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

SC Appeal 145/2016

Court of Appeal Case No:
CA/LA/493/06

DC Case No: 20456/L

Hettiarachchige Manel alias Manel Hettiarachchi,
2/38, Heerasagala Road,
Kandy

PLAINTIFF

- VS –

1. Victor Seneviratne
2. Manel Dissanayake
   Both of
   1/38, Heerasagala Road, Kandy

3. Seetha Chandrasekara (deceased)
   32, Devi Road, Watapulawa, Kandy

3A. Indrani Dissanayake,
32, Devi Road, Watapulawa
Kandy

DEFENDANTS

AND THEN

Manel Dissanayake
Both of 1/38, Heerasagala Road,
Kandy

2nd DEFENDANT – APPELLANT

- VS -

Hettiarachchige Manel alias Manel Hettiarachchi,
2/38, Heerasagala Road, Kandy

PLAINTIFF – RESPONDENT

1. Victor Seneviratne
   of 1/38, Heerasagala Road, Kandy

3A. Indrani Dissanayake,
32, Devi Road, Watapulawa,
Kandy.

1st and 3A Defendants – Respondents

AND NOW BETWEEN

Manel Dissanayake
Both of 1/38, Heerasagala Road,
Kandy

2nd DEFENDANT – APPELLANT – APPELLANT

- VS -

Hettiarachchige Manel alias Manel Hettiarachchi,
2/38, Heerasagala Road, Kandy

PLAINTIFF – RESPONDENT – RESPONDENT

1. Victor Seneviratne
   of 1/38, Heerasagala Road,
   Kandy.

1A. Neeta Magret Seneviratne (nee Amarasinghe)
   1/38, Heerasgala Road,
   Mulgampola, Kandy

3. Seetha Chandrasekara
   32, Devi Road, Watapulawa, Kandy

3A. Indrani Dissanayake
   No. 32, Heerassagala Road, Kandy

1st AND 3A DEFENDANTS – RESPONDENTS – RESPONDENTS

Before : Justice Murdu Fernando, PC., CJ.
Justice E.A.G.R. Amarasekara, J.
Justice Achala Wengappuli, J.

Counsel : Sachindra Sanders instructed by Ms. Manoja Gunawardana for the 2nd Defendant – Appellant – Appellant.

Ms. Mudithavo Premachandra for the Plaintiff – Respondent – Respondent.

Argued on : 31.01.2023

Decided on : 13.06.2025

E.A.G.R Amarasekara, J.

The Plaintiff – Respondent – Respondent (Hereinafter referred to as the "Plaintiff") instituted an action in the District Court of Kandy under DC Case No: 20456/L against the 2nd Defendant – Petitioner – Appellant (Hereinafter referred to as the "Appellant" or "2nd Defendant") and 1st and 3A Defendants – Respondents – Respondents (Hereinafter sometimes referred to as the "1st Defendant" and "3A Defendant" and all 3 Defendants will be collectively referred to as "Defendants") by virtue of the Plaint dated 3.7.2001 – Vide page 142 of the Brief.

As per the Plaint dated 03.07.2001, the Plaintiff had stated how the title devolved on her from the original owners to the land mentioned in the schedule to the Plaint and she had also claimed prescriptive title to the same. She had also stated that the whole land that belonged to her is described in the 1st schedule to the Plaint and the portion disputed by the Defendants is described in the 2nd schedule to the Plaint. As per the Plaint, her land is also depicted as Lot 1 and Lot 2 in Plan No.3764 made by T. B. Atthanayake, L.S.

The Plaintiff, in her Plaint, alleged that the Defendants were disputing the southern boundary of the land described in the 2nd schedule to the Plaint from March 2001 and they had encroached a certain portion from that land towards the South. Thus, the Plaintiff, among other things, had prayed for a declaration of title to the land described in the 1st and 2nd schedules to the Plaint, to demarcate the southern boundary of the land described in the 2nd schedule to the Plaint and eviction of the Defendants from the portion encroached and to put her back in peaceful possession of the same.

