant-
Respondents-Respondents.

Argued on: 10-03-2020

Decided on: 17.12.2021

Murdu N.B. Fernando, PC. J.,

The 5th Defendant-Appellant-Petitioner/Appellant (“the 5th defendant/appellant”) came before this Court, being aggrieved by the judgement of the Civil Appellate High Court of the Western Province, holden in Gampaha (“the High Court”) dated 17th February, 2012.

By the said judgement, the High Court affirmed the judgement of the District Court of Gampaha dated 03rd March, 2008 permitting the partitioning of the corpus and dismissed the appeal of the 5th defendant.

To state the facts of this appeal in brief, the Plaintiff-Respondent-Respondent (“the plaintiff”) filed action in the District Court, to partition a land called and known as Beligahawatta in an extent of about 3 acres in the following manner:

The land	- plaintiff	- 24/32 shares
	- 4 th defendant	- 15 perches
	- 7 th defendant	- 8/32 shares less 15 perches
The house	- plaintiff	- 5/9 shares
	- 1 st , 2 nd , 3 rd and 7 th defendants	- 1/9 share each

The plaintiff pleaded that he was a minor, represented by his next friend, his mother and that the aforesaid rights and interests to the land and the house standing thereon, devolved on him primarily from his father Awin Wickramasinghe, by virtue of a deed bearing No 975 dated 15-05-1995 (P6).

The plaintiff also pleaded that the said Awin Wickramasinghe (plaintiff’s predecessor in title) obtained title to the said land and the tiled house on the said land from Seditis Appuhamy, Awin Wickramasinghe’s father, on two deeds executed in 1964 and in the manner described therein. The plaintiff named the 1st, 2nd, 3rd, 4th and 7th defendants as persons who have rights and interests in the said land and house as aforesaid.

The plaintiff further pleaded that the 5th defendant and the 6th defendant- respondent- respondent (spouse of 5th defendant) were made parties to this action, as the said two defendants who had no interest in the corpus were in illegal possession of the house standing on the said land.

The 5th defendant in the statement of claim filed before the District Court, took up the position that he was in lawful occupation, having obtained title to the house standing on the corpus, from the very same Awin Wickramasinghe by deed bearing No 8527 dated 27-11-1995 (P8) and moved for his rights under the said deed. However, in the said statement of claim the 5th defendant did not specify the exact interest he is said to have acquired on the house, upon the said deed bearing No. 8527.

In an amended statement of claim filed, the 5th defendant changed his assertion to prescriptive rights to the house and the appurtenant land and moved for dismissal of the plaint upon the basis that the corpus was not properly depicted in the preliminary plan and was not identified. The 5th defendant by taking up the new position abandoned his claim to the house based upon the deed bearing No 8527 dated 27-11-1995 (P8).

At the trial the 5th defendant raised issues only with regard to the identity of the land to be partitioned. Hence, the 5th defendant did not pursue the claim of prescriptive possession upon the house and the appurtenant land, the new ground taken up in its amended statement of claim.

The District Court permitted the partitioning of the land and the house standing thereon and gave judgement, upon analyzing the evidence led before court and on being satisfied of the identity of the corpus and the chain of title of the parties to the land and the house to be partitioned.

The claim of the 5th defendant was also dismissed by the district judge. The judgement referred to the many contentions taken up by the 5th defendant, especially the admission to court that he is a trespasser and walked into an abandoned house. Thus, the district judge cast doubts with regard to the evidence given by the 5th defendant, considered him as an untrustworthy witness and rejected the evidence and dismissed the 5th defendant's case.

Being aggrieved by the said judgement, the 5th defendant appealed to the High Court. The High Court dismissed the appeal and upheld the judgement of the District Court.

The 5th defendant thereafter, invoked the jurisdiction of this Court and obtained Leave to Appeal, on three Questions of Law referred to in paragraph 12 (v), (vi) and (vii) of the Petition.

