

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

In the matter of an Application for Leave to Appeal under section 5C (1) of the High Court of the Province (Special Provisions) Act No. 19 of 1990 read with the Supreme Court Rules 1990 from the Judgment pronounced on 22.05.2012 by the High Court of the Central Province sitting in Kandy in Civil Appeal No. CP/HCCA/KAN/183/2010 (F) in terms of section 5A (1) High Court of the Province (Special Provisions) Amended Act No. 54 of 2006 and now an Appeal upon leave having been granted on 04.09.2012.

SC Appeal 152/2012

SC/HCCA/CA No. 242/12

CP/HCCA/ KAN No. 183/2010 (F)

DC Kandy No. L. 19332

1. Kulasinghe Mudiyanse Lage Silindu Menike
2. Kulasekera Mudiyanse Lage Godapele Gedara
Sandya Kumari Swarnalatha Ekanayake
3. Kulasekera Mudiyanse Lage Godapele Gedara
Wasantha Kalyani Ekanayake
4. Kulasekera Mudiyanse Lage Godapele Gedara
Prabhath Mangala Ekanayake
5. Kulasekera Mudiyanse Lage Godapele Gedara
Pulasthi Kumara Raveendra Ekanayake

All of

Putuhapuwa, Watapana,

Godapolawatta

PLAINTIFFS

Vs.

1. Kulasekera Mudiyanseleage Abeyratne alias
Abeysinhe Banda (**Dead**)
- 1A. Kulasekera Mudiyanseleage Godapele Gedara
Jayawardena

1st AND 2nd DEFENDENTS

3. Kulasekera Mudiyanseleage Godapele Gedara Biso
Menike

3rd DEFENDANT

All of

Putuhapuwa, Watapana,
Godapolawatta

AND

2. Kulasekera Mudiyanseleage Godapele Gedara
Jayawardena

2nd DEFENDANT-APPELLANT

Vs.

1. Kulasinghe Mudiyanseleage Silindu Menike
2. Kulasekera Mudiyanseleage Godapele Gedara
Sandya Kumari Swarnalatha Ekanayake

3. Kulasekera Mudiyansele Gedapele Gedara
Wasantha Kalyani Ekanayake
4. Kulasekera Mudiyansele Gedapele Gedara
Prabhath Mangala Ekanayake
5. Kulasekera Mudiyansele Gedapele Gedara
Pulasthi Kumara Raveendra Ekanayake

All of

Putuhapuwa, Watapana, Godapolawatta

PLAINTIFF-RESPONDENTS

Kulasekera Mudiyansele Gedapele Gedara Bisso

Menike

3rd DEFENDANT-RESPONDENT

And NOW BETWEEN

1. Kulasinghe Mudiyansele Silindu Menike
2. Kulasekera Mudiyansele Gedapele Gedara
Sandya Kumari Swarnalatha Ekanayake
3. Kulasekera Mudiyansele Gedapele Gedara
Wasantha Kalyani Ekanayake
4. Kulasekera Mudiyansele Gedapele Gedara
Prabhath Mangala Ekanayake

5. Kulasekera Mudiyansele Gedara

Pulasthi Kumara Raveendra Ekanayake

All of

Putuhapuwa, Watapana,

Godapolawatta

PLAINTIFF-RESPONDENT-PETITIONER-APPELLANTS

Vs,

Kulasekera Mudiyansele Gedara

Jayawardena

2nd DEFENDANT-APPELLANT-RESPONDENT-RESPONDENT

Kulasekera Mudiyansele Gedara Biso

Menike

3rd DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT

Before: Justice Buwaneka Aluwihare PC

Justice Vijith K. Malalgoda PC

Justice P. Padman Surasena

Counsel: Chandana Prematilake for Plaintiff-Respondent-Petitioner-Appellants

Jacob Joseph with Ms. Sandamali Madurawala for 2nd Defendant-Appellant-Respondent

M. D. J. Bandara for 3rd Defendant-Respondent-Respondent

Argued on: 16.01.2020

Decided on: 11.03.2020

Vijith K. Malalgoda PC J

The Plaintiff-Respondent-Appellants (herein after referred to as the Plaintiff-Appellants) instituted proceedings before the District Court of Kandy against the 1st and the 2nd Defendant-Appellant-Respondents (hereinafter referred to as 1st and the 2nd Defendant-Respondents) for declaration of title and ejection from the land more fully described in the schedule to the plaint.

