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

In the matter of an Appeal under the provisions of the High Court of the Provinces (Special Provisions) (Amended) Act No. 54 of 2006.

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff.

Supreme Court Appeal No. 162/10
Supreme Court Leave to Appeal
Application No. HC/HCCA/LA/342/09

Civil Appellate High Court Kegalle
Appeal No. SP/HCCA/KAG/170/2007/(F)

D.C. Mawanella
Case No. 132/L.

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika,
   Ihala Daswatte,
   Mawanella.
2. Pitihuma Ralalage Premaratne Menike,
   Ihala Daswatte,
   Mawanella.
3. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Hondiya Deniya,
   Udunuwara.
4. Pitihuma Ralalage Illangaratne Menike,
   320B, Menikagara Road,
   Korathota,
   Kaduwela.

Defendants

And Between

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff – Appellant.

Vs.

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika,
   Ihala Daswatte,
   Mawanella.
2. Pitihuma Ralalage Premaratne Menike,
   Ihala Daswatte,
   Mawanella.
3. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Hondiya Deniya,
   Udunuwara.
4. Pitihuma Ralalage Illangaratne Menike,
   320B, Menikagara Road,
   Korathota,
   Kaduwela.

Defendants – Respondents.

And Between.

Pitihuma Ralalage Premaratne Menike,
Ihala Daswatte,
Mawanella.

2ND Defendant – Respondent – Petitioner.

Vs.

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff – Appellant-Respondent

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Manika,
   Ihala Daswatte,
   Mawanella.

2. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Hondiya Deniya,
   Udunuwara.

3. Pitihuma Ralalage ILLangaratne Menike,
   320B, Menikagara Road,
   Korathota,
   Kaduwela.

1st, 3rd and 4th Defendant – Respondent Respondents.

AND NOW BETWEEN.

Pitihuma Ralalage Premaratne Menike,
Ihala Daswatte,
Mawanella.

2ND Defendant – Respondent – Petitioner-Appellant.

Vs.

Pitihuma Ralalage Tennakone Banda,
Maligatenna,
Thunthota,
Dedigama.

Plaintiff – Appellant – Respondent-Respondent.

1. Wickramasinghe Mudiyanselage Podi Menika alias Punchi Menika,
   Ihala Daswatte,
   Mawanella. (Deceased)

1A. Pithuma Ralalage Upananda Gamini Wickramasinghe
1 B. Pitihuma Ralalage Dissanayake
Both of Ihala Dawatte,
Mawanella.

2. Pitihuma Ralalage Kuda Menike,
   Wegiriya Veediya,
   Udunuwara.

3. Pitihuma Ralalage Illangaratne Menike,
   320 B, Meniagara Road,
   Korathota,
   Kaduwela.

Substituted 1A and 1B and, 3rd and 4th Defendant -Respondent- Respondent-Respondents.

Before : Priyantha Jayawardena, PC, J
P. Padman Surasena, J &
E.A.G.R. Amarasekara, J

Counsel : Ms. L.M.C.D Bandara Instructed by Ms. Minoly De Zoysa for the 2nd Defendant – Respondent – Petitioner - Appellant.
Rohan Sahabandu, PC, with Chathurika Elvitigala for the Plaintiff – Appellant- Respondent- Respondent.

Argued On : 11.03.2019

Decided on : 28.02.2020

E.A.G.R. Amarasekara, J

This action was instituted in the District Court of Mawanella by the Plaintiff - Appellant- Respondent above named (herein after sometimes referred to as the plaintiff) against the 2nd Defendant Respondent Petitioner (hereinafter sometimes referred to as the 2nd Defendant) and the 1st , 3rd, 4th Defendant Respondent Respondents (hereinafter sometimes referred to as 1st, 3rd and 4th Defendants respectively) for a declaration of title to the land more fully described in the schedule to the plaint and to eject the 2nd Defendant and the said 1st , 3rd, 4th Defendants and their agents, servants and all those holding under them and for damages. The Plaintiff also prayed for a sum of Rs. 150,000/- jointly and severally from the Defendants being the value of the trees felled by them but could not be used for the purposes of the Plaintiff due to the actions of the Defendants.

