

**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 of the High Court of the Provinces (Special
Provisions) Act No. 54 of 2006

SC Appeal 88/2016

SC/HCCA/LA 92/2012

CP/HCCA /KAN 143 /2008F

DC Kandy Case No. 19216L

Wimala Rubasinghe,
No. 69/1, Peradeniya Road, Kandy

Plaintiff

Vs,

1. Lazarus Peter George,
No. P6 Housing Scheme, Suduhumpola,
Kandy

2. Chandra Gunasekara,
No. D7, Aruppola Flats, Kandy

Defendants

And between

Chandra Gunasekara,
No. D7, Aruppola Flats, Kandy

2nd Defendant- Appellant

Vs,

Wimala Rubasinghe,
No. 69/1, Peradeniya Road, Kandy

Plaintiff- Respondent

Lazarus Peter George,
No. P6 Housing Scheme, Suduhumpola,
Kandy

1st Defendant- Respondent

And Now Between

Wimala Rubasinghe,
No. 69/1, Peradeniya Road,
Kandy

Plaintiff- Respondent -Appellant

Vs,

Chandra Gunasekara,
No. D7, Aruppola Flats, Kandy

2nd Defendant- Appellant-Respondent

Lazarus Peter George,
No. P6 Housing Scheme, Suduhumpola,
Kandy

1st Defendant- Respondent- Respondent

Before: Hon. Justice Vijith K. Malalgoda PC
Hon. Justice Murdu N.B. Fernando PC
Hon. Justice S. Thurairaja PC

**Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam for the Plaintiff-
Respondent-Appellant**
Hirosha Munasinghe for the 2nd Defendant-Appellant-Respondent

Argued on: 29.03.2019

Decided on: 25.07.2019

Vijith K. Malalgoda PC J

The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted proceedings before the District Court of Kandy for declaration and ejectment of one Lazarus Peter George from premises bearing assessment Number 19/4 Vihara Mawatha, Suduhumpola, Kandy. When the said matter was pending before the District Court of Kandy, one Chandra Gunasekara claiming to be the wife of one Gunasiri Rubasinghe sought intervention to the above case. When court permitted the said intervention, the Plaintiff, with permission of court filed an amended plaint making the said Chandra Gunasekara the 2nd Defendant to the case and praying a declaration that the Plaintiff is entitled to the possession of the property in the schedule to the plaint and ejectment of the 1st Defendant and/or any other person holding under him from the said premises.

At the beginning of the District Court Trial the learned Counsel who appeared for the 1st Defendant had taken up the position that his client the 1st Defendant will not claim the property in question and is willing to handover the property to the party whose rights are affirmed by the District Court. Based on the above position taken up by the 1st Defendant, the Plaintiff and the 2nd Defendant proceed to trial recording one admission and raising 1-5 and 13-16 issues on behalf of the Plaintiff and 6-12 on behalf of the 2nd Defendant.

As revealed before this court the trial before the District Court was limited to a single witness summoned by the Plaintiff namely Kotapitiyegedara Appuhamy Maldeniya, Manager National Housing Development Authority (NHDA) Kandy.

During the trial before the District Court the Plaintiff marked document from P-1 to P-7 through the above witness and the defendant too had produced document 2D1 to 2D7 through the same witness.

When the said witness was under cross examination, the 2nd Defendant had produced several documents to establish that the property in question i.e. No 19/4 Vihara Mawatha, Suduhumpola was offered to one Gunasiri Rubasinghe by the NHDA and thereafter a payment of Rs. 45,000/- had been accepted from the said Gunasiri Rubasinghe. Even though the witness did not have the office copies of those documents in the file he produced before the District Court, witness had admitted those documents in his evidence. However the position taken by the witness before the District Court was that, after the death of the said Gunasiri Rubasinghe a request had been made by his sister Wimala Rubasinghe for the same property. An inquiry was held at the Head Office and during the inquiry it was revealed that Gunasiri Rubasinghe was unmarried at the time of his death and his father, mother and the other remaining sister had no objection for the property being given to the said Wimala Rubasinghe. Accordingly an agreement was signed between Wimala Rubasinghe and the NHDA to transfer the property to her after accepting Rs. 45,000/- from the said Wimala Rubasinghe. During the trial before the District Court, the agreement between Wimala Ruibasinghe and NHDA, affidavits received for the family members of deceased Gunasiri Rubasinghe, the request made by Wimala Rubasinghe and the payment receipt issued in the name of Wimala Rubasinghe were produced through witness Maldeniya.