The 1st and 2nd Defendants filed their Answer and denied any right for the Plaintiff to file or maintain an action against them. They had stated that they are the protected tenants in terms of Rent Act under the 3rd Defendant, and there was a rent and ejectment case between the 3rd Defendant and the 1st Defendant before the District Court, Kandy, which was decided in favour of the 1st Defendant. The 2nd and 3rd Defendants alleged that this was a collusive action by the

Plaintiff and the 3rd Defendant to evict the 1st and 2nd Defendants from the property relevant to this action. Even though the 1st and the 2nd Defendant had averred that they are tenants under the 3rd Defendant, in the land relevant to this case at hand (vide paragraph 3 of their joint Answer), they have described in a schedule to the said Answer, a property that once belonged to the 3rd Defendant- vide paragraph 4 and schedule of the said Answer. However, the 1st and 2nd Defendants had alleged that there appeared to be an attempt by the Plaintiff to encroach their 10 feet wide access road. Thus, the 1st and 2nd Defendants had prayed for a dismissal of the Plaintiff's action, a declaration that they are the lawful tenants under the 3rd Defendant and to make a 10 feet road available as their access road to the property described in the schedule to the Answer. It must be noted that the description of the land in the Plaint is quite different from the land described in the schedule to the Answer.

The 3rd Defendant or her substitute 3A Defendant had not filed an Answer and the matter had been decided *ex parte* against the 3A Defendant along with an *inter-parte* Judgment made against the 1st and 2nd Defendant following an inspection of the subject matter that took place with the consent of the Plaintiff and the 1st and 2nd Defendants.

During the inspection, the learned District Judge had observed a roadway relating to the dispute presented by the Defendant which was only 4 ½ and 5 feet wide in contrast to the claim of 10 feet width by the 1st and 2nd Defendants. It was also observed by the learned District Judge that said road access was widened for about 6 to 7 feet of width at a certain place by the Defendants on a day close to the inspection. The learned District Judge further observed certain things relating to the water drainage system on the ground and hindrance caused to the flaw of water due to certain acts of the said Defendants. It should be noted that the said Defendant's claim in the Answer was that an existing 10 feet wide road was at the verge of being encroached by the Plaintiff but no road with such width was observed by the learned District Judge other than an attempt to widen it by the Defendants.

Thus, the learned District Judge, after the inspection done on 15.09.2003, delivered his *inter parte* Judgment dated 07.10.2003 based on the inspection which among other things stated as follows;

- Being tenants, the 1st and 2nd Defendants have no right to ask for a wider access road from the Plaintiff and it is a claim that should be prayed for by the 3rd Defendant.

- Defendants should not block the water drainage system on the ground and Defendants should make certain changes to the said drainage system as directed in the Judgment.

On the same day the learned District Judge delivered his aforesaid *inter parte* Judgment, aforesaid *ex parte* trial against the 3A Defendant had taken place and the Judgment dated 07.10.2003, was given against the 3A Defendant. As per the page 97 of the brief, the 1st and 2nd Defendants were also present and represented by their lawyer before the District Court on that date. Thus, they should be aware of the *ex parte* Judgment against the 3A Defendant from the day it was delivered. In terms of the *ex parte* Judgment, which appears to have been later confirmed as there is no dispute over that, reliefs in Prayer (a), (b), (c) and (e) had been granted to the Plaintiff against the 3A Defendant. It appears that the Prayer (d) was to call for a commission report through a surveyor and such report had been taken and marked during the *ex parte* trial. Thus, all the reliefs prayed for by the Plaintiff had been granted to her which includes the declaration of title, demarcation of the southern boundary of the land in the second schedule and especially the eviction of the Defendant from the encroached portion of the land which is depicted in the said plan marked X at the *ex-parte* trial. It appears that a decree had been entered combining the *ex parte* Judgment and *inter parte* Judgment and later on, an amended decree had been entered- vide pages 165 to 175 of the brief.

It is alleged in the Petition that the Plaintiff sought to amend the decree without notice being sent in that regard to the Petitioner (the 2nd Defendant) and the 1st Defendant as per the procedure laid down in Section 189 of the Civil Procedure Code (hereinafter "C P C"). All the journal entries of the District Court or the full brief of the District Court including documents relating to service of notices etc have not been tendered to establish that no notice was given. Only certified copies of selected portions of the District Court are available in the brief. It is true that if the Judgment or order is going to be amended, it is essential to give notice. However, basically, a decree is one should be prepared by the Court (vide Section 188 of C P C) in conformity with the Judgment. Thus, what is important is whether this amended Decree is in conformity with the Judgments delivered or not. On the other hand, I do not see any clear allegation to say that the amended decree is not in conformity with the judgments delivered. If it is in conformity with the Judgment, it is the decree that has to be executed. It appears that the position of the Appellant is that the said decree should not be allowed to be executed against or to affect the 1st Defendant and the 2nd Defendant, as the case between the Plaintiff and them

was decided as per the findings of the inspection and concluded, making it unlawful to execute the decree against them. Further, as no notice was given, it is violative of Section 189 and breach of natural justice.