The learned District Judge of Mawanella dismissed the plaint and granted some of the reliefs prayed for in the amended answer. However, in appeal, the learned Civil

Appellate High Court Judges allowed the appeal and granted reliefs to the Plaintiff. Being aggrieved by the said judgment of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden at Kegalle, the 2nd Defendant preferred a leave to appeal application to this court and leave was granted on the following questions of Law mentioned in paragraph 25(c), (d) and (f) of the Petition.

25."(c). Has the Civil Appellate High Court come to a erroneous finding that in view of the facts placed before Court, the main issue to be decided is whether the Lot No.1 depicted in Plan 2V1 is a part of the land described in the Schedule to the Plaint or not?

(d). Has the Civil Appellate High Court erred in law failing to consider whether the Plaintiff has identified the land in dispute with reference to the metes and bounds given in the Plaint and the boundaries specified in the schedules to the deeds that the 1st Respondent relied upon?

(f). Has the Civil Appellate High Court failed to consider whether the 1st Respondent has proved a case against the Petitioner and the 4th Respondent by identifying the land he claimed and by proving title thereto?" [Sic]

The Plaintiff in his amended Plaint pleaded that;

- The land described in the schedule to the plaint belongs to him and his title is based on 3 deeds, namely deed No. 12970 attested on 16.10.1942, deed No. 9306 attested on 10.11.1954 and deed No. 3674 attested on 10.11.1983.

- He also has prescriptive title to the said land since he and his predecessors have been in long, continuous and uninterrupted possession of the land for a period more than 10 years.
- He planted the land with Mahogany and Pepper worth of Rs. 500,000.00 and enjoyed the fruits of his plantation.
- When, in 1995, he felled a number of trees among his plantation, the 2nd Defendant lodged an entry at the Mawanella Police and from there onwards even the other Respondents disputed the Plaintiff's title to the land in question. Thus, he was denied of his rights to enjoy his land and its plantation.
- Thereafter, the Mawanella Police Station referred the dispute to the Mawanella Primary Court and filed the case bearing No. 27525 where the learned Magistrate directed the plaintiff to file a civil case to resolve the dispute over title.

Thereafter, the Defendants filed the amended answer and pleaded inter alia;

- That the Plaintiff was living away from the corpus for more than 14 years, and has not had long and continuous possession of the said land; thus, does not have a right to claim prescriptive title under the Prescription Ordinance.
- That the Plaintiff had never cultivated the land described in the schedule to the plaint or any other land.
- That the valuation of the trees felled down is not accurate since the value of the same which was deposited to the credit of the primary Court case was only Rs. 15,000/-

- That the Plaintiff forcefully entered the said land for which he did not have any right or possession and felled trees without any right to do so, giving rise to the dispute between the parties.
- That the Defendants' land described in the 1st schedule to the answer was originally owned by Pitihuma Ralalage Dasanayake Banda (herein after sometimes referred to as Dasanayake Banda), father of the 2nd Defendant, by virtue of deed No. 16830 dated 14.7.1961, attested by W. Manamperi Notary Public. Dasanayake Banda enjoyed the land until his death upon which the title devolved on the Defendants as heirs to Dasanayake Banda.
- That the land described in the Plaint is adjacent to the land described in the 1st schedule to the amended answer and the Plaintiff has no right to claim the reliefs as prayed for in the plaint.
- That initially the land claimed by the Plaintiff and the land described in the 1st schedule to the amended answer existed as one land and said 2 lands are called by the same name while there was no fence of permanent nature separating the two lands.
- That the Plan No. 1201 dated 17.01.1998 made by A.D. Sirisooriya, licensed surveyor depicts clearly the nature of the 2 lands and the Lot 1 of the said Plan is the land described in the 1st schedule to the amended answer.
- That Lot 2 of the said Plan No.1201 together with Lot 1 has been in the possession of the Defendants over a period of more than 25 years and at no point of time, the Plaintiff possessed the said land.