The said Questions of Law are as follows: -

- (v) Whether the predecessor in title of the petitioner was left with any rights (1/9) in the house and soil covered by the said house, after transferring his rights by deed bearing No 975 dated 15-05-1995?
- (vi) Whether the said (1/9) rights to the house and the soil covered by the said house was transferred to the petitioner by deed bearing No 8527 dated 27-11-1995?
- (vii) Whether the Honorable Judges of the High Court of Civil Appeal have erred in law as well as in facts in their failure to take into consideration of the fact that the trial judge had failed to investigate title of the parties which had resulted a miscarriage of justice?

From the foregoing Questions of Law, it is observed that the 5th defendant is traversing new terrain. He has abandoned the claim on prescription and the challenge to the identity of the corpus, the basis or the grounds taken up in the amended statement of claim filed and at the trial court to move for dismissal of the partition action and is now presenting an entirely a new case.

The 5th defendant pivots this appeal upon **deed bearing No 8527 dated 27-11-1995 (P8)**, an assertion which he did not rely upon or pursue before the trial court [though in his initial statement of claim, a passing reference was made to the said deed]. Having abandoned the claim on prescriptive rights to the house the 5th defendant is founding this appeal on the rights he claims from Awin Wickramasinghe. However, it is observed that the 5th defendant is only claiming **1/9th right to the house and the soil covered by the said house**. Thus, the 5th defendant has *abandoned his initial claim to the entire house and the appurtenant land of the house* and confines it only to 1/9th right to the house and the soil covered by the said house, an entirely a new ground not adverted to before the District Court.

This Court has time and again held, that a party cannot be permitted to present in appeal a case different from that presented before the trial court, where matters of fact are involved which were not in issue at the trial.

In **Candappa nee Bastian v. Ponnambalampillai [1993] 1 Sri LR 184** at page 189 this Court observed,

“..... the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to Section 150 of the Civil Procedure Code. It reads thus,

The case enunciated must reasonably accord with the party's pleading. i.e. plaint or answer, as the case may be and no party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet.

A fortiori, a party cannot be permitted to present in appeal a case different from the case presented before the trial court, except in accordance with the principles laid down by the House of Lords in Tasmania [(1890) 15 App. Cases 233] and followed by Dias, J. in Setha v. Weerakoon 49 NLR 225 at pages 228 and 229..." (emphasis added)

Thus, G.P.S. de Silva, J., (as he then was) in the afore said case emphatically observed, that in appeal an entirely a new case cannot be presented. I fully concur with the above observations.

Hence, in my view the 5th defendant who abandoned his initial challenge to the partition action based upon the deed bearing No 8527 dated 27-11-1995 (P8) and relied upon a new ground, a new arena, i.e., of prescriptive rights to the entire house and to the appurtenant land therein, should not be allowed or permitted to resurrect the deed P8 and present a new case before this Court.

Moreover, it is observed that the 5th defendant not only resurrected the deed P8, but varied its stance and contention, from the right to use and possess the entire house and the appurtenant land therein, to one of **1/9th share of the house and the soil covered by the said house**, as enunciated in the questions of law raised before this Court.

The instant appeal in my view, should be evaluated by this Court, not upon the new contention put forward by the 5th defendant but on the evidence presented before the District Court, in order to ascertain whether the trial judge misdirected himself when investigating title. This Court should also consider whether the analysis of the trial judge pertaining to investigation of title resulted in a *miscarriage of justice* as averred to by the 5th defendant or whether the trial judge has fully filled his obligations and arrived at a correct decision, as contemplated by Section 25 (1) of the Partition Law No 21 of 1977 as amended ("the Partition Act").

Section 25(1) of the Partition Act reads as follows: -

".... the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine

all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which the action relates... ”

The aforesaid provision and the similar provisions in the earlier enactments i.e. the Partition Act of 1951 and the Partition Ordinance, have been analyzed by this Court, extensively and the duty of the trial court to examine and investigate title, has been time and again greatly emphasized [see **Juliana Hamine v. Don Thomas (1957) 59 NLR 546; Cooray v. Wijesuriya (1958) 62 NLR 158; Jane Nona v. Dingiri Mahathmaya (1968) 74 NLR 105**]

Nevertheless, our Courts have also held that in investigating title, balance of probability is the standard of proof and no higher level of proof is required than in any other civil suit. The ratio of the decisions of the Appellate Courts have been, that a trial court could investigate title, only within the limits of pleadings, admissions and issues and evidence led before court and the courts should not go on a voyage of discovery [see **Cynthia de Alwis v. Marjorie de Alwis and others (1997) 3 Sri LR 113; Karunaratne v. Sirimalie (1951) 53 NLR 444; Thilagaratnam v. Athpunathan and others (1996) 2 Sri LR 66**].

