

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 151/2013

SC/ HCCA/LA/ 502/2012

WP/HCCA/LA/143/2005(F)

DC Colombo/18378/L

Thambachchi Ramiah Mallikanu
Letchchumi,
No. 51, Kotahena Weediya,
Colombo 13.

Plaintiff

Vs.

Bambarendage Jimoris Jinadasa,
No. 255, Vihara Mavatha,
(Assessment No 17)
Hunupitiya Road, Wattala.

AND BETWEEN

Bambarendage Jimoris Jinadasa,
No. 255, Vihara Mavatha,
(Assessment No 17)
Hunupitiya Road, Wattala.

Defendant Appellant

Vs.

Thambachchi Ramiah Mallikanu
Letchchumi,
No. 51, Kotahena Weediya,
Colombo 13.

Plaintiff Respondent

AND NOW BETWEEN

Thambachchi Ramiah Mallikanu
Letchchumi,
No. 51, Kotahena Weediya,
Colombo 13.

Plaintiff Respondent Appellant

Vs.

Bambarendage Jimoris Jinadasa,
No. 255, Vihara Mavatha,
(Assessment No 17)
Hunupitiya Road, Wattala.

Defendant Appellant Respondent

BEFORE

: B. P. ALUWIHARE, PC, J.
PRIYANTHA JAYAWARDENA, PC, J.
UPALY ABEYRATHNE, J.

COUNSEL : Athula Perera with Nayomi Kularatne for
the Plaintiff Respondent Appellant

Dr. Sunil Cooray with Ms. Sudarshani
Cooray and K. de Mel for the Defendant
Appellant Respondent

WRITTEN SUBMISSION ON: 05.12.2013 & 30.05.2017 (Plaintiff
Respondent Appellant)
20.01.2014 (Defendant Appellant
Respondent)

ARGUED ON : 17.05.2017

DECIDED ON : 04.08.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted an action in the District Court of Colombo against the Defendant Appellant Respondent (hereinafter referred to as the Respondent) seeking inter alia a declaration of title to the land described in the schedule to the plaint and to eject the Respondents from the said land and to hand over the vacant possession of the same to the Appellant. The Appellant has further sought an order declaring the deed of transfer bearing No 804 dated 23.02.1987 attested by R. C. B. Joseph, Notary Public, null and void.

The Respondent has filed an answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. The Respondent

has not claimed title to the land in dispute nevertheless has claimed compensation for the improvements, in a sum of Rs 1,200,000/-.

The case has proceeded to trial on 22 issues. After trial, the learned Additional District Judge has delivered the judgment dated 26.05.2005 in favour of the Appellant. Being aggrieved by the said judgment the Respondent has appealed to the Provincial High Court of Civil Appeal holden at Colombo. The High Court, by judgment dated 05.10.2012, has allowed the appeal and has dismissed the Appellant's action. The Appellant sought leave to appeal to this court and leave has been granted on the questions of law set out in paragraph 20 (a) to (g) in the petition dated 15.11.2012.

According to the Appellant, she had derived the title to the land in suit by virtue of deed of transfer bearing No 4288 dated 22.12.1971. Thereafter she had commenced constructing a house on the said land in 1973 and had concluded the same in 1979. On or around 16.07.1982 she had gone to Middle East for an employment. For the said purpose, she had borrowed a sum of Rs. 5,000/- from one Sivagnanam Subramaniam, entering into an agreement before an Attorney at Law and Notary Public V. Pushpadevi Joseph who was not known to the Appellant and leaving the original copy of the said deed 4288 in the custody of the said Attorney at Law. She had sent money to settle the said loan. Subsequent to her arrival from Middle East in 17.03.1983, she had requested said Attorney at Law to hand over the original copy of the said deed 4288, but the Attorney at Law had failed to do so. Since the said house had been damaged and the Appellant had been displaced during the 1983 July insurgency, she had been placed in a refugee camps located at St. Benedict College and Central College, Kotahena. Subsequently, as per directive of the government, the said land together with the house had been handed over to REPIA. In November 1983, when she returned to the said house

with permission to repair it, said Subramaniam had forcibly entered into possession of the premises. At that time, she had learnt that said Subramaniam, by using her signature had fraudulently executed a deed of transfer bearing No. 1809 dated 20.11.1981 in respect of the property in suit.