- That, the Defendants owned and possessed the said lot 1 as per the title obtained through aforesaid deed no.16830, and they have prescriptive title to aforesaid lot 2 through the possession over a period exceeding 25 years.
- That the above stated amount (Rs. 15,000/-) deposited in courts belongs to them since the trees were from aforesaid lot 1.

It appears that in the original answer dated 23rd September 1996, the Defendants had stated that the Defendants have no title to the land described by the Plaintiff but to the land described in the schedule to the answer which is the same land in the 1st schedule to the amended answer. However, by amending the answer the Defendants have claimed not only the land in the 1st schedule to the answer but the land in the second schedule to the answer which as per evidence of the 2nd Defendant(Petitioner in this Application) is the land bought by Dasanayake Banda from Muthubanda – vide pages 171- 173 of the Brief; In other words, to the land claimed by the Plaintiff. On the other hand, as per the evidence of the 1st Defendant, mother of the Plaintiff as well as of the other Defendants, what is surveyed by both surveyors, namely aforesaid A.D. Sirisooriya, Licensed Surveyor on a commission taken by the Defendants and M.D. Senavirathne, Licensed Surveyor on a commission taken by the Plaintiff, is the land bought from said Muthubanda. Thus, it appears, the Defendants craftly had changed their stance with regard to the land claimed by the Plaintiff in their amended answer by claiming prescriptive title to it in the amended answer though they have clearly stated in their original answer that they have no title to the land described in the plaint. If this change of stance was revealed it might have affected the permission for the amended answer.

The trial at the District Court commenced on the 24 issues raised by the contesting parties, namely the Plaintiff and the 1st and 2nd defendants, out of which 14 were raised by the Plaintiff and 10 issues were by the 1st and 2nd Defendants and there was no admission made at the commencement of the trial. Trial was taken exparte against 3rd and 4th Defendants.

The Plaintiff in his amended plaint avers that the land in the schedule to the amended plaint was one time owned and possessed by one H.M. Muthubanda on the strength of a deed dated 16.10.1942 attested by P.C.M.Molligoda, Notary Public and said Muthubanda sold it by deed no. 9306 dated 10.11.1954 (P3) to Pitihuma Ralalage Dasanayake Banda who came to the peaceful and undisputed possession and enjoyed the said land. As per the amended plaint, said Pitihuma Ralalage Dasanayake Banda has sold the said land to the plaintiff by deed no. 3674(P4) dated 10.11.1983 attested by A. Rajasinghe, Notary public.

As per the schedule to the amended plaint, the land claimed by the plaintiff is described as “Gira Ambe Watta” which is in extent “one pela of paddy sowing” and the boundaries are as follows:

North and West – The ditch of the lands that belong to Pinhami and others (පින්හාමිට හා තවත් අයට අයිති ඉඩම් වල අගල)

East – “Gal Enda” seperating Girithale Watte (ගිරිතලේ වත්ත වෙන්වන ගල් ඇන්ද)

South – Arambe Deniya paddy field (අරඹේදෙනිය කුඹුර)

The aforesaid boundaries included and described in the schedule to the amended plaint are in conformity with the schedules to the deeds relied by the Plaintiff for his title to the land.

As per the said schedule in the amended plaint aforesaid land is depicted in the plans made for this case, namely as lot 1 in the plan no. 1057 made by M.D. Senaviratne, Licensed surveyor and also as lot 1 and 2 in the plan no. 1201 made by A.D. Sirisooriya, Licensed surveyor.

The Plan No. 1057 marked as P1 at the trial describes the boundaries as follows;