Thus, an appeal pertaining to a partition matter ought to be considered upon the four corners of the afore mentioned legal principles to ascertain whether justice has been meted out or whether a miscarriage of justice has taken place *viz-a-viz* the parties to the partition application.

However, I do not have to delve into the aforesaid legal provisions or the change of stance, of the 5th defendant or even the legality or validity of presenting a materially different case in this appeal, in view of the three questions of law already formulated. Hence, I would limit the scope of this appeal to the questions of law raised before this Court and would proceed to answer the said questions only.

The 1st question of law refers to the **deed bearing No 975 dated 15-05-1995 (P6)**. This is the deed by which the *plaintiff claims rights and interests to the land and the house standing thereon*, from his father Awin Wickramasinghe.

The 5th defendant did not challenge the said deed or the rights and interests emanating from the said deed, which devolved on the plaintiff in respect of ***the land to be partitioned***. The 5th defendant's challenge or grievance is only in respect of ***the house standing on the said land***.

In a nutshell, the 5th defendant's contention is that while the land to be partitioned was transferred to the plaintiff by Awin Wickramasinghe i.e., plaintiff's father and predecessor in title,

that 1/9th share of the house standing on the said land was retained by Awin Wickramasinghe and transferred to the 5th defendant thereafter.

The 5th defendant also contends that the said transfer was by a deed executed subsequent to the afore said deed (P6) referred to in the 1st question of law, i.e., the deed bearing **No 8527 dated 27-11-1995 (P8)** by which 1/9th right to the house and the soil covered by the said house was conveyed to the 5th defendant. The 2nd question of law raised before this Court pertains to the said assertion.

The 3rd question of law posed to this Court is the correctness of the district judge's finding, with regard to investigation of title in the first instance and whether on the evidence led and the material before court, a miscarriage of justice has taken place viz-a-viz the 5th defendant.

In order to answer the aforesaid questions and to ascertain whether a miscarriage of justice has taken place or not, the primary factor to be examined, in my view is what exactly was transferred by Awin Wickramasinghe by the said two deeds P6 and P8. Undoubtedly, it is his rights and interests pertaining to the land and the house standing thereon.

Thus, I would examine Awin Wickramasinghe's title to the land and the house standing thereon in the first instance.

In the year 1964, Awin Wickramasinghe received title to the said land and the house standing thereon, from his father Sederis Appuhamy on two deeds bearing No 3926(P1) and 3927(P2). Whilst Awin Wickramasinghe, obtained title to 3/4th share of the corpus from the deed bearing No 3926 (P1), Awin Wickramasinghe together with his nine siblings received title to the house standing thereon, from their father, upon deed bearing No.3927 (P2). This factor is further evidenced by the schedule to the two deeds. It is observed that the schedule to deed bearing No. 3926 (P1) denotes, that it is the '*land only excluding the tiled house*' that was transferred to Awin Wickramasinghe whereas the schedule to deed bearing No 3927 (P2) refers to the '*tiled house*' being bestowed upon Awin Wickramasinghe and his nine siblings by their father, Sederis Appuhamy.

Thus, it is apparent that the house standing upon the corpus is co-owned by the nine siblings, each sibling being entitled to 1/9th share, including Awin Wickramasinghe.

Therefore, I see no ambiguity with regard to the undivided property that devolved on Awin Wickramasinghe in 1964, upon the two deeds, viz 3/4th share of the land and 1/9th share of the tiled house standing on the said land.

As discussed earlier, the 5th defendant does not dispute the plaintiff's predecessors title to the land and to the house nor dispute plaintiff's right to the land either.

The matter in issue or the bone of contention in this appeal, is the rights and interests pertaining to the house standing on the said land. Did Awin Wickrmasinghe transfer his **interests in the house together with the land to the plaintiff by deed P6** or **did he retain the rights to the house and transfer it subsequently by deed P8 to the 5th defendant?**

In other words, was it only the **land excluding the house** that was gifted to the plaintiff by Awin Wickrmasinghe by P6 or was it the **land together with the house** that was gifted to the plaintiff by P6?

