

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

**In the matter of an Appeal from  
a Judgment of the Civil Appellate  
High Court.**

1. Henda Witharana Badralatha
2. Henda Witharana Nandasiri  
Both at Kurunduwatte,  
Wathugedera

Plaintiffs

**SC APPEAL No. 95/16**

SC HC CA LA No. 117/2014

HCCA Galle No. SP/HCCA/GA/25/2008(F) Vs

DC Balapitiya No. 1916/L

1. K.W.Chandra Mallika,
2. K.W.Wijesiri alias Wimalasena
3. K.K.V. Pramawathi  
All of Kurunduwatte,  
Wathugedera.

Defendants

AND

- 1.Henda Witharana Badralatha
- 2.Henda Witharana Nandasiri  
Both at Kurunduwatte,  
Wathugedera

Plaintiff Appellants

Vs

- 1.K.W.Chandra Mallika,
  - 2.K.W.Wijesiri alias Wimalasena
  - 3.K.K.V. Pramawathi
- All of Kurunduwatte,  
Wathugedera.

Defendant Respondents

**AND NOW BETWEEN**

- 1.Henda Witharana Badralatha
  - 2.Henda Witharana Nandasiri
- Both at Kurunduwatte,  
Wathugedera

**Plaintiff Appellant Appellants**

Vs

1. K.W. Chandra Mallika,  
Kurunduwatte, Wathugedera,  
Presently at  
No. 4/13, Heegalduwa Road,  
Wilegoda, Ambalangoda.
2. K.W.Wijesiri alias Wimalasena,  
Kurunduwatte, Wathugedera.
3. K.K.V.Pramawathi,  
Kurunduwatte, Wathugedera,  
Both presently at  
C/o K.W.Viraji, Near Dallukanda  
Junction, Thalgasgoda,  
Ambalangoda.

**Defendant Respondent Respondents**

**BEFORE**

**: S. EVA WANASUNDERA PCJ.  
L. T. B. DEHIDENIYA J &  
MURDU FERNANDO PCJ.**

Counsel

: Chathura Galhena with Tivanka  
Jayasinghe for the Plaintiff Appellant  
Appellants.  
The Defendant Respondent  
Respondents were absent and  
Unrepresented.

ARGUED ON

: 08.06.2018.

DECIDED ON

: 29.06.2018.

**S. EVA WANASUNDERA PCJ.**

This Court has granted leave to appeal on the following questions of law at the time the matter was supported for leave on 10.05.2016 :-

1. Did the Civil Appellate High Court misdirect itself in deciding that the Petitioners had not produced the Partition Plan No. 164?
2. Did the Civil Appellate High Court err in law by deciding that the Petitioners are not entitled to the reliefs prayed for in their Complaint?
3. Did the Civil Appellate High Court misdirect itself by failing to give due consideration to the evidence of the Licensed Surveyor who prepared the Plan bearing No. 4047?

The two Plaintiff Appellant Appellants (hereinafter referred to as the Plaintiffs) had filed action in the District Court of Balapitiya on 11.08.1992 against the three Defendant Respondent Respondents (hereinafter referred to as the Defendants) praying from court, a declaration of title to the land morefully described in the 1<sup>st</sup> Schedule to the Complaint and for a declaration that the land morefully described in the 2<sup>nd</sup> Schedule is an **access road to the land in the 1<sup>st</sup> Schedule to the Complaint.**

The said 1<sup>st</sup> and 2<sup>nd</sup> Schedules to the Plaint described the land and the access road according to Plan No. 164 dated 17.03.1975. This Plan 164 was a final partition plan of the Partition Action No. 2775/NP which was heard and concluded in the District Court of Balapitiya. The Plaintiffs claimed that they were legally entitled to Lot 1 of the said plan with the right of way through Lot 12. The Defendants filed answer denying all the averments in the Plaint and prayed for a dismissal of the action. However the Plaintiffs raised 7 issues and the Defendants raised 3 issues at the commencement of the trial. The Plaintiffs took out a commission on a Surveyor namely, Gunasiri Mendis and he produced Plan No. 4047 and gave evidence at the trial. The Defendants also took out a commission on a surveyor named Victor Godahena and he produced Plan No. 518.

The subject matter of this action is the ‘ access roadway ’ claimed by the Plaintiffs. **The Plaintiffs allege that this roadway was encroached by the Defendants.** The 1<sup>st</sup> Plaintiff Bhadraltha gave evidence of this encroachment and two Policemen also gave evidence on their behalf at the trial. Furthermore, on behalf of the Plaintiff, the surveyor Delath **Gunasiri Mendis** of 70 years of age, the Court Commissioner gave evidence and produced **the Plan No. 4074 dated 03.05.1995** marked as **X** and the **report** thereon marked as **X1**. While giving evidence he had produced to court certified copies of two other survey plans which were used by him to make Plan No. 4074 by superimposing the said Plans on the Plan he had made. The said certified copies of Plans were marked as **X2 and X3** which are respectively Plans Nos. **1778** done by the surveyor Garvin de Silva and **164** done by the surveyor A.G.F. Perera. The Plaintiffs closed their case marking in evidence, documents X, X1 ,X2, X3 and P1 to P13 through four witnesses.