North; Gira Ambe Watte

East; Girithale Watte

South; Arambe Deniya

West: Hitinawatte

Moreover, the diagram therein depicting the land surveyed clearly shows a "Gal Enda"(ගල් ඇන්ද) on the eastern boundary separating Girithale Watte and a ditch running through the western boundary towards the north, extending to some extent to the northern boundary but the rest of the northern boundary that reaches the eastern boundary is not depicted by a ditch. The plaintiff admits in evidence that there is a fence made of Enderu trees ,about 30 feet in length on the northern boundary where there is no ditch and that part is not compatible with the description in the deeds and the schedule to the plaint since as per the Plaintiff's deeds and the schedule to the plaint the northern boundary is a ditch- vide pages 105 and 106 of the brief). However, the presence of an 'Enderu' Fence at the time of survey covering a portion of the northern boundary cannot be considered as a

serious discrepancy since ditches can be filled up with soil and decaying parts of trees and other things with the passage of time and people may plant trees to fix the boundaries. Such changes of the nature of boundaries is evidenced even by the description of the southern boundary of the land described in the first schedule of the amended answer. It describes the southern boundary as 'Ditch, presently by Land belonging to Punchirala and Others' indicating that once there was a ditch but at present the relevant land is bounded on the south by the land identified with the said description. Thus, a change in the description of part of the Northern boundary in the plan made by M.D.Senavirathne, licensed surveyor for the case after many years of executing the original deed that contains the same schedule in the plaint shall not be considered as a serious discrepancy with regard to the identity of the land when all other boundaries are compatible with the schedule in the plaint as well as with the schedules in the plaintiff's deeds. Notaries Public generally follow the descriptions in the old deeds unless there is a new plan or instruction with regard to the change of the nature of the given boundary. Furthermore, the Plaintiff while giving evidence had indicated that the lands separated by the boundaries to the west and the north shown in plan no. 1057 made by said surveyor, M.D. Senavirathne are lands owned by Pinhamy and his brothers – vide page 107 of the brief. This fact has not been controverted by the contesting defendants in their evidence. As per the schedules to the plaint and the deeds of the plaintiff, the lands adjoining the boundaries to the West and North belonged to Pinhamy and others. In fact the evidence of the first witness of the defendants, the 1st Defendant Wickramasinghe Mudiyanselage Podimenike who is the mother of contesting 2nd Defendant as well as the Plaintiff supports the contention of the Plaintiff that the land surveyed by M. D. Senavirathne the licensed surveyor on the commission

taken by the Plaintiff is the land claimed by the Plaintiff in his plaint. As per her evidence recorded at page 151 of the brief the said witness Podimenika during cross examination admits that the Plaintiff got the land within the four boundaries described by him surveyed and again at page 154 of the brief states that both the surveyors surveyed the correct four boundaries and it is the land that was given to Dasanayake Banda by Hearath Mudiyanselage Muthu Banda (both are predecessors in title of the plaintiff as per the stance taken by the Plaintiff) by deed marked as P3. Thus, while giving evidence the 1st Defendant very clearly has indicated that the land surveyed by M.D. Senaviratne as one lot is the land bought by Dasanayake Banda, brother of her husband who lived in an associated marriage, in other words fraternal polyandry, with her and her husband Biso Banda.

Being a person who closely associated Dasanayake Banda as one of her husbands in the polyandrous union, she should have a better knowledge of the land bought by said Dasanayake Banda from Muthu Banda. Thus, her admissions made while giving evidence should not be lightly looked upon. It is true that at certain occasions this witness,1st defendant Podimenika has tried to convince the trial court that there are 2 lands within the boundaries of the land surveyed by M.D. Senavirathne , licensed surveyor; one of 10 Lahas of paddy sowing in extent and the other of 9 Lahas of paddy sowing in extent – vide evidence in chief and re-examination of her evidence. However, during the cross-examination, questions have been put to her referring to the boundaries and, as mentioned before, she has clearly admitted what has been surveyed by both the surveyors is the land bought from Muthu Banda by Dasanayake Banda. The 2nd defendant also in her evidence has tried to establish that Dasanayake Banda bought two lands, namely 9 lahas of paddy sowing in extent from one Yaso menika and One Pela (10 lahas) of paddy sowing from