As revealed before us, the said proceedings were commenced only against the 1st and 2nd Defendant-Respondents but, at a later stage of the trial the 3rd Defendant-Respondent-Respondent (hereinafter referred to as 3rd Defendant-Respondent) too had intervened in the proceedings pending before the District Court.

The trial before the District Court proceeded with one admission and 25 issues raised by the parties and at the conclusion of the said trial, the learned District Judge entered the judgment in favour of the Plaintiff-Appellants, answering issues 1-9 and 11 in favour of them.

Being dissatisfied with the said decision of the District Court, the 1st and the 2nd Defendant-Respondents appealed to the Civil Appellate High Court of the Central Province, holden in Kandy. By Judgment dated 22.05.2012, Judges of the Civil Appellate High Court of the Central Province, holden in Kandy, had allowed the appeal and dismissed the Plaintiff 's case with costs.

The said decision of the Civil Appellate High Court was challenged before the Supreme Court by the Plaintiff-Appellants by the instant application and when the instant application was supported before the Supreme Court, Court granted leave on the following questions,

- a) Did the Provincial High Court (exercising Civil Appellate Jurisdiction) factually err in concluding that the boundaries of the land described in the schedule to the Plaint and those shown in Plan No. 1901 (P1) are different except the northern boundary by comparing the two sets of boundaries?
- b) Did the Provincial High Court factually err in assuming that the Plaintiffs' Land described in the schedule to the plaint is only "Dambuhena" though their deeds refer to "Western portion of Kosgahamulahena" and "Dambuhena" when the said schedule clearly refers to both Gale Kosgahamulahena and Dambuhena?
- c) Did the Provincial High Court also err in stating that according to P-1 Dambuhena is to the north of the land shown in P-1 when the surveyor had clearly identified the land in P-1 as the amalgamated land of Gale Kosgahamulahena and Dambuhena?
- d) Did the Provincial High Court thus err in concluding that the Plaintiffs have not been able to identify the land claimed by them?
- e) Did the Provincial High Court err in concluding that the finding of the District Judge that the subject matter of the action is depicted in plan "P-1" as lots 1, 2 and 3 is not supported by evidence?
- f) Did the Provincial High Court err in allowing the appeal which includes a prayer that the relief claimed by the 2nd Defendant in the answer be granted without citing any reasons whatsoever to grant the said relief?

According to the plaint dated 1st September 1998 filed before the District Court of Kandy the Plaintiff-Appellants had sought declaration of title of a land referred to in the schedule to the plaint as;

"amalgamated land of "Gale Kosgahamulahena" of one Nelly of Kurakkan Sowing extent and 'Dambuhena' of seven Nelly of Kurakkan Sowing extent"

which consist of lots 1, 2 and 3 of Plan No. 1901 dated 13.07.1996.

As revealed before us, a commission plan was not prepared in the case in hand (DC Kandy L 19332) but the Plaintiff- Appellants had relied on Plan No. 1901 dated 13.07.1996 to identify the land in question. The Plan No. 1901 which was produced marked P-1 at the District Court trial was a Commission plan prepared by the Licensed Surveyor G. Heenkenda in District Court Kandy Case No. L 17966.

During the hearing before us, it was revealed that District Court Kandy L 17966 was an action filed by the 1st Plaintiff-Appellant in the case in hand, against the same defendants but withdrawn, since it was revealed that she only had the life interest to the property in question under the Kandyan Law and instituted the present action along with her four children who are the heirs of their late father.