The 1<sup>st</sup> Defendant , Mallika, surveyor Victor Godahena and Waradana Sarath Samarajeeva de Silva, a member of the Pradeshiya Sabha were the three witnesses who gave evidence for the defense. The surveyor and court commissioner Victor Godahena giving evidence marked the superimposed plan **518 as Z**. He stated that he used Plan X2 for superimposition. That is the Plan 164 as aforementioned which was already marked by the surveyor who gave evidence on behalf of the Plaintiffs. The defense had marked documents V1 to V10 and Plan Z.

On 30.01.2008, the District Judge dismissed the Plaintiffs' action without costs on the ground that the roadway claimed by the Plaintiffs was not properly identified. Being aggrieved by the said judgment, the Plaintiffs appealed to the Civil Appellate High Court. After hearing both parties and having considered the written submissions of both parties, the High Court Judges dismissed the Appeal on 21.01.2014. The basis on which the learned High Court Judge had done so, is that the **Plan on which the rights of the Plaintiffs are identified has not been produced before the trial court for its consideration.**

I find that the Plan 4074 dated 03.05.1995 made by Licensed Surveyor and the Court Commissioner who was issued with a commission by the District Court at the instance of the Plaintiffs is marked as "X" and produced. It is in page 246 of the brief. This Plan clearly shows the house and the land in which the Plaintiffs live, (adjacent to the rail road reservation) which is **Lot 1 in Plan No. 164** and the access road which is **Lot 12 in Plan No. 164**, ending at the entrance to the block of land marked Lot 1 which belongs to the Plaintiffs. The surveyor Gunasiri Mendis had superimposed Plan No. 164 relied on by the Plaintiffs and Plan No. 1178 containing Lots 32 and 33 within that area which is relied on by the Defendants, on the total area surveyed by him and identified that the **Defendants had encroached on the access road. The surveyor had shown the encroached areas as Lot A of an extent of ½ a Perche and Lot B of an extent of 1 Perch** and marked in red and green lines.

Then the Plaintiffs have marked the report of the survey X written by Gunasiri Mendis as X1 and it is at pages 250 and 251 of the brief. The Plans which were superimposed are Plan 164 and Plan 1778. Plan 164 and its report are marked as X3 which is at page 259 and its report is at page 258. This plan is dated 8.3.1973 and done by surveyor A.G.F. Perera. Plan No. 1778 dated as partitioned on 17.07.1975 is marked as X2 and it is at page 257 of the brief. The Licensed Surveyor and Court Commissioner in his evidence at page 89 of the brief states thus:

- ප්‍ර. තමා ගාවින් ද සිල්වා මහතා විසින් සකස් කොට ඇති අංක.1178 දරණ සැළැස්මේ සහතික පිටපත X.2 ලෙස ලකුණු කර ඉදිරිපත් කරනවා ?
- උ. ඔව්.

- ප්‍ර. තමා ඒ.පී.එෆ්.පෙරේරා මහතාගේ අංක.164 දරණ සැලැස්මේ පිටපතක් X.3 ලෙස ලකුණු කර ඉදිරිපත් කරනවා ?
- උ. ඔව්.
- ප්‍ර. තමා කියන්නේ, එම අධිෂ්ඨාපනය මොනවගේ එකක් කියලද ?
- උ. නිශ්චිත අධිෂ්ඨාපනයක්.
- ප්‍ර. එම අධිෂ්ඨාපනයන් අනුව අංක.32,33 කැබැලිවල විත්තිකරුවන් මෙම අංක.12 දරණ කැබැල්ලේ කොටස් අල්ලාගෙන තිබෙනවාද ?
- උ. එහෙමයි පාරෙන් අල්ලාගෙන ඇත.
- ප්‍ර. එම කැබැලි තමා ලකුණු කරලා ඇත්තේ මොන අක්ෂර වලින්ද ?
- උ. 33 කැබැල්ල ඒ. අක්ෂරය වශයෙන්, 32 කැබැල්ල බී.අක්ෂරය වශයෙන්.
- ප්‍ර. එම අංක.12 පාර කොපමණ පලලද ?
- උ. අඩි 12 ක් 13 ක් පලලයි.