Muthubanda and the said lands are shown in the plan made by A.D .Sirisooriya, Licensed Surveyor as Lot 1 and lot 2 respectively- vide page 164 of the brief. Now I will proceed to see whether there was sufficient material to accept this stance as correct. As per the evidence given by the 2nd Defendant lot 1 in Sirisooriya's plan is the 9 lahas- land Dasanayake Banda bought from Yasomenika by deed marked 2v3 at the trial and lot 2 is the one Pela- land bought by said Dasanayake Banda from Muthubanda- vide pages 164,165,171 and173. Thus, when evidence of 2nd Defendant and 1st Defendant are taken together, the lot 2 of Sirisooriya's plan must either be the land bought from Muthubanda which is the land claimed by the Plaintiff on deeds marked P3 and P4 or part of it. Hence, there cannot be any disagreement that the land situated to the south of it is the same land described as the southern boundary in the schedule to the plaint and plaintiff's deeds, namely Arambedeniya Kumbura. Similarly there cannot be any disagreement that "Gal Enda" shown as the eastern boundary to lot 2 of Sirisooriya's plan no.1201(2v1) is the same 'Gal Enda' described in the schedule to the plaint as the eastern boundary and the land described as Korale Mahaththayage Watte by the defendants to the surveyor Sirisooriya in 2v1 is the same Girithalewatte mentioned in the schedule to the plaint as the boundary to the East. On the same footing, the land to the east of lot 2 should be the same land described in the schedule to the plaint as land belonging to Pinhamy and others, even though it was described as Hitinawatte by the Plaintiff and as Pansalewatte by the Defendant to the surveyor Sirisooriya. It is also observed that the 'Gal Enda' on the eastern boundary of lot 2 of 2v1 extends further towards the north and becomes the eastern boundary of the lot 1 and similarly land to the west of lot 2, which should be land of Pinhamy and others as aforesaid, extends further towards the north and becomes the western boundary

of lot 1 of 2v1. This makes it more probable that lot 1 is also a part of the land claimed by the plaintiff owing to the fact that when taken together the boundaries are compatible with the descriptions in the plaint on 3 sides without any issue except for the area of about 30 feet in length mentioned above.

If the second Defendant's evidence stating that only the lot 2 of 2v1 is the land bought from Muthubanda by Dasanayake Banda is correct, lot 1 should be a land once belonged to Pinhamy and others as per the northern boundary described in the deed marked P3. However, there is no evidence to show that lot 1 was ever owned by Pinhamy. Further it is pertinent to note that the name of the lot 1 as per the evidence of the second Defendant is also Gira Ambe Watte. If the land pertaining to the Deed marked P3 (land bought from Muthu Banda) was limited to lot 2, northern boundary of the land in P3 should have been described as Gira Ambe Watte, which is not the case.

On the other hand, if lot 1 of 2v1 is the land bought from Yasomenika by said Dasanayake Banda, the boundaries mentioned in the schedule to the deed no.16830 marked as 2v3 must match with the boundaries of lot 1 of 2v1. As per 2v3, the northern boundary of Gira Ambe Watte of 9 lahas is the land that belongs to Kawrala and others and as per the plan marked as 2v1 said boundary is described as Kawralalage Watte by the Defendant and as Gira Ambe Watte by the Plaintiff. However, as mentioned before, the Plaintiff in his evidence had indicated that it is a land belonging to Pinhamy and brothers. Furthermore, as said before even the first defendant had clearly admitted in evidence that the land surveyed by both the surveyors is the land bought from Muthubanda. If so, what is shown as Kawrallage Watte or Gira Ambe Watte as aforesaid has to be the land once belonged to

Pinhamy and others as per the plaintiff's schedule. According to 2v3 the western boundary is 'Gal weta' (Stone Fence) which connotes a man-made structure but what is found in 2v1 as the westen boundary is the "Gal Enda" mentioned before in this judgment. "Gal enda" connotes a natural setting of a kind of rock. Thus, western boundary shown in 2v1 does not match with the description of western boundary in 2v3. As explained above, as per the evidence led at the trial, there cannot be any doubt that the land separated by the "Gal Enda" to the west is Girithale Watte though it had been described as Koralemahaththyage Watte by the defendants to the surveyor Sirisooriya.