When the witness was under cross-examination on behalf of the 2nd Defendant, it was brought to his notice that, the property referred to in the said agreement cannot be identified since the schedule has not been filled.

The witness whilst admitting that the schedule of the said agreement is not filled, submitted that there is no other agreement signed in respect of the property in question and the property which was allocated to Gunasiri Rubasinghe was granted to Wimala Rubasinghe based on the said agreement produced (marked P-1) after an inquiry held with regard to the same property. At the

conclusion of the trial before the District Court, the learned District Judge whilst answering the issues infavour of the Plaintiff had entered the judgment infavour of the Plaintiff.

Being dissatisfied with the above decision of the learned District Judge, the 2nd Defendant had preferred an appeal before the Provincial High Court of Civil Appeals of the Central Province holden in Kandy. At the conclusion of the hearing, the learned Judges of the Provincial High Court of Civil Appeals had allowed the said appeal and dismissed the action of the plaintiff.

The Plaintiff Respondent before the Provincial High Court of Civil Appeal had preferred the present appeal before this court, and this court on 4th May 2016 granted leave on the following questions of law.

- a) Was the High Court in err by not taking into consideration the evidence adduced by the official from the National Housing Department to the effect that the Authority had transferred the rights thereof to the Plaintiff as borne out by the documents contained in the file maintained by the Authority?
- b) Did the High Court err in law by ignoring the fact that the Plaintiff became entitled to the property in suit upon the sales agreement marked *ex.1* which was followed by the allocation of the premises described in the schedule of the plaint to the plaintiff?
- c) Were the learned High Court Judges in error in reversing the findings arrived at by the learned District Judge upon the evaluation of evidence adduced by the witness called by the Plaintiff at the trial?
- d) Did the High Court err in law by its failure to take into account that the contest raised by the 2nd Defendant was with regard to her right to be in possession as a mistress of the original allottee, Gunasiri Rubasinghe and not the identity of the corpus?

When going through the grounds on which the leave had been granted by this court it is important to consider the issues raised before the District Court, since the decision of the District Court will be based on those issues raised by the parties.

As referred to in this judgment earlier, there was one admission recorded at the trial and in the said admission both parties admitted that the property in question was belonging to the National Housing Development Authority. When considering the above admission recorded before the District Court, it is observed by this court that both contesting parties before the District Court had no doubt with regard to the property in question and the said property was belonging to the NHDA.

The 2nd Defendant had raised the following issues before the District Court,

06. The property said to have acquired by the Plaintiff was sold and handed over to one Gunasiri Rubasinghe by NHDA previously
07. Did Gunasiri Rubasinghe and the 2nd Defendant lived as husband and wife and invested their money for the said Gunasiri Rubasinghe to purchase the said property?
08. Even though the property was in Gunasiri Rubasinghe's name, it belongs to both the 2nd Defendant and Gunasiri Rubasinghe
09. The relationship the 2nd Defendant had with the said Gunasiri Rubasinghe amounts to a marriage between the two under the Common Law
10. Did Gunasiri Rubasinghe died on 23.03.1993?
11. After the death of Gunasiri Rubasinghe, did the 2nd Defendant become entitled to the his share of the properly

12. If the said questions are answered infavour of the 2nd Defendant, did the 2nd Defendant entitled to the relief claimed by her in her amended answer.

