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

In the matter of an appeal against the judgment of the High Court

Fritzroy Clarance De Seram
Plaintiff.

SC Appeal No. 143/2013
SC HC (CA) LA 82/2013
Civil Appellate High Court
Mt Lavinia WP/HCCA/Mt 110/06(F)
DC Mt Lavinia 1587/02/L

Vs

Dehiwela Mount Lavinia Municipal Council

Defendant.

AND BETWEEN

Dehiwela Mount Lavinia Municipal Council

Defendant-Appellant

Vs

Fritzroy Clarance De Seram

Plaintiff-Respondent

AND BETWEEN

Dehiwela Mount Lavinia Municipal Council

Defendat-Appellant-Petitioner

Vs

Fritzroy Clarance De Seram

Plaintiff-Respondent-Respondent

AND NOW BETWEEN

Dehiwela Mount Lavinia Municipal Council

Defendant-Appellant-Petitioner-Appellant

Vs

Fritzroy Clarance De Seram

Plaintiff-Respondent-Respondent-Respondent

Before : Chandra Ekanayake J
Eva Wanasundera PC, J
Sisira J De Abrew J

Counsel : Vikum de Abrew DSG with Suranga Wimalasena SSC for the Defendant-Appellant-Petitioner-Appellant
Wimal Premathilake instructed by GD Gunaratne for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 5.6.2014 and 21.7.2014
Written submission filed on : 29.8.2014 by the Defendant-Appellant-Petitioner-Appellant
10.9.2014 by the Plaintiff-Respondent-Respondent
Decided on : 17.10.2014

Sisira J De Abrew J.

This is an appeal against the judgment of the learned High Court Judges of the Civil Appellate High Court of Mount Lavinia wherein they affirmed the judgment

of the learned District Judge of Mount Lavinia who decided the case in favour of the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent).

Plaintiff filed action against the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-Appellant) for declaration of title to the land described in the 1st schedule of the plaint [lot No 6B of plan No.1921 dated 1.3.2000 made by Licenced Surveyor BHA de Silva] and to eject the Defendant-Appellant from the said land. The learned District Judge held in favour of the Plaintiff-Respondent and on appeal Civil Appellate High Court affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has appealed to this court. This court granted leave to appeal on the questions of law set out in paragraph 15 of the petition of appeal which are reproduced below.

1. Did both the District Court and the Civil Appellate High Court err in Law by failing to consider the failure of the Plaintiff-Respondent to prove his title which is indispensible requirement in a vindicatory action?
2. Did both the District Court and the Civil Appellate High Court err in Law by failing to consider the long and continued possession by the Defendant-Appellant of the subject matter adverse to the rights of the Plaintiff-Respondent?
3. Did both the District Court and the Civil Appellate High Court err in Law by not taking into account of the validity or invalidity of the Power of Attorney marked and produced as P1 in the trial?
4. Did both the District Court and the Civil Appellate High Court err in Law by not taking into account that the plaint had not disclosed a cause of action against the Defendant-Appellant?

5. Is the judgment of the Civil Appellate High Court wrong or contrary to Law?
6. Did both the District Court and the Civil Appellate High Court err in Law by not taking into account the provisions of the cemeteries and Burial Grounds Ordinance?

At the very inception I must state here that no evidence was led to challenge the validity of the power of attorney marked as P1 and that there was no specific issue on this matter. It is undisputed that the corpus in this case is Lot No.6B of plan No.1921 dated 1.3.2000 made by Licenced Surveyor BHA de Silva (hereinafter referred to as Plan No 1921). The extent of the said land is eight (8) perches. The Defendant-Appellant claimed prescriptive title to this land. The original owner of the land described in the 3rd schedule of the plaint the extent of which isA5,R2,P9.8 was Peter Thomas De Seram. This land was divided into 23 Lots. The Plaintiff-Respondent claims that Lot No.6 of plan No.233 dated 2.3.1957 made by W R de Silva Licensed Surveyor (hereinafter referred to as Plan No.233) is one of the said 23 Lots. An extract of Plan No. 233 has been produced as P3. Thus it is clear that the original owner of Lot No.6 (21.75 perches) was Peter Thomas De Seram. After his demise, his wife Agnes Maria De Seram and children Shirley Brian De Seram, Fritz Roy Clarenz De Seram and Rex Stanly De Seram became the owner of Lot No.6 of Plan No 233. This Lot No. 6 is shown as Lot No. 6A and 6B of Plan No 1921. According to this plan the extent of Lot 6A is 14 perches and extent of Lot No.6B is 8 perches. It appears that there is a difference of 0.25 perches between Plan No. 233 and Plan No.1921. This difference can be understood as plan No.1921 was drawn up after 43 years of the earlier plan. After Maria De Seram's demise three children Shirley Brian De Seram, Fritz Roy Clarenz De Seram and Rex Stanly De Seram became the owner of Lot No.6 of