As per the schedule to 2v3, the southern boundary of Gira Ambe Watte of 9 lahas in extent is described as "By Ditch, presently land belonging to Punchirala and others". The deed marked as 2v3 was executed in July 1961.Thus, it is clear that during 1961 Punchirala should have been the owner of the land on the southern boundary of the land described in the schedule to the deed marked as 2v3. However, as per the evidence led at the trial, southern boundary of lot 1 in 2v1 is lot 2 which is undisputedly the Gira Ambe Watte of 10 Lahas (one Pela) or part of that land, which was bought from Muthubanda by Dasanayake Banda. There was no evidence to show that the said lot 2 was ever owned by Punchirala and, since P3 was executed in 1957 and P4 was executed in 1983, said Dasanayake Banda who is also the vendee in 2v3, should be the owner of lot 2 of 2v1 in 1961. Hence, the southern boundary of lot 1 of 2v1 definitely does not match with the southern boundary of the land in 2v3 as in 1961 the owner of the land to the south was not Punchirala but Dasanayake Banda. This supports the stance that the lot 1 of 2v1 is not Gira Ambe Watte of 9 lahas of paddy sowing. The land to the west of lot 1 of Sirisooriya's plan is described as Pansale Watte (according to the Defendants) and

Hitinawatte (according to the Plaintiff). However, as stated before, as per the evidence led at the trial it should be the land belonging to Pinhamy and others referred to in the Plaintiff's schedule, since lot 2 in Sirisooriya's plan is undisputedly is or is part of Gira Ambe Watte of one pela bought from Muthu Banda.

Surveyor Sirisooriya, has shown a "Gal weta" and a ditch separating lot 1 and 2 of his plan 2v1 but surveyor Senavirathne who made plan P1 about 6 months prior to that have not seen such a boundary on the land. Even the Plaintiff does not admit that there was such a boundary. If there was a such boundary the defendants could have shown that to surveyor Senaviratne who made the 1st plan. No suggestion was made to surveyor Senaviratne during cross examination that such a boundary was shown to him and he had evaded in showing it in his plan P1. Surveyor Sirisooriya does not indicate how old this ditch and the Galweta he found in between lot 1 and 2 of his plan are. It appears that the defendants have been in possession after the Primary Court case and as such, it is not improbable that this "Gal Weta" and ditch might have even come into existence after the first survey as a result of an afterthought. Furthermore, as per the averments in their own amended answer, there was no fence of permanent nature separating the two lands; Namely the land of one Pela and the land of 9 lahas. The court should not lightly regard the admission made by the 1st Defendant in cross examination that land surveyed by both surveyors is the land bought from Muthubanda which is the land of one Pela in extent.

As explained before the southern boundary and eastern boundary of lot 1 of 2v1 plan cannot be the southern boundary and eastern boundary mentioned in the deed marked 2v3 by which Dasanayake Banda bought the 9 Lahas of Gira Ambe

Watte. On the other hand, as per the evidence led except for the non-existence of a ditch for about 30 feet in length on the northern boundary, all the boundaries surveyed by both surveyors are compatible with the plaintiff's schedule in the plaint and in deeds he relies on. As mentioned before in this judgment disappearance of the ditch in the above area of 30 feet in length may happen with the passage of time.

As per the plaintiff, the land he claims is a land of one Pela (10 Lahas) of paddy sowing in extent and as per the defendants what is surveyed is two lands containing 19 lahas. It appears that one of the reasons to dismiss the plaintiff's action in the District Court was the conclusion of the learned district judge that the plaintiff has surveyed in excess than he is entitled.

The Plaintiff's written submissions refers to the Ferguson Directory and admits that according to it one pela of paddy sowing in extent is similar to 2 roods and 20 perches in English measurements but the Plaintiff relies on the following two reported judgments.

1. **Gabriel Perera Vs. Agnes Perera** and others 43 CLW 82. There it was held that where in a deed the portion of land conveyed is clearly described and can be precisely ascertained a mere inconsistency as to the extent thereof should be treated as mere falsa demonstratio not affecting that which is already sufficiently conveyed.
2. **Ratnayake and Others V Kumarihamy and Others** 2002 (1) SLR 65 – where it was held that the system of land measures computed according to the extent of land required to sow with paddy or kurakkan vary due to the interaction of several factors. The amount of seed required could vary

according to the varying degrees of the soil, the size and quality of the grain, and the peculiar qualities of the sower. In the circumstances it is difficult to correlate extent accurately by reference to surface areas.