To ascertain an answer to the said question, I wish to look at the 'property' transferred, as referred to in the deeds and defined and reflected more fully in the schedule of the deeds, marked and produced before the trial court.

In the year 1985, [10 years prior to the execution of the deed bearing No 975 dated 15-05-1995 (P6)] Awin Wickrmasinghe *transferred the very same corpus to the plaintiff, subject to his life interest*, by a deed bearing No 5978 (P4) dated 12-02-1985. The schedule to the said deed (P4) refers to the property transferred to the plaintiff, as '**the land and everything standing thereon**'. Thus, it is observed, in 1985, Awin Wickrmasinghe transferred *his rights and interests in the land and everything standing thereon*, to the plaintiff, subject to his life interest. i.e., 3/4th share of the land and 1/9th share of the titled house standing thereon.

Awin Wickrmasinghe revoked the above referred deed of gift (P4) on 15-05-1995 [by deed of revocation bearing No 974 (P5)] and executed the aforesaid (P6) deed bearing No 975 on the same date i.e. 15-05-1995 and transferred the property *free of all encumbrances* to the plaintiff. In the deed of revocation (P5) and in the new deed of gift (P6) executed on 15-05-1995, the schedules refer to the property transferred as '**land, plantation and everything standing thereon**.'

Thus, it is observed, Awin Wickrmasinghe who in the year 1985 transferred *the land and everything standing thereon* to the plaintiff, subject to his life interest, transferred the very same property i.e. *the land, plantation and everything standing thereon* to the plaintiff, (without holding on to his life interest) free of all encumbrances in the year 1995.

Hence, the contention of the plaintiff before this Court was that in 1995 Awin Wickrmasinghe transferred the *land together with the plantation and everything standing thereon*

which included his rights and interests to the house standing on the said land to the plaintiff vide deed (P6) bearing No 975 executed on 15-05-1995. Conversely, the contention of the 5th defendant was that **only the land** was transferred to the plaintiff by the said deed P6 and not the rights to the house standing thereon.

Upon a plain reading of the deed P6, it is very clear and in my view there is no ambiguity that when Awin Wickramasinghe conveyed his undivided rights and interests to the land, plantation and everything standing thereon to the plaintiff, his intention was to transfer his 1/9th share of the tiled house (standing on the land) together with the 3/4th share of the land, to the plaintiff, his son. Hence, I see merit in the aforesaid assertion of the Counsel for the plaintiff.

The said position is also supported by case law of this Court.

In **Kanagasabai v. Mylwaganam (1976) 78 NLR 280 at page 288** Shraavananda, J. (as he then was) observed as follows: -

“Our law does not recognize ownership of a house or building apart from the land on which it stands. The building loses its independent existence and becomes part of the land on which it is constructed. The principle of accession in the case of buildings is embodied in the maxims, ‘*Omne quad inaedificatur solo cedit*’ (All that is built on the soil belongs thereto) and ‘*Superficies solo cedit*’ (Things attached to the earth go with the immovable property). **Thus, land, in its signification means not only the surface of the ground, but also everything built on it.** *Cujus est solum ejus est usque ad caelum* (He who possesses land possesses also that which is above it). **On a conveyance of land, all buildings erected thereon pass with the land, even though there is no specific mention of such buildings in the deed of transfer.** Thus, ‘land’ in our law, includes houses and buildings, and when the legislature employs the term ‘land’ in any statute, the word is presumed to include ‘house and buildings’, unless there are words to exclude ‘houses and buildings’.” (emphasis added)

From the foregoing passage, it could undoubtedly be stated, that **on a conveyance of land, all buildings erected thereon pass with the land**, unless it is specifically excluded.

As we are very much aware, the general principles governing the interpretation of a deed is that the deed must be considered as a whole and effect given to the intention of the parties. [see **Mohammed v. Mohamad 30 NLR 225; Jayasundera v. Wijetilake and others [2006] 3 Sri LR 401**].