The commission moved by the Defendants was done by Licensed Surveyor Victor Ganegoda and he also had made the superimposed Plan No. 518 which was surveyed on 19.06.1996. This Plan and its report were marked and produced as Z. The Plan 518 is at page 252 and the report is at page 253 of the brief. This report **specifically mentions that Lot B of an extent of 0.06 Perches has been encroached by the 2<sup>nd</sup> Defendant and Lot C of an extent of 0.64 Perches has been encroached by the 1<sup>st</sup> Defendant.** This surveyor while giving evidence has stated thus at page 203 of the brief:

- ප්‍ර. දැන් තමා දන්නවා තමාට මේ " ඉසෙඩ් " දරණ සැලැස්මේ අධිෂ්ඨාපනය කරන්න තමාට සැලැස්මක් ඉදිරිපත් කලා. ඒ සැලැස්ම බී.2 නොහොත් X.2 වැනියට ඉදිරිපත් කරලා තිබෙනවා? ( එය පෙන්වයි.)
- උ. එහෙමයි. මේ පිඹුර තමයි අධිෂ්ඨාපනය කලේ මම අධිෂ්ඨාපනය කරලා මගේ පිඹුරේ පෙන්වා තිබෙනවා.
- ප්‍ර. දැන් තමා කියා සිටියා ඒ අධිෂ්ඨාපනය තමාගේ සැලැස්මේ රතු ඉරි වලින් පෙන්වා තිබෙනවා?
- උ. එහෙමයි.

- ප්‍ර. ඒ සැලැස්මේ දැන් තමා කියා තිබෙනවා බස්නාහිර තිබෙන්නේ පාරක් කියලා?
- උ. බස්නාහිරට පාරක් තිබෙනවා.
- ප්‍ර. ඒ පාරෙන් අල්ලාගෙන තිබෙනවාද ?
- උ. චන්තිකරුවන් පාරෙන් කොටස් දෙකක් අල්ලාගෙන තිබෙනවා. කැබැලි අංක.බී, කැබැලි අංක.සී.කැබලි.

It is rather conspicuous that the access road Lot 12 which leads up to Lot 1 in Plan No. 164 has been encroached upon by the Defendants, according to the Plans done by both the Commissioners who surveyed the land at the instance of the Plaintiffs and the Defendants.

In the judgment of the District Judge, issues 1 and 2 have been answered in the affirmative and as such the Plaintiffs have been held to have good title to Lots 1 and 12 of Plan 164 as in the Schedules to the Plaint. The learned trial judge has erred when he went on to find that the end of the roadway is not correctly depicted in the Commission Plan of the Plaintiff whereas the Plaintiffs contended only ' that the access roadway was encroached by the Defendants and that the same be removed". Anyway the learned District Judge had correctly answered the issues and affirmed the position that the Lot 12 of the Partition Plan No. 164 is a roadway used by the Plaintiffs; the said roadway has been encroached upon by the Defendants and that the said encroachments have been identified as 'A' and 'B' in the Commission Plan No. 4074.

The Civil Appellate High Court has arrived at an incredible conclusion that Plan No. 164 was not marked and produced at the trial before the District Court. At page 4 of the judgment, it is stated thus:

" පැමිණිල්ලේ 1 වන සහ 2 වන උප ලේඛණ දෙකම පදනම් කරගෙන ඇත්තේ, ඒ.ජේ.එල්.පෙරේරා මිනින්දෝරුවරයා විසින් සකස් කරන ලද අංක.164 හා 17.03.1973 දරණ පිඹුර මතය. නමුත් එම පිඹුර මෙම නඩුවට ඉදිරිපත් කර නොමැත."

" ඉහතින් විස්තර කරන ලද අංක.164 දරණ පිඹුර නඩුවට ඉදිරිපත් කර නැති නිසා එක් පිඹුර පදනම් කරගෙන පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති සහන ප්‍රදානය කිරීමේ ගැටළුවක් පවතී."

I have gone through the brief and found that not only the Plan 164 but also the report thereto attached by the Surveyor had been marked and produced before the trial judge as explicitly explained in the foregoing paragraphs hereof. It must have been a hallucination in the minds of the Civil Appellate High Court Judges to state that the said plan was not produced at the trial.

I answer the questions of law raised at the inception of this judgment in the affirmative in favour of the Plaintiff Appellant Appellants and against the Defendant Respondent Respondents. I set aside the Judgment of the Civil Appellate High Court dated 21.01.2014. I set aside the judgment of the District Court dated 30.01.2008. The Plaintiffs are entitled to the reliefs as prayed for in the Plaint.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court.

L. T. B. Dehideniya J.  
I agree.

Judge of the Supreme Court.

Murdu Fernando PCJ.  
I agree.

Judge of the Supreme Court.