The factual position of the matter at hand as discussed above can be summarized as follows,

- Except for 30 feet area on the northern boundary, other boundaries match with the land claimed by the Plaintiff.
- The 1st defendant who lived and had conjugal relationship (whether legal or illegal) with Dasanayake Banda, the predecessor in title of both the parties admits in cross examination that the land surveyed by the plaintiff is the land bought from Muthubanda by said Dasanayake Banda.
- Lot 1 of the plan made by the defendants cannot be the land bought from Yasomenika by said Dasanayake Banda as claimed by the defendants, especially due to the incompatibility of southern and eastern boundaries.
- It is common ground that the land surveyed is called Gira Ambe Watte and the entirety was owned by said Dasanayake Banda and there was no evidence to indicate that there was another Gira Ambe Watte (other than the one Pela-land and 9 lahas-land) owned by the said Dasanayake Banda.

If one looks at the above factual positions in the light of above decisions, even though there is a difference in extent as per the measurements in Ferguson Directory, the land surveyed by the Plaintiff cannot be any other land than Gira Ambe Watte of 1 Pela bought from Muthubanda by said Dasanayake Banda. One also should look at the usage within the relevant region where the land is situated. As per the cross examination of the plaintiff recorded on page 96 of the brief, on

behalf of the Defendants it has been suggested that in measuring high lands extent of 8 lahas is equal to 1 acre, for which the plaintiff has answered that he had not heard so. Though the Plaintiff was not aware about it, it shows the instructions given for cross examination by the Defendants. Furthermore, the 1st Defendant giving answers in cross examination has admitted that with regard to high land, 8 lahas in extent equals to 1 Acre in English measurements. Though she has denied her knowledge with regard to the same in her re-examination, as shown before, on behalf of the Defendants similar proposition has been suggested in cross examination by the Defendants. Thus, her denial with regard to the knowledge of correlation between Sinhala Measurements and English Measurements as far as lahas and acres are concerned cannot be relied upon. Thus, it appears in the relevant region 8 lahas of paddy sowing is considered equal to 1 acre and 1 pela is similar in extent to 1 acre and 1 rood. Even the Surveyor Sirisooriya, who gave evidence for the Defendants has stated that, in that area, there are 8 lahas for a one-acre land. In that context the difference between the extent surveyed by the plaintiff and extent considered as equivalent to the traditional measurement is around 57 perches which is very much less than the calculations done according to the aforesaid correlated measurements indicated in Ferguson directory.

The above shows that the learned District Judge erred in evaluating evidence and coming to the conclusion that the Plaintiff failed in identifying the land and had surveyed in excess than his entitlement by his deeds. Since the 1st Defendant admitted while giving evidence that the land surveyed by the Plaintiff is the correct land and even the contesting 2nd Defendant admitted while giving evidence that lot 2 of 2v1 is the land bought from Muthubanda by Dasanayake, in other words land claimed by the Plaintiff, the learned High Court was not in error in finding that in

view of the facts placed before Court, the main issue to be decided was whether the Lot No.1 depicted in plan 2v1 is part of the land described in the schedule to the plaint or not. Thus, the first question of law has to be answered in the negative.

As far as the Judgment of the Civil Appeal High Court is concerned this court observes that learned judges have not given elaborate reasons to its conclusion that lot 1 in 2v1 is part of the land described in the schedule to the plaint and thus to show that the land surveyed by the plaintiff is the land in the schedule to the plaint. However, for the reasons elaborated above this court is of the view that the learned high court judges have however come to the correct finding that the identity of the land is proved by the Plaintiff. Thus, the answer to the second question of law allowed by this court is that there may be infirmities and insufficiencies in giving reasons but the final finding that the land in the schedule to the plaint is identified and proved by the plaintiff is not flawed.