Hence, it is apparent that the contention of the plaintiff as discussed, is in line with and supported by the ratio of a multitude of cases of this Court as well.

Contrary to the aforesaid contention of the plaintiff, the assertion of the Counsel for the 5th defendant before us, was that by deed bearing No 8527 dated 27-11-1995 (P8) [which was executed subsequent to P6] Awin Wickramasinghe transferred *his parental inheritance interests on the house standing on the defined land* to the 5th defendant. Thus, I wish to consider the said proposition now.

It is observed that the *schedule* to the said deed (P8) only refers to Awin Wickramasinghe's *parental inheritance rights to the house*. It does not refer to 1/9th share of the house being his right and interest to the house, as referred to in the questions of law raised before this Court. Moreover, it does not refer to the house being co-owned [by Awin Wickramasinghe with nine others] or that Awin Wickramasinghe's parental inheritance rights and interest to the property is only for an undivided portion or 1/9th share of the house standing on the land described therein.

This deed (P8) in the *recital and the habendum* too, refers to *parental inheritance only* and does not refer to the manner and mode in which Awin Wickramasinghe received title to the said house. It does not refer to the deed P2 i.e., the 1964 deed bearing No. 3927 by which Awin Wickramasinghe received titled to the said house from his father together with his nine siblings. It does not refer to the property transferred, as a *co-owned property* (with nine others who are his siblings and who have equal rights to the house) or that his rights and interests in the house is only a 1/9th share, as referred to in the questions of law.

Further, it is observed that the deed P8, by which the 5th defendant claims title from Awin Wickramasinghe is an instrument with bare facts and minimal details, unlike P6 executed six months earlier also by Awin Wickramasinghe from whom the plaintiff claims title. As discussed earlier, P6 specifically refers to the manner and mode in which Awin Wickramasinghe obtained title to the 'land, plantation and everything thereon' whereas P8, is silent of such fact and only refers to 'parental inheritance rights to the house'.

It is also a matter of interest, that by another deed bearing No 7753 dated 07-10-1995 (P3), four of Awin Wickramasinghe's siblings transferred their rights and interests [i.e. 1/9 x 4= 4/9] to the

plaintiff. This deed was executed after P6 and prior to P8. In the aforesaid deed (P3), the schedule specifically refers to the property transferred to the plaintiff being **4/9th share of the tiled house standing on the said land.**

Hence, it is observed, that consequent to Awin Wickramasinghe transferring his rights to the land, plantation and everything standing thereon (by P6) to the plaintiff, that four of Awin Wickramasinghe's siblings (by P3) transferred their share, i.e., 4/9th rights and interests to the tiled house standing on the defined land to the plaintiff which entitled the plaintiff to 5/9th share of the house, viz 1/9th share upon P6 and 4/9th share upon P3.

As stated earlier, the 5th defendant did not challenge any of the deeds marked in evidence and specifically the deed P6 executed in May 1995 as well as P3 executed in October 1995. His contention before this Court was consequent to P6 and P3, he received title to *Awin Wickramasinghe's parental inheritance to the tiled house standing on the land defined in the said deed* by P8 executed in November 1995.

I do not see merit in the said contention of the 5th defendant that he is entitled to 1/9th share of the house in issue in this appeal, for the below mentioned reasons.

Firstly, the deed bearing No 8527 (P8) does not refer to Awin Wickramasinghe's rights and interests pertaining to the house or him being a co-owner of the said house together with his nine siblings or that Awin Wickramasinghe received co-owned title to the said house in the year 1964, from his father Sediris Appuhamy upon deed bearing No 3927 (P2).

Secondly, the said deed P8 only refers to *parental inheritance to the tiled house* whereas, from the afore discussed facts it is amply clear that Awin Wickramasinghe and his siblings received title to the said house not upon parental inheritance but from their father and that too, upon a notarially executed deed (P2) in the year 1964.

Thirdly, the deeds P4, P5 and P6 [i.e., the initial transfer of the land and the house standing thereon to plaintiff by Awin Wickramasinghe subject to his life interest in 1985, revocation of the said deed in 1995, and the subsequent transfer without any reservations and free of any encumbrances in 1995] amply demonstrate that the rights and title to the land together with the house standing thereon clearly passed to the plaintiff from his predecessor in title on 15th May, 1995.

