

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

In the matter of an application for leave to appeal to The Supreme Court in terms of section 5C 1 of the High Court of the Provisions (Special Provisions) (Amendment) Act no 54 of 2006

K.L.A. Kulathunga,
624/8, Godage Mawatha,
Anuradhapura.

Defendant-Appellant-Appellant

SC Appeal 130/10

SC/HC/CALA140/2010

NCP/HCCA/APR272/2007

DC Anuradhapura 16174/L

Vs, Karthigesu Nagaligam,
Depot Road, Kanagapuram, Killinochchi.

(The Deceased Plaintiff)

(Appeared through his Power of Attorney holder
Vairamuttu Thanapakyam)

Nagalingam Rasalingam,
10, Ananda Nagar, Killinochchi.

Substituted Plaintiff- Respondent-Respondent

Before: Eva Wanasundera PC J
Priyantha Jayawardena PC J
Vijith K. Malalgoda PCJ

Counsel: Pubudu Alwis with K.A.D. Karasinghe for the Defendant Appellant-Appellant
Dr. Sunil Cooray for the Substituted Plaintiff Respondent-Respondent

Argued on: 06.06.2017

Decided on: 19.09.2017

Vijith K. Malalgoda PC J

Deceased Plaintiff Respondent-Respondent Karthigesu Nagalingam instituted action through his Power of Attorney holder Vairamuttu Thanapakyam against the Defendant-Appellant- Appellant Kamburugamuwa Loku Arachchige Kulatunga in the District Court of Anuradhapura on 10.09.1997 claiming inter-alia,

- a) A declaration that the Plaintiff is the lawful lease permit holder of the land described in the schedule to the plaint
- b) An order ejecting the defendant and his agents from the said land and to place the Plaintiff in peaceful and uninterrupted possession
- c) Damages at the rate of Rs. 5000/- for month for the loss and damages caused by the defendant

When the defendant filed his answer to the said plaint filed against him, had prayed inter-alia,

- a) For a dismissal of the action
- b) If the case is decided in favour of the Plaintiff, a sum of Rs. 300,000/- as compensation for *bona-fide* improvement carried out by him

The trial before the District Judge of Anuradhapura had proceeded on the following issues raised by the parties;

Issues raised on behalf of the plaintiff are as follows:-

- i. Is the Plaintiff, the lawful lease permit holder of the land described in the schedule to the plaint by permit No L/N/R/21 dated 25.01.1965
- ii. Has the Plaintiff built a house on the land referred to in the above permit and occupied it
- iii. From 1993 onwards has the defendant encroached on to the land in dispute and is he in unlawful possession of the land
- iv. Is the defendant in unlawful occupation of the land in dispute up to now in spite of the demand made by the plaintiff to handover the said premises to him
- v. Are the damage caused to the Plaintiff from the unlawful occupation of the defendant amount to Rs. 5000/- per month

- vi. If the above issues are answered in favour of the Plaintiff, is the Plaintiff entitle to obtain the relief prayed for
- vii. Is the Power of Attorney holder of the Plaintiff is entitled to appear on behalf of him and to proceed with the case as the Plaintiff is unable to appear before court due to war situation

Issues raised on behalf of the defendant are as follows:-

- viii. Has the Plaintiff given his consent to the defendant to occupy the land in dispute and to carry out any development under the power of Attorney bearing No. 10/691 attested by Lionel P. Dayananda
- ix. If the defendant in lawful and peaceful possession of the land in dispute due to the consent given by the Plaintiff
- x. Has the Plaintiff given his consent to the defendant to develop the land and to be in lawful and peaceful possession of the land, according to the affidavit dated 16.08.1993
- xi. If the above issues 8-10 are answered in favour of the defendant, is the defendant entitle to obtain relief prayed for in the answer
- xii. Is the value of the development done to the land by the defendant is Rs. 300,000/-
- xiii. If the above issue is answered in favour of the defendant, is the defendant entitle to Rs. 300,000/- as compensation from the Plaintiff

During the cause of the trial before the District Court the Plaintiff above named had died and an application was made to substitute the son of the Plaintiff in the room and place of the deceased and the defendant objected to the said substitution.

However Learned District Judge by his order dated 11.09.2003 had allowed the substitution.

The Learned District Judge by his Judgment dated 25.02.2005 decided the case in favour of the Substituted Plaintiff by answering issues 1-4, 6 and 7 in favour of the Substituted Plaintiff, granting the relief (a) and (b) referred to above.

Being aggrieved by the said decision of the Learned District Judge the defendant appealed to the Provincial High Court of Civil Appeal of the North Central Province holden at Anuradhapura and giving the judgment, the said High Court of Civil Appeal had dismissed the Defendant's Appeal. The

Defendant Appellant had appealed against the said decision of the High Court of Civil Appeal to the Supreme Court, and leave was granted on questions of law set out in paragraphs c, e, f, i, g, and m of the Petition by this court.

As observed by me the case for the Plaintiff, before the District Court of Anuradhapura had proceeded on the validity of the lease permit issued on the Plaintiff and the right of the Power of Attorney holder to represent the Plaintiff at the said trial. As against the said position the Defendant had tried to establish that he too had entered the land in question as the Power of Attorney holder of the Plaintiff and continued to be in possession of the said land on the strength of the said Power of Attorney and during the said uninterrupted period, the Defendant had constructed a house in the said land.