Before considering to answer the third question of law allowed by this court, I proceed to consider whether the claim of prescription by the Defendant is sustainable. As per the deed no.9306 marked as P3, said Dasanayake Banda has bought the land in the schedule to the plaint from Muthubanda. The title of Dasanayake Banda obtained through aforesaid deed is not in dispute. Both contesting parties claim through Dasanayake Banda. Said Dasanayake Banda has sold the said land to the Plaintiff by deed no.3674 marked as P4 at the trial. Thus, the Plaintiff has proved the paper title to the land claimed by him. He has led the evidence of his brother, Pitihuma Ralalage Disanayake, to say that he possessed and enjoyed the property through him. This witness has stated that he possessed the land for about 15 years till he was prohibited from entering the land by the

Primary court. It is pertinent to note that during the cross examination of this witness nothing was suggested to indicate that this witness was lying with regard to the possession of 15 years except for the suggestions made to indicate that he was lying by stating that he received income from selling pepper and denying the ditch in the middle of the land surveyed. Even though the witnesses for the Defendant speak of the possession of the Defendants, they have not stated anything refuting the evidence given by the Plaintiff's brother with regard to the possession or enjoyment of the land. Thus, during the trial, there was no proper challenge of the possession of the plaintiff through his brother. The Defendants position is that they inherited this land from Dasanayake Banda since 1st defendant is the wife and other defendants are children of the associated marriage- vide issue no.18 framed at the trial. If so, not only the Defendants but the plaintiff and the Plaintiff's brother who gave evidence for the plaintiff should inherit their title through inheritance as they are also children of the same relationship. As per the Plaintiff's stance title to the land devolves only on him. Thus, the plaintiff's brother, who gave evidence for the Plaintiff, should be considered as a witness who gave evidence against a stance which is beneficial to him. As such it can be assumed that the plaintiff's brother was truthful in giving evidence. On the other hand, rights of Dasanayake Banda could not have directly devolved on the children or wife of the associated marriage since associated marriages are illegal since 1859 (vide ordinance No. 13 of 1859 and page 147 of Kandyan Law and Buddhist Ecclesiastical Law by Dissanayake and Collin De Soysa) and as per the oral evidence legal marriage was with his brother Biso Banda. If there is any inheritance it should have taken place by Dasanayaake Banda dying issueless and his rights devolving upon Biso Banda as the brother and through him to his wife and children. However, there

cannot be any right passed through inheritance with regard to the land of 1 Pela in extent since Dasanayake Banda had transferred his rights to the plaintiff through the deed marked P4. Since the Defendants rely on inheritance from Dasanayake Banda, their alleged possession of the land has to be in the pretext of an existing co-ownership. As such, their animus possidendi (Intention of Possession) cannot be considered as adverse to the Plaintiff without a proof of an overt act, as he too should be a co-owner in that context.

On the Other hand, as per the evidence of the 1st Defendant she had a conjugal relationship, whether legal or illegal, and lived with Dasanayake Banda. Thus, her and her children's possession (if any) of the One - Pela land owned by Dassnayake Banda should be presumed as one commenced as licensees of Dasanayake Banda. Dasanayaka Banda had transferred his rights to the Plaintiff. Thus, without proving an overt act that changes the nature of possession or the circumstances that give rise to a presumption of such an overt act and 10 years adverse possession there onwards, the Defendants cannot claim prescriptive title to the One- Pela land. No such evidence has been led to prove such an overt act and adverse possession by the Defendants.

For the foregoing reasons, this court is of the view, the plaintiff was successful in proving his case against the Defendants by identifying the land he claimed and by proving title there to and the Defendants failed in proving the identity of the land they claimed and title to it or title by prescription to the land claimed by the Plaintiff. As such, this court has to answer even the third question of law in the negative.

Thus, the answers to the questions of law allowed by this court are as follows;

1. No
2. No, even though there may be infirmities and insufficiencies in giving reasons.
3. No

Hence, the appeal is dismissed with costs as all three questions of law have been answered in favour of the Plaintiff (1st Respondent in this application).

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E.A.G.R.Amarasekara, J

Judge of the Supreme Court

I agree

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Priyantha Jayawardene, P.C. J

Judge of the Supreme Court.

I agree

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P. Padman Surasena, J

Judge of the Supreme Court.