Hence, when Awin Wickramasinghe is said to have transferred his *parental inheritance to the 5th defendant* (by P8) in November 1995, Awin Wickramasinghe was not entitled to any rights

or interests to the land or the house standing thereon, as he had already denuded himself of all rights and interest to the corpus.

Thus, my considered view is that Awin Wickramasinghe did not convey any right or interest to the 5th defendant by P8 i.e., deed bearing No 8527 executed on 27-11-1995, since on such date, Awin Wickramasinghe did not possess or have any right or interest to the tiled house standing on the corpus in issue in this appeal.

Therefore, upon the material presented before the District Court especially, the deeds P3, P4, P5, P6 and P8, I see no merit in the assertion of the 5th defendant that the trial judge misdirected himself when investigating title of the parties before Court or that a miscarriage of justice took place as contended by the 5th defendant.

Let me now consider this appeal from another perspective i.e., **soil rights**.

Based upon P8, another contention put forward by the 5th defendant before this Court was in addition to his 1/9th share of the house that he was entitled to his acquired rights to the corpus or in other words his entitlement to *soil rights or soil covered by the house standing on the defined land*. He relied upon two judgements of this Court to substantiate his argument, namely, the case of **Vincent and others v. James and others [1982] 1 Sri LR 332** and the case of **Ranasinghe v. Ariyaratne Epa and others (1969) 74 NLR 153**.

The aforesaid argument with regard to *soil rights* in my view, has no bearing on the instant appeal for two reasons.

Firstly, as discussed in this judgement, no right flows or devolves upon the 5th defendant on the deed bearing No 8527(P8).

Secondly, the said **Vincent's case** has no relevance to the instant appeal and can be distinguished as it refers to a praedial servitude and a right of way. Servitude is a different legal regime and cannot be equated to an absolute or full transfer of property as contemplated by the deed P8.

Similarly, **Ranasinghe's case** also can be distinguished from the instant appeal and has no bearing to the matter before us since, the said case refers to a person knowingly erecting a building on another's land, intending it to become a permanent structure on the said land. In the aforesaid situation this Court held that the building becomes annexed to the land and accedes to the soil.

Hence the ratio of the said two cases in my view, will not assist the 5th defendant to establish his contention before this Court pertaining to his entitlement to the *soil rights* that is said to flow

from the deed P8. If I may say in simpler terms, the 5th defendant is claiming a right to the soil based upon the [1/9th] right which the 5th defendant claims he has on the house.

The Counsel for the plaintiff totally denying the said assertion drew our attention to the converse of the 5th defendant's contention, and specifically to the observations of Gratien A.C.J. in the case of **Suwaris and others v. Samarajeeva (1954) 55 NLR 387**.

The said **Suwaris's case**, pertains to a declaration of title and ejectment by a subsequent owner against persons who were in possession of certain buildings standing on a land. In the said case it was observed that a subsequent grant of soil rights would vest the ownership of a building on the land upon such person, in accordance with the maxim *omne quod inaedificatur solo cedit*, i.e., everything that is erected on the soil goes with it. Gratien A.C.J. at page 389, also quoted and referred to the **Digest**, *wherein it is decreed that if in a conveyance of land, the alienor purports to convey the soil apart from the surface, it does not prevent the surface passing with the soil, for by its nature it is one with it.*'

In the said case, the precise nature of the servitude *habitatio* was discussed as explained by Voet and it was further observed, that if an owner of immovable property conveys it to A, but **in the same instrument** purports to grant to B the buildings standing on it, then the logical reconciliation of the two inconsistent grants would be for the ownership of the land and buildings to be with A, subject only to a personal servitude of *habitatio* in favour of B.

Hence, it is amply clear, as discussed by Gratien A.C.J. in the case above and Sharvananda J. in **Kanagasabai's case** (supra), a building erected on the soil goes with the soil and not vice versa, as contended by the 5th defendant. In any event what the 5th defendant claims is not a servitude but an outright transfer upon deed P8 executed six months after the deed P6. Thus, the issue of servitude or grating two rights in one and the same instrument does not arise in this appeal.