Plan No 233. Shirley Brian De Seram, by deed No 912 of HA Kulatunga Notary Public dated 16.4.1998 gifted his share of Lot No. 6 to Fritz Roy Clarenz De Seram (the Plaintiff-Respondent). By this deed Shirley Brian De Seram even gifted his share of Lot No.7 of Plan No.233 to Fritz Roy Clarenz De Seram. Plaintiff-Respondent says that later he and Rex Stanly De Seram who were the owners of Lot No.6 of Plan No.233 sold 14 perches from Lot No.6 of plan No 233 by deed No. 934 of HA Kulatunga Notary Public to Samaraweera Silva. It appears that the said 14 perches were later demarcated as Lot No 6A of Plan No.1921.Thus it appears that Fritz Roy Clarenz De Seram and Rex Stanly De Seram are the owners of Lot no 6B of Plan No 1921 which is the balance portion of Lot No 6 of Plan No.233. The subject matter of the case is Lot No.6B of Plan No.1921.

Learned DSG appearing for the Defendant-Appellant contended that deed No 934 was a fraudulent deed. He contended that Lot No.7 of Plan No.233 had earlier been sold by Agnes Maria, Shirley Brian De Seram, Fritz Roy Clarenz De Seram and Rex Stanly De Seram to one Haniffa Munzir Marrikkar by deed No 981 dated 16.5.1964. The said Haniffa Munzir Marrikkar transferred the said lot No.7 to Peter Damian Fernando by deed No.4364 dated 4.10.1967. The said Peter Damian Fernando, by deed No 5796 dated 18.11.1976, transferred the said Lot No.7 to the Municipal Council (Defendant-Appellant). Learned DSG therefore contended that deed No.934 was a fraudulent deed. I would like to state here that the folio in which deed No.5796 was registered (if it was registered) had not been produced at the trial by the Defendant Appellant. It is interesting to find out the portion that had been sold by deed No.934 dated 24.7.1998. According to this deed a portion (22.25 perches) from amalgamated Lots No. 6 and 7 of Plan No.233 had been sold to Saundahannadige Samaraweera Silva. Learned DSG submitted that the Plaintiff-Respondent and his brothers could not have sold portion of Lot No.7

of Plan No.233 in 1998 since it had been sold in 1964. He therefore contended that deed No.934 dated 24.7.1998 was not a genuine one. But the Plaintiff-Respondent contended that by deed No.934 he and his brothers sold 14 perches from Lot No.6 of Plan No.233. It appears that the said 14 perches had later been demarcated as Lot No.6A of Plan No.1921 and that they remained to be owners of the remaining portion of Lot No.6B of Plan No.1921. Can this court declare that deed No.934 is a fraudulent deed in these proceedings? It is Samaraweera Silva who had purchased the property mentioned in deed No.934 by this deed. Court cannot make a pronouncement that deed No 934 is a fraudulent one without giving a hearing to Samaraweera Silva. Further I would like to state here that the deed No.981 has only dealt with lot No.7 of Plan No.233. It has not dealt with lot No.6 of Plan No. 233. Lot No.6 of Plan No.233 had not been sold by deed No.981. Therefore the ownership of Lot No.6 remains unaffected even after the execution deed No.981. Although the learned DSG contended that deed No.934 which was executed in favour of Samaraweera Silva was a fraudulent one, I would, for the following reasons, like to state here that the Defendant-Appellant had accepted the rights of Samaraweera Silva with regard to this property. The Defendant-Appellant, by P5 (a letter written by Municipal Council Dehiwala-Mount Lavinia), has stated that it would issue a development permit with regard to Lot No.6A of Plan No.1921. This letter with a copy to Samaraweera Silva was addressed to the Lawyer of the Plaintiff-Respondent. For the Defendant Respondent to have issued such a letter, it must have been satisfied with the title of the property of Samaraweera Silva. This shows that Defendant-Appellant had accepted the title of the property of Samaraweera Silva (Lot 6A of plan No.1921). How did Samaraweera Silva get title to his property? It is only through deed No.934.This shows that the Defendant-Appellant had accepted the title of Samaraweera Silva with regard to of Lot No.6A

of Plan No.1921. How can the learned DSG who appears for the Defendant-appellant now challenge the deed No.934? It is an accepted principle in law that one cannot approbate and reprobate.