When the trial commenced before the District Court, all parties admitted that the previous action filed before the District Court was on same cause of action and was withdrawn with liberty to file a fresh action. Except for issue No. 22 raised on behalf of the 3rd Defendant-Respondent to the effect,

“පැමිණිල්ලේ 8 වෙනි පේදයේ දැක්වා ඇති අංක 1901 දරණ පිඹුරේ උපලේඛනයේ සඳහන් ඉඩම පෙන්වා නොමැත්තේද?”

none of the parties challenged the identity of the corpus.

At the conclusion of the District Court trial, whilst entering the judgment in favour of the Plaintiff-Appellant, the District Judge had answered the above issue in the affirmative.

However when going through the questions of law under which the leave was granted and the submissions placed before this court by the learned Counsel for the Appellant, it appears that the

question of identity of the land in question was one main ground for reversing the decision of the District Court, by the Civil Appellate High Court of the Central Province holden in Kandy.

As observed by this court, whilst referring to some boundaries, the Judges of the Civil Appellate High Court had concluded, that

“In these circumstances it cannot be said that the Plaintiffs have been able to identify the land to which they claimed title. The finding of the learned trial Judge, that the subject matter of this action is depicted in Plan P-1 as lots 1 to 3 is not supported by evidence and therefore is incorrect.”

and proceeded to dismiss the plaintiff’s action.

In the above circumstances, it is important to consider the evidence placed before the District Court and ascertain whether the learned District Judge had correctly assessed the said evidence, and in the said circumstances, the decision by the Judges of the Civil Appellate High Court to interfere with the finding of the trial Judge, who had the opportunity of observing the demeanor and deportment of the witnesses, and to go through the plans and documents submitted before him by their makers, was taken correctly, in the light of long line of authorities by Appellate Courts including the decision in the case of ***Alwis Vs. Piyasena Fernando (1993) 1 Sri LR 120 at 122*** where his Lordship G.P.S de. Silva (CJ) observed that;

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

According to the plaint, the Plaintiffs (before the District Court) title to the land referred to in the schedule to the plaint as, “amalgamated land of Gale Kosgahamulahena of 01 Nelly of Kurakkan sowing extent and Dambuhena of 07 Nelly of Kurakkan sowing” which consist of lots 1, 2, and 3 in Plan

No. 1901 dated 13. 07. 1996 to the extent of 3 roods and 11 perches had devolved on the Plaintiffs as explained in paragraphs 5 and 6 to the plaint; As submitted by the Plaintiffs' the 1st and the 2nd Defendants have allegedly created a dispute of the Plaintiffs' land along the Western boundary, which is part of lot 1 in Plan No. 1901.

Whilst disputing the above position, the 1st and the 2nd Defendants (before the District Court) took up the position that a land about 1 Acre including the disputed area belongs to them and submitted a cross claim for a declaration in respect of the said disputed area of land called Dambuhena Watta.

The 3rd Defendant, (before the District Court) who intervened in the District Court trial, had claimed entitlement for a part of the land called Dambuhena through several deeds produced along with the papers filed before court.

Whilst giving evidence before the District Court, summoned by the Plaintiff, one Gamini Heenkenda a Licensed Surveyor had admitted preparing the Plan No. 1901 on a commission he received from the District Court in case No. L 17966. By the single admission recorded during the trial, parties admitted that,

“L 17966 which was pending before the District Court in respect of the same cause of action, was withdrawn with liberty to file fresh action”

Whilst explaining the plan he prepared, the witness took up the position that he identified the corpus, referred to in the schedule to the said plaint, included in the commission he received in case No. L 17966.

According to witness Heenkenda the plan he prepared was referred to the land called “the amalgamated land of Gale Kosgahamulahena and Dambuhena” and in preparing the said plan he took guidance from the boundaries given in the schedule to the plaint.

During his evidence, the plaint in L 17966 and its schedule was produced marked P-2 and P-2a respectively. According to P-2a the boundaries of the disputed land are as follows;

- To North - boarder of Appuhamy's land
- To East - outer canal (ඔළු ඇළ)
- To South - boarder of Godapale Gedara Dingiri Banda's land
- To West - ditch (අඟල)

As observed by me, these are the same boundaries referred to in the schedule to the plaint in the instant case.