It appears that based on the resistance made to the execution of the writ of possession, the 1st and 2nd Defendants and another was charged for contempt, but what is challenged in this application is the Order made by the learned District Judge dated 08.12.2006, refusing the application made by the 1st and 2nd Defendants, which contained certain objection against the issuance and enforcement of writ of execution and the refusal of the Court of Appeal to set aside the said Order of the District Court by the Court of Appeal judgment dated 05.10.2015.

As per the Order dated 08.12.2006, the learned District Judge refused the said application made by the 2nd Defendant, among other things, on the following grounds;

- Even though the position of the 2nd Defendant was that there is no decree empowering to issue a writ of execution against the 1st and 2nd Defendants, or to evict the 1st and 2nd Defendants, prayer (e) of the Plaint had been granted to the Plaintiff which prayed for the eviction of the Defendants and everyone claims under them from the portion encroached towards the southern boundary of the portion of land described in the second schedule to the Plaint and to put her back in peaceful possession of the same.
- There is no appeal made against that judgment.
- As the tenancy under the 3rd Defendant had been admitted, there is no bar to execute this writ of execution.

The learned Judges of the Court of Appeal refused to set aside the said Order, *inter alia* on the grounds mentioned in the paragraph quoted below;

"*All parties have not disputed the fact that the 1st and 2nd defendant petitioners are tenants of the 3A defendant and is in occupation of the house belonging to the 3A defendant according to plan No. 2003-40 a strip of two perches of land belonging to the plaintiff's land had been encroached by 3A defendant, the land shown as Lot 3 is occupied by 1st and 2nd defendants. The exparte judgment given against the 3A defendant petitioner on this issue have not been challenged by the 3A defendant. The prayer to the plaintiff respondent's plaint to evict the*

defendants which includes the 1st and 2nd defendants as well has not been challenged in appeal by the 3A defendant. The exparte judgment stands unchallenged."

Further the learned Court of Appeal Judges has stated that the learned District Judge had carefully analyzed the evidence and has correctly refused the objections and allow the Plaintiff to execute decree of the District Court.

When one reads the above reasons given by the Court of Appeal, as well as the learned District Judge, it may give the impression, that, as prayer (e) was granted by the *ex parte* Judgment, grant of that relief itself allows evicting the 1st and 2nd Defendants qua 1st and 2nd Defendant as it is prayed in that part of the prayer to evict all the Defendants and all who claims under them from the encroached portion and put the Plaintiff back in peaceful possession. However, the case between the Plaintiff and the 1st and 2nd Defendants concluded with the inspection and the *inter parte* Judgment made in accordance with the inspection. Thus, as far as the *ex parte* Judgment against 3A Defendant is concerned, prayer (e) in the Plaint has to be read and understood as a relief prayed for to evict the 3rd Defendant and all who claim under her from the said encroached portion of the land as 1st and 2nd Defendants are not parties to the *ex parte* trial and Judgment. If the 1st and 2nd Defendants fall within the category of 'all who claim under the 3rd Defendant', irrespective of the fact that they were the 1st and 2nd Defendants for the *inter parte* Judgment, they have to face the consequence of the issuance of the writ against the 3A Defendant. Even if they were never Defendants in this case, and only 3A was the Defendant, still if they fall under the term 'all who claim under 3A Defendant', they are bound to respect the decree. If the 1st and 2nd Defendants do not fall under the term 'all who claim under the 3rd Defendant', they can make their claim or objection when the writ of possession is executed, but here admittedly, through their Answer, they have stated that the Plaintiff has no right to file or maintain an action of the nature of what is contained in the Plaint against them, indicating that they have nothing to do with the cause of action of the Plaintiff, which is based on the encroachment of his property, apparently because they are tenants of the 3rd Defendant, who is the landlord. When the writ is issued against the legal representative of the 3rd Defendant, namely 3A defendant, they cannot say that they do not fall under the term "All who claim under the 3rd Defendant". In fact, the relevant part of the amended decree which is relevant to the *ex parte* Judgment, order to evict the 3A Defendant and all who claim under 3A Defendant. Thus, the amended decree and any writ of execution based on that amended decree is lawful. On the other hand, any unlawful encroachment done in favour of the 3rd Defendant has to be proceeded

against the 3rd Defendant (now against his legal representative) and people claimed under him. The amended decree with regard to the *ex parte* Judgment has been entered lawfully for that purpose. The *inter parte* Judgment and the part of the decree entered in that regard against 1st and 2nd Defendants qua 1st and 2nd Defendants cannot stop executing the decree against the 3rd Defendant's legal representative and against them, not as 1st and 2nd Defendants but as the people who claimed under 3rd Defendant. There may be a part of a building put up on the encroached portion, but it goes with the soil rights of the Plaintiff, as the case had been decided against the 3rd Defendant and in favour of the Plaintiff with regard to the encroached portion. The Plaintiff is entitled to get the amended decree enforced against 3rd Defendant (now the 3A Defendant, legal representative) and people claimed under him. The 3rd Defendant and the 1st and the 2nd Defendants through their agreement to let cannot create tenancy rights over the property of the Plaintiff without his consent.