Thereafter, the Appellant had instituted an action against said Subramaniam in the District Court of Colombo seeking a judgment declaring the said deed 1809 null and void and to eject said Subramaniam from the land in dispute and a judgment had been entered in favour of the appellant and a writ of possession had been issued. Thereafter, the Respondent of the instant appeal had made an application in terms of Section 325 of the Civil Procedure Code and after inquiry he had been placed in possession on the basis that he had derived title to the land in dispute by virtue of a deed of transfer bearing No 804 dated 23.02,1987 and hence he was a bona fide possessor.

In the aforesaid premise, the learned counsel for the Appellant submitted that while the said case 4843/ZL was pending before court and also, whilst a caveat was in operation, said Subramaniam, who was the defendant in the said case bearing No 4843/ZL, had fraudulently executed the said deed No 804. Since the deed bearing No 1809 had been declared null and void in the said case 4843/ZL, the subsequent deed No 804 is inevitably null and void since it had been executed on the strength of deed No. 1809.

On the other hand, the Respondent contended that the judgment of the said case No 4843/ZL was delivered on 27.10.1992. The sole Defendant in the said case bearing No 4843/ZL was said Subramaniam. He had died on 29.04.1991, prior to the delivery of the judgment of the said case. Since the judgment of the said case 4843/ZL had been delivered without effecting substitution in place of the

deceased Subremanium, said judgment of the District Court is a nullity. In proof the said death, the Respondent has produced a death certificate marked V 6.

The Appellant has further contended that there was no evidence to establish the fact that S. Subramanium referred to in the death certificate marked V 6 was the same Sivagnanam Subramanium who was the 1st Defendant in case No DC/Colombo/4843/ZL and he died prior to the delivery of the judgment of the said case.

On this point the Respondent has raised the issue No 14 to wit; “has the defendant of the case bearing No 4843/ZL died on 28.04.1991?” As I mentioned above, the Respondent had produced a death certificate marked V 6. However, V 6 refers to a death of a person called S. Subramanium. Since, the death certificate does not bear the name of Sivagnanam Subramanium, evidence should have been adduced to prove that said Sivagnanam Subramanium, the Defendant of the case bearing No 4843/ZL, and S. Subramanium, the person referred to in the said death certificate marked V 6, is one and the same person.

In order to prove the said death, the Respondent had led the evidence of the Registrar of the District Court, Colombo. The Registrar, producing the said death certificate marked V 6 subject to proof, has stated that it was the death certificate of one S. Subramanium. As per the evidence of the Registrar, the death certificate V 6 was in Tamil language and the Registrar could not understand the contents of the said death certificate. It has been brought to the notice of this court that the said death certificate which was in Tamil language is not in the brief and instead a death certificate in sinhala language is available in the brief marked V 6, without bearing the signature of the learned District Judge.

Udawatthage Don Premalal Kumarasiri, Clerk, Divisional Secretariat, Thimbirigasyaya, has been called to produce the original death certificate of V 6. Said Officer, in evidence, has stated that according to the original death certificate a person named S. Subramanium had died on 29.04.1991. Particulars, such as the deceased's residence and parent's names were not available in the said death certificate. It is apparent from the said death certificate that the death had been informed to the Registrar of Births and Deaths by a Medical Officer of the Colombo General Hospital, in terms of Section 29(3) to be read with Section 30(1) of the Births and Deaths Registration Act No 17 of 1951. In terms of Section 30(1) of the said Act, a declaration has to be sent when a person required under Section 29 of the said Act to give particulars of a death occurring in the division cannot conveniently attend the office of the Registrar of that division. Accordingly, the said death certificate manifests that when the post mortem was held on the deceased body the relatives of the deceased were not present and there had been no claim for the dead body.

The Respondent has not led evidence of any relative or a friend or a known person of said Sivagnanam Subramanium in order to prove that the said S. Subramanium and said Sivagnanam Subramanium is one and the same person.

In the said circumstances, I hold that the Respondent has failed to prove the death of the said Defendant Sivagnanam Subramanium had occurred prior to the delivery of the judgment of the said case bearing No 4843/ZL. Therefore, the Respondent's contention that the said judgment of the case No 4843/ZL is a nullity stands to fail.