In his evidence witness Heenkenda had said that he could identify the land in the ground, and prepared the Plan No. 1901 based on his findings. It was his evidence that, the ditch referred to above had been cut and converted to a road by the 1st and 2nd Defendants. The said area was at the West edge of lot 1 of the commissioned plan and it was marked as X-Y in Plan No.1901. The 1st Plaintiff who was present at the inspection had pointed out lot 01 and the area identify as X-Y as the encroachment by the 1st and the 2nd Defendants.

As further revealed from the evidence of witness Heenkenda, one Godapale Gedara Seveviratne Banda the 3rd Defendant in DC Kandy Case No. L 17966 (who is the 1st Defendant in the instant case) was also present during the survey and submitted plan bearing No.2967 dated 03.09.1992 prepared by A. B. Weerasekara licensed Surveyor and he made use of the said plan when making 1901. The said plan was produced at the instant case marked P-3.

The learned District Judge when analyzing the evidence placed before him had referred to both the plans submitted before him marked P-1 and P-3 and had correctly observed that the land depicted in Plan 2967 (P-3) is the Northern boundary of the disputed land identified in Plan No.1901.

Even though the Judges of the Civil Appellate High Court had stated that they have a doubt with regard to the other boundaries, according to P-1 the plan bearing No. 1901, the Eastern boundary had been identified as “outer canal”. The Southern boundary to the said land in question is, “land earlier belongs to Dingiri Banda and presently belongs to the 1st Defendant” (in case No. L 17966) and the Western boundary is “the ditch said to have cut by 3rd Defendant” (in case No. L 17966) when compared the said boundaries with boundaries referred to in schedule to the plaint in the instant case, the position taken up by the learned Judges of the Civil Appellate High Court, that “except for the Northern boundary the other boundaries do not tally with each other” does not appear to be correct.

The learned Counsel, who represented the Plaintiff-Appellants before us, had also submitted that nowhere in the plaint or in the proceeding before the District Court, the Plaintiff had referred to the land in dispute as “Danduhena” but always referred to it as, amalgamated land of Gale Kosgahamulahena of one Nelly of Kurakkan sowing extent and Dambuhena of seven Nelly of Kurakkan sowing extent”

However, according to the impugned Judgment of the Civil Appellate High Court, the Judge had further observed that,

“It is pertinent to note that assuming the land claimed by the Plaintiffs is not “Danduhena” as referred to in the schedule to the plaint but “Dambuhena” the deeds relied on by the Plaintiffs to establish their title do not refer to a separate allotment of land called “Dambuhena.” The deeds refer to two contiguous allotments of land that is “Southern portion of Kosgahamulahena” and “Dambuhena” but according to the plain P-1 Dambuhena is to the north of the land surveyed by him. In these circumstances it cannot be said that the Plaintiffs have been able to identify land to which they claimed title.”

When considering the material already discussed by me, I am reluctant to agree with the above observation made by the Civil Appellate High Court when reversing the findings of the learned District Judge.

I further observed that the Judges of the Civil Appellate High Court had erred in law by reversing the findings of the District Judge of Kandy when the evidence placed before the District Court support the said finding of the District Court.

In the said circumstances, I answer the questions (a) – (e) raised on behalf of the Petitioner-Appellants in affirmative. There is no material before me to answer questions (f) and therefore I will not answer the said question.

The Judgment dated 22.05.2012 by the Judges of the Civil Appellate High Court of Central Province is set aside and the Judgment dated 27.06.2007 by the District Judge, Kandy is affirmed. The learned District Judge of Kandy is directed to enter decree accordingly.

Appeal allowed.

Judge of the Supreme Court

Justice Buwaneka Aluwihare PC

I agree,

Judge of the Supreme Court

Justice P. Padman Surasena

I agree,

Judge of the Supreme Court