It appears that because of the cross claim they made against the Plaintiff over a dispute regarding a road access, the inspection had taken place. However, it has to be observed that they could not have made a cross claim when they refused the Plaintiffs' entitlement to file and maintain the action, as cross claims can be made when it is of a nature that can be set off with the claim of the Plaintiff. Anyway, no objection had taken place, and with the consent of parties, an inspection had been taken place and an *inter parte* Judgment had been made on that. Anyway, that part of the decree is not challenged.

While granting Leave to Appeal, this Court has accepted the following questions of law, and they are answered accordingly as below;

Q. i) *Did the learned District Judge as well as their Lordships /Ladyships of the Court of Appeal err, misdirect and/non direct themselves by failing to appreciate that the Plaintiff had got the decree amended without prior notice to the petitioner and the 1st Defendant by violating the express provisions of section 189 of the Civil Procedure Code (as Amended)?*

A. Answered in the Negative as, other than a mere statement in the application, there is no sufficient material to say that no notice was given to the 1st and 2nd Defendants in the brief provided. On the other hand, the relevant part of the amended decree is relevant to the 3rd Defendant (Now 3A legal Representative) and people claiming

under her. Thus, if any notice is necessary, it has to be given to the 3A Defendant, but she had been absconding the proceedings and the matter went *ex parte.* After serving notice, no step had been taken to vacate the *ex parte* Judgment. Thus, there is no need of notice on the 3rd Defendant or her legal representative. Further, being present on the day of the *ex parte* trial, the 1st and the 2nd Defendants were aware of the outcome of that trial.

Q. ii*) Did the Learned District Judge as well as their Lordships /Ladyships in the Court of Appeal err, misdirect and/or nondirect themselves by holding that, the amended decree in question had not caused any prejudice to the petitioner's tenancy rights?*

A. Answered in the Negative.

Q. iii) *Did the Learned district Judge as well as their Lordships /Ladyships of the Court of Appeal err, misdirect and/or none direct themselves that the settlement between the Petitioner and the plaintiff could have been enlarged to include the execution of the writ of possession where the settlement(sic) involved or concerned the 3A Defendant?*

A. Answered in the Negative.

Q. iv) *Are the 1st and 2nd Defendant-Petitioner-Petitioner bound by the Judgment against the 3rd Defendant as those who are holding under the 3rd Defendant?*

A. Answered in the affirmative.

Q. v) *By the Judgment delivered against the 1st and 2nd Defendant-Petitioners has their claim being rejected by and dismissed by the District Court?*

A. Answered in the affirmative as their claim had not been granted after the Judgment made following the inspection.

Q. vi) *Have the 1st and 2nd defendants fail to prefer an appeal against the said Judgment if they are agreed* (sic)?

A. Does not arise as the Judgment against the 1st and 2nd Defendants appear to have been made after inspection in terms of Sections 408 and 428 of the C P C. Thus, no appeal lies. Judgment against the 3rd Defendant was made *ex parte* and 3rd Defendant did not move to vacate it. 1st and 2nd Defendants being persons claimed under the 3rd Defendant and not a party to the *ex parte* trial, has no right of appeal over it.

On the other hand, as said before, the 1st and 2nd Defendants do not have any rights to the lands of the Plaintiff. Their contractual rights as tenants are with the 3A Defendant. That has nothing to do with the rights of the Plaintiffs relating to the encroached lands of the Plaintiff. The 1st and 2nd Defendants have not claimed any land rights to that portion, nor have any contractual rights with the Plaintiff as to the tenancy. Therefore, it cannot be said that any substantial right of the 1st and 2nd Defendants are going to be affected by the enforcement of the amended decree.

I do not see any reasonable ground for making these appeals to the Court of Appeal and then to this Court other than relying on mere technicalities without any merit. The conduct of the Appellant has hindered the Plaintiff enjoying his victory peacefully for about twenty years. Thus, this Court orders that the Plaintiff-Respondent is entitled to twice the amount of taxed costs.

Hence, this appeal is dismissed with costs as above.

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Judge of the Supreme Court

Hon. Murdu Fernado, PC, CJ.

I agree.

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The Chief Justice

Hon. Achala Wengappuli, J.

I agree.

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Judge of the Supreme Court