The Respondent further contended that the Appellant has failed to register *lis pendens* in terms of Section 11(5) of the Registration of Documents

Ordinance No 23 of 1927. Said Section 11(5) stipulates that “A *lis pendens* may be registered at any time after the plaint has been accepted by the court in accordance with the provisions of the Civil Procedure Code.”

At the trial, the Respondent has not raised any issue on the matter of registration of *lis pendens*. Also, he has not raised this matter before the High Court of Civil Appeal. The Respondent has raised this matter for the first time in appeal before this court. The learned counsel for the Respondent submitted that this matter being a pure question of law could be raised for the first in appeal before this court.

The learned counsel for the Appellant submitted that if the question of *lis pendens* has been raised at the trial and if the *lis pendens* has not been registered in the said case 4843/ZL, the Appellant could have taken the position that even though the *lis pendens* has not been registered, there was a caveat filed in the correct folio. He further submitted that, if there was a “search dispensed with” before the date of the execution of the said deed bearing No 804 the Respondent could have seen that there is a dispute with regard to the ownership of Sivagnanam Subramaniam. Having noted such circumstances if this court decides to entertain such a contention for the first time in appeal, then, the Appellant would lose the opportunity of adequately meeting this contention in appeal.

I am reluctant to agree with the said submission of the learned counsel for the Respondent. Whether the *lis pendens* had been registered is not a pure question of law, but a question mixed of law and fact. If the matter of *lis pendens* had been raised as an issue at the trial, the Appellant would certainly have defences open to him which he is now debarred from setting up. For example, the counsel for the Appellant submitted that there was a caveat filed in the correct folio. If

there was a “search dispensed with” before the date of the execution of the said deed bearing No 804 it could have been seen that there is a dispute with regard to the ownership of Sivagnanam Subramaniam. If the matter was raised at the trial the Appellant could prove such fact by evidence.

In the case of Seta vs. Weerakoon [1948] 49 NLR 225 Dias J. (Howard C.J. agreeing) observed that “It is a question of fact in each case as to when *litis contestatio* arose so as to give rise to the doctrine of *lis pendens*. That fact has not been proved here. I am of opinion that the point sought to be raised on appeal for the first time is not a pure question of law but is a mixed question of law and fact. It is uncovered by any of the issues framed, and the defendant respondent has no opportunity of adequately meeting this contention in appeal. I am, therefore, of opinion that this is not a matter which can be raised for the first time in appeal. This being the only substantial question raised, the appeal fails and must be dismissed with costs.”

The Respondent has claimed compensation for the improvements made on the house which was in the land in dispute. It was an admitted fact that the said house was there when the title was passed on to the Respondent. According to the schedule of the said deed No 804, the Respondent has got title to the land together with the trees, plantations and building thereon bearing assessment No 255, Vihara Mawatha. Issue No 14 has been raised on the claim for the improvements. The learned District Judge has concluded that the Respondent has failed to prove the improvements. Other than the Respondent’s mere statement that he spent about ten lakhs on the improvements to the house standing on the land in dispute, there was no iota of evidence in order to compute the quantum of the compensation. Even the learned counsel for the Respondent, in the written submission, has admitted that the Respondent had failed to state the exact amount

he had spent on the above repairs. When I take in to consideration the said evidence of the Respondent's case, I cannot find fault with the findings of the learned District Judge. It is well established and settled by our courts that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. (Alwis vs. Piyasena Fernando (1993) 1 SLR 119)

In the aforesaid circumstances, I am of the view that the learned High Court Judges have failed to consider the merit of the case in a correct perspective. Therefore, I hold that the Respondent is not entitled to raise the issue on registration of *lis pendens* for the first time in appeal, as, it is a mixed question of law and facts. Therefore, I set aside the said judgment of the High Court of Civil Appeal dated 05.10.2012 and uphold the judgment of the learned Additional District Judge dated 26.05.2005. I allow the appeal of the Appellant with costs.

Appeal allowed.

Judge of the Supreme Court

B. P. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

PRIYANTHA JAYAWARDENA, PC, J.

I agree.

Judge of the Supreme Court