

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

B.K. Winson De Paul Rodrigo,
No. 73, Thimbirigasyaya,
Hendala, Wattala.

Plaintiff

SC APPEAL NO: SC/APPEAL/32/2021

SC LA NO: SC/HCCA/LA/509/2016

HCCA GAMPAAH NO: WP/HCCA/GPH/03/2009 (F)

DC NEGOMBO NO: 5527/L

Vs.

1. K.D.H Ferdinandez,
2. Annette Fernando,

Both of

No. 3/12,

Weliamuna Road,

Hendala, Wattala.

Defendants

AND BETWEEN

1. K.D.H Ferdinandez,
2. Annette Fernando,

Both of

No. 3/12,
Weliamuna Road,
Hendala,
Wattala.
Defendant-Appellants

Vs.

B.K. Winson De Paul Rodrigo,
No. 73,
Thimbirigasyaya,
Hendala, Wattala.
Plaintiff-Respondent

AND NOW BETWEEN

B.K. Winson De Paul Rodrigo,
(Deceased)
No. 73,
Thimbirigasyaya,
Hendala, Wattala.
Plaintiff-Respondent-Appellant

Bridget Rodrigo,
No. 73,
Thimbirigasyaya,
Hendala, Wattala.
Substituted Plaintiff-Respondent-
Appellant

Vs.

1. K.D.H Fernandez, (Deceased)
 - 1A. Ernard Treshiya Fernando,
 2. Annette Fernando,
- All of
No. 3/12,
Weliamuna Road,
Hendala,
Wattala
Defendant-Appellant-
Respondents

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Nadvi Bahaudeen with Jayantha Bandaranayake for
the Substituted Plaintiff-Respondent-Appellant.
Niranjan De Silva for the Defendant-Appellant-
Respondents.

Argued on : 07.07.2021

Written submissions:

by the Substituted Plaintiff-Respondent-Appellant
on 27.07.2021.

by the Defendant-Appellant-Respondents on
30.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff filed this action against the two defendants seeking a declaration that he is the owner of the land described in the 2nd schedule to the plaint, ejectment of the defendants from a portion of this land as described in the 3rd schedule to the plaint, and damages.

The defendants filed the answer seeking dismissal of the plaintiff's action and a declaration that they are the owners of the land described in the 2nd schedule to the answer. They also sought a declaration that they are entitled to the use of a road about 10 feet wide on the land described in the 1st schedule to the plaint by way of prescription as well as by way of necessity. In furtherance of the claim to the said right of way, they moved in the prayer to the answer that a commission be issued to a surveyor to depict the said right of way.

Let me pause for a while to emphasise that by the said reliefs, the defendants make no claim to the land described in the 1st schedule to the plaint except for a right of way over it.

Both parties took out commissions to explain to the court their respective claims. The plaintiff's commission plan was marked P1 by the plaintiff but the defendants' commission plan found in the case record was not produced in evidence by the defendants.

By the illustration (f) to section 114 of the Evidence Ordinance, the court can presume that the defendants did not produce their own commission plan as evidence because had it been produced it would have been unfavourable to them.

The defendants by deed V4 claim title to a land described as “*the half of one forth portion of Godakadurugahawatte*” and “*containing in extent twenty perches more or less.*” But there was no survey plan at the time of purchasing this land or at any time thereafter in order to properly identify the land.

However, the 1st defendant admits in his evidence (at page 170 of the brief) that he saw the surveyor Hopman’s plan marked P4 at the time of purchasing the land by deed V4. In Hopman’s plan, the land claimed by the plaintiff is clearly depicted and there is no roadway shown on the plan (save the public road on the eastern boundary). This means at the time the defendants purchased the land they claim, they had knowledge of the land claimed by the plaintiff and the fact that there was no right of way which could be used by them through the land of the plaintiff.

The 1st defendant admits in his evidence that the plaintiff gave Hopman’s plan to the court commissioner, Croos Dabrera, at the survey. The Croos Dabrera’s commission plan marked P1 shows the right of way claimed by the defendants as lot 2. However Croos Dabrera states in his evidence that this was shown on the plan as lot 2 not because there was a road on the ground but for the purpose of identifying the defendants’ claim.

According to plan P1, there is a footpath along the western boundary of the land. The defendants admit that they obtained electricity and water supply to their land through this footpath. This goes to prove there was no road on the plaintiff’s land.

The defendants’ claim to a right of way over the land described in the 1st schedule to the plaint shall fail.

After trial, the learned District Judge entered judgment for the plaintiff as prayed for in the prayer to the plaint.

The reliefs sought by the defendants were refused on the basis that the deeds V2-V4 relied upon by the defendants are not relevant to the land in suit.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and allowed the appeal granting the reliefs prayed for by the defendants in the prayer to the answer. Hence the appeal to this court by the plaintiff.

This court granted leave to appeal against the judgment of the High Court of Civil Appeal on the following question of law:

Have their Lordships of the High Court of Civil Appeal misdirected themselves in considering a corpus not put in issue in the plaint in delivering the judgment?

The defendants raised the following two questions of law:

Have their Lordships of the High Court of Civil Appeal correctly considered the corpus in relation to the dispute as presented before the District Court?

Are the defendants entitled to the reliefs as prayed for in the answer?

On what basis did the High Court of Civil Appeal set aside the judgment of the District Court? The High Court of Civil Appeal compared the land claimed by the defendants on their title deed V4 with the second land described in the plaintiff's title deed P3 to conclude that the land in suit is an undivided land of which a $\frac{1}{2}$ share is claimed by the plaintiff and a $\frac{1}{2}$ share is claimed by

the defendants, and therefore the plaintiff should have filed a partition action, not an action for declaration of title.

This is a misdirection of primary facts on the part of the High Court of Civil Appeal which vitiates the judgment.

The second land described in the schedule to deed P3 was never put in issue in this case. That land is not the subject matter of this action. This is made clear by the averments in the plaint and the schedules thereto.

The defendants never took up the position in the District Court that the defendants and the plaintiff are entitled to equal shares of the land in suit and therefore the plaintiff's action as presently constituted is misconceived in law.

Nor did the defendants take up the position before the District Court that the two lands described in the 1st schedule to the plaint are situated in two different places. As I said before, the defendants' only claim to the lands described in the 1st schedule to the plaint is a right of way over the two lands. The defendants cannot take up new positions which are questions of fact for the first time on appeal.

I answer the questions of law raised by the plaintiff in the affirmative and those raised by the defendants in the negative.

I set aside the judgment of the High Court of Civil Appeal and restore the judgment of the District Court and allow the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court