The contention of the plaintiff before this Court was that even if this Court holds that the 5th defendant is entitled to 1/9th right to the house, that the 5th defendant cannot prefer a claim to the soil rights or the soil covered by the house standing thereon. Nevertheless, Dr. Cooray, for the plaintiff vehemently contended that together with the alienation of the land, *ipse dixit* the rights to the house standing thereon was conveyed to the plaintiff by Awin Wickramasinghe by the deed P6 and there were no rights or interests remaining for Awin Wickramasinghe to convey subsequently to 5th defendant by the deed P8.

In the aforesaid circumstances, I do not see merit whatsoever in the argument put forward by the 5th defendant pertaining to soil rights.

At this Juncture, I wish to refer to another legal maxim, *cujus est solum ejus usque ad coelom et ad inferos* quoted by Sharvananda J. in **Kanagasabai's case** referred to earlier i.e., **whoever's is the soil, it is theirs all the way to Heaven and all the way to Hades** which speaks of a property holder's right not only to the plot of land itself, but also to the air above and the ground below.

Blackstone's Commentaries, Book 2, Chapter 2 page 18 too, refers to the above phrase and defines 'land', to include not only the face of the earth, but everything under it, or over it and goes on to state if a man grants all his lands, he grants there by all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.

The above referred 13th century legal maxim is accepted even in the present day context and modern law and followed subject to certain variations, with regard to '*air and space*' and also '*sub-surface rights*'. However, there is no dispute or variation pertaining to '*surface rights*' and in a conveyance of land, *surface and everything erected thereon passes with the soil, because by nature it is one and the same.* [see also **Tissera v. Tissera (1940) 42 NLR 60, Jayasundere v. Wijetilake and others (2006)3 SLR 401**]

From the foregoing discussion it is apparent, that upon execution of P6 in the instant appeal, the 'land' was conveyed and the title to the 'land' passed onto the plaintiff.

The 5th defendant did not challenge P6 or have any qualms or issues with regard to the deed P6 or conveyance of the 'land' to the plaintiff by Awin Wickramasinghe.

In my view, by P6, not only the land, but the surface of the land and everything standing thereon, which included Awin Wickramasinghe's rights to the co-owned house, was conveyed to the plaintiff. Thus, the 5th defendant's contention or his claim for Awin Wickramasinghe's rights to '*the house and the soil covered by the house,*' is legally flawed and should be rejected. Moreover, it does not stand to rhyme or reason either.

In any event, I am of the opinion that the conveyance which the 5th defendant is relying upon, i.e. the deed bearing No 8527 dated 27-11-1995 (P8), does not convey any right or interest to the 5th defendant, as Awin Wickramasinghe had already denuded and disposed of his rights to the house, when he transferred the corpus together with the **land, plantations and everything standing thereon** to the plaintiff, by deed bearing No 975 on 15-05-1995 (P6).

In the aforesaid circumstances, my considered view is that the 5th defendant cannot claim any right to the corpus. Hence, I answer the 1st and 2nd questions of law raised before this Court in the negative and in favour of the plaintiff.

Further, I hold that the High Court judges have correctly evaluated the judgement of the District Court with regard to the District Judge's finding in respect of the investigation of title and specifically, the rights of the 5th defendant and thus no miscarriage of justice has taken place, in the instant partition application and for the said reason, I answer the 3rd question of law raised before this Court also in favour of the plaintiff.

In the foregoing and for reasons morefully adumbrated in this judgement, the appeal of the 5th Defendant -Appellant- Appellant is dismissed with costs.

The judgement of the Civil Appellate High Court of Gampaha dated 17th February 2012 is upheld and the judgement of the District Court of Gampaha dated 03rd March, 2008 permitting the partitioning of the corpus in the manner stated therein, is also affirmed.

This Court further holds that the Plaintiff - Respondent- Respondent is entitled to a sum of Rs. 50,000 payable by the 5th Defendant- Appellant- Appellant. This sum is payable to the Plaintiff- Respondent- Respondent in addition to the costs of the courts below.

Appeal is dismissed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J.

I agree

Judge of the Supreme Court

Yasantha Kodagoda, PC. J.

I agree

Judge of the Supreme Court