The Petitioner's arguments before this court was mainly based on the validity of the Power of Attorney bearing No 394 dated 05.09.1996 and the validity of the Substitution of the son of the deceased as the Substituted Plaintiff during the pendency of the trial before the District Court. Questions of the law under which the leave was granted by this court was based on the above arguments.

During the arguments before us the Defendant-Appellant- Appellant challenged the validity of the Power of Attorney bearing No. 394 dated 05.09.1996. Section 2 of the Powers of Attorney Ordinance No 02 of 1902 as amended by Ordinances No 09 of 1913 and 13 1939 has interpreted a Power of Attorney as ;

“any written power or authority other than that given to an Attorney at Law or Law Agent, given by one person to another to perform any work, do any act, or carry on any trade or business and executed before two witnesses, or executed before or attested by a notary public or by a Justice of Peace, Registrar, Deputy Registrar or by any Judge or Magistrate.....

and section 3 of the said Ordinance provides for the said Power of Attorney may register with the Registrar General.

Section 4 of the Powers of Attorney Ordinance refers to the cancellation of a Power of Attorney but further provided that, ***until such notification and publication of the revocation, the grantor shall be held liable and bound by all acts of his attorney.*** (emphasis added)

When considering the above provisions in the Powers of Attorney Ordinance No. 02 of 1902 amended by Ordinances No. 09 of 1913 and 33 of 1939, it is clear that there is no restriction imposed by the said Ordinance to have only one Power of Attorney but the grantor shall be held liable and bound by all acts of such Attorneys until the Power of Attorney is cancelled or revoked under the provisions of section 4 of the said Ordinance.

In the said circumstances I see no merit in the argument raised by the Defendant-Appellant-Appellant challenge the validity of the Power of Attorney bearing No 394 as against the Power of Attorney bearing No 10691 granted to Defendant-Appellant-Appellant.

The Defendant-Appellant-Appellant had further argued that the Plaintiff (Deceased Plaintiff Respondent-Respondent) is not entitled to institute the present action based on a lease permit since the present application is a *rei-vindication* action.

However when going through the issues raised on behalf of the Defendant at the trial before the District Court of Anuradhapura, I observe, that defendant had failed to raise this point before the Learned District Judge.

When considering the issues 8 to 10 referred to above in my judgment, the Plaintiff had taken up the position that he entered the land in question with permission of the Plaintiff and was in peaceful possession or in other words with the leave and license of the Plaintiff.

In the case of ***Hanji V. Nallamma 1998 (1) SLR 73*** Supreme Court held that,

“Once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and the pleadings recede to background,”

and therefore the decision which was challenged before Civil Appellate High Court of the North Central Province, was delivered by the District Judge of Anuradhapura determining the said issues framed before the District Court and the defendant in the said District Court proceeding is not entitled to raise new points during the appeal.

In the case of ***Setha V. Weerakoon 49 NLR 225*** Howard CJ stated that,

“A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more.”

As revealed before the District Court, the Plaintiff was issued with P-2 on 15.01.1962 which is the lease permit for the land in question and the said permit was in operation even at the time when the case was taken up for trial, and at the time witness Sandya Sri Jayampathi Ratnamalala, Land Officer gave evidence on 11th December 2003.

In this regard the Defendant-Appellant- Appellant challenges the lease hold rights of the Plaintiff and argued that a proper lease agreement or a permit issued either under the Land Development Ordinance or State Land Ordinance had not been produced before the District Court.

However the above position is contrary to his own issues which were to be determined at the District Court Trial, based on the evidence led before the trial court.

In the case of ***Alwis V. Piyasena (1993) 1 Sri LR 199*** G.P.S. de. Silva CJ held that,

“It is well established that finding of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.”

The Defendant-Appellant- Appellant had challenged the permission granted by the Learned District Judge to substitute the son of the Deceased Plaintiff as the Substituted Plaintiff and submitted that the said permission was granted without considering the provisions of the Land Development Ordinance or the State Land Ordinance. It was further submitted on behalf of the Defendant-Appellant- Appellant that, until the succession rights are considered under the provisions of Law, the land in question vest with the State and therefore the said permission granted, to substitute the Deceased Plaintiff was bad in Law.

However the Defendant-Appellant-Appellant has failed to canvass against the decision of the Learned District Judge when he made the said order permitting the substitution. This position too

was considered in the decision of the High Court of Civil Appeal and I see no reason to interfere with the said findings.

It is further observed by me that the substitution effected at the District Court was to protect the rights of the deceased plaintiff and it has nothing to do with the succession rights of the deceased Plaintiff which has to be decided under the provisions of the relevant legislation.

As discussed above the Defendant-Appellant-Appellant has failed to establish any of the grounds under which leave had been granted by this court. I therefore answer the questions of Law in favour of the Substituted Plaintiff-Respondent-Respondent and dismiss this appeal with costs.

Appeal in dismissed with costs.

Judge of the Supreme Court

Eva Wanasundera PC J

I agree

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree

Judge of the Supreme Court