When going through the above questions raised on behalf of the 2nd Defendant, it is clear that there was no doubt with regard to the identity of the corpus and the property that is allocated to the Plaintiff as claimed by her in her plaint was once allocated to Gunasiri Rubasinghe. As further observed by this court, the 2nd Defendant's case before the District Court was that, she lived with the deceased as husband and wife prior to his death and invested their money to purchase the said property. Therefore she too is entitled for a share of the said property and due to her marriage with the deceased Gunasiri Rubasinghe, she is entitled to his share as well.

However when going through the proceedings before the District Court I cannot see any evidence led before the District Court to establish the said position. Even though the 2nd Defendant had produced some documents through the same witness (who was summoned by the Plaintiff) to establish that the property in question was allocated to the said Gunasiri Rubasinghe by NHDA and that he paid Rs. 45,000/- to the said NHDA, the 2nd Defendant had failed to lead any evidence before the District Court to establish that there was a marriage between Gunasiri Rubasinghe and her and the money spent to purchase the property in question is not only belongs to the deceased Gunasiri Rubasinghe but belongs to both.

As further observed by this court, the evidence placed before the District Court clearly established that the property in question which was previously allocated to the Gunasiri Rubasinghe was allocated to the Plaintiff after a full inquiry held at the Head office when the Plaintiff made a request to allocate the said property to her after the death of the previous allottee. When allocating the said property, the inquiry officer was satisfied that the deceased Gunasiri Rubasinghe was not married at

the time of his death and all the other family members had no objection for the property being allotted to Wimala Rubasinghe who is a sister of the deceased Gunasiri Rubasinghe.

As observed by this court, the learned District Judge after analyzing the above evidence which was placed before him during the trial was satisfied with regard to the identity of the property in question and the failure to include the schedule to the property in *ex.1* has not considered as a serious laps on the part of the Plaintiff's case in the light of the evidence placed before him by the Plaintiff and answered issue 1 to 5, 15 and 16 raised on behalf of the Plaintiff infavour of him.

However during the appeal before the Provincial High Court of Civil Appeal, the Hon. Judges who heard the appeal whilst analyzing the case for the Plaintiff had observed that,

“It is common ground between the parties the premises in dispute was owned by the NHDA. The position of the Plaintiff is that she is entitled to possess these premises in terms of the agreement to sell entered into between her and the NHDA. The said agreement is evidence marked as P1 it was submitted by the learned Counsel for the 2nd Defendant that the aforesaid agreement was not in respect of the premises in suit.

.....

It does not describe the premises in respect of which the agreement was entered into between the Plaintiff and the NHDA. Therefore the learned District Judge was not correct in holding that the Plaintiff was entitled to possess these premises on this agreement.

and decided to allow the appeal and dismiss the action of the Plaintiff.

However as observed by this court the learned District Judge was mindful of the above position when deciding the trial before him but he has analyzed the evidence placed before him correctly and

observed that property referred to in the Plaint as claimed by both parties before him is one and the same and there is no doubt that the said property had been now granted to the Plaintiff by the NHDA after death of Gunasiri Rubasinghe.

As further observed by this court the learned Judges of the Provincial High Court of Civil Appeal too had concluded that the premises in dispute was owned by the 'NHDA' but failed to appreciate the evidence placed before the Trial Judge and as to how the learned Trial Judge analyzed the said evidence and answered the issues raised by both parties before him, in the absence of any contest as to the identity of the corpus.

When considering the matters already discussed by me in this judgment, I answer the questions of law raised before this court infavour of the plaintiff Respondent Appellant and hold that the learned Judges of the Provincial High Court of Civil Appeal had erred when they decided to allow the appeal before them.

The appeal before this court is allowed and the Judgment of the learned District Judge Kandy is affirmed.

Appeal allowed with costs.

Judge of the Supreme Court

Hon. Justice Murdu N.B. Fernando PC

I agree,

Judge of the Supreme Court

Hon. Justice S. Thurairaja PC

I agree,

Judge of the Supreme Court