As I pointed earlier deed No.981 had not touched Lot No.6 of Plan No.233. If one assumes without conceding that deed No.934 marked asV6 is a fraudulent deed, what would have been the position? Then the title of the property stated therein may not have passed to Samaraweera Silva. Then the ownership of Lot No.6 of Plan No.233 would continue to remain with the Plaintiff-Respondent and his brothers. Further it has to be noted here that the Defendant-Appellant does not claim title to Lot No.6B by deeds.

Learned DSG contended that since Lot No.7 had had been earlier sold by deed No.981 (P8), the Plaintiff-Respondent and his brothers could not have again sold Lot No.7 of Plan No.233. Therefore he contended that, by deed No.934, if the Plaintiff-Respondent and his brothers had transferred **22.25** perches to Samaraweera Silva, it could have been done only from Lot No.6 of Plan No.233. This contention, at the very inception, fails because the extent of Lot No.6 is only **21.75** perches.

Learned DSG, at the end of his submission, tried to contend that the Plaintiff-Respondent and his brothers did not have title Lot No 6 and Lot No7 of Plan No.233 as they had sold the same to Samaraweera Silva by deed No.934. But by deed No. 934, Lot No.6 and/or lot No.7 of Plan No.233 had not been sold. They had, by the said deed, only sold a portion (22.25 perches) of amalgamated Lots 6 and 7 of Plan No.233.

I would again like to consider the letter sent by the Defendant-Appellant marked P5. The Defendant-Appellant, in the said letter, had admitted that Lot No.6B of plan No.1921 belonged to the Plaintiff-Respondent.

When I consider all the above matters, I hold that the Learned District Judge was right when he held that the Plaintiff-Respondent had established title to Lot No.6B of Plan No.1921. The learned High Court Judges too, in my view, were right when they agreed with the learned District Judge on this point. For the above reasons I reject the contention of the learned DSG who appeared for the Defendant-Appellant that the Plaintiff-Respondent had not established title to Lot No.6B of Plan No.1921.

The next question that must be considered is whether the Defendant-Appellant had established prescriptive title to Lot No.6B of Plan No.1921 (the corpus of the case). Defendant-Appellant says that this Lot was used by it as a part of the cemetery of Mount Lavinia over a period of ten years. But the land Officer of The Defendant-Appellant Mallika Kankanmge Sunil, in his evidence, had stated that the Defendant-Appellant possessed the said Lot 6B with the permission of the Plaintiff-Respondent and his brothers. Then how can the Defendant-Appellant claim prescription? If a person possesses a land over a period of ten years with permission of owner of the land he cannot claim prescriptive title against the owner. Further the Defendant-Appellant, in P5, has stated that it had acquired Lot No.6B of Plan No.1921 which is the corpus in this case. The said letter further says that the Defendant-Appellant would pay compensation for the said land as it had been acquired for the cemetery. If the Defendant-Appellant had acquired prescriptive title to the land, why should it (the Defendant-Appellant) pay compensation to the Plaintiff-Respondent in respect of the land? Further isn't it an implied admission that the land belongs to the Plaintiff-Respondent? The Municipal Commissioner, in the said letter marked P5, has referred to two lots. They are Lot No.6A and Lot No.6B of Plan No.1921. He, in the second paragraph of the said letter, says that a development permit would be issued to lot No.6A and

in the 3rd paragraph he refers to the land acquired for the cemetery. Thus this land should be Lot No.6B of Plan No.1921. I would like to point out here that the Municipal Commissioner, in the said letter, has admitted this land (Lot No.6B of Plan No.1921) belongs to the Plaintiff-Respondent. As I pointed out earlier this letter has been addressed to the lawyer of the Plaintiff-Respondent. When I consider all the above matters, I hold that Defendant-Appellant had not established prescriptive title to the corpus of the case. I therefore hold the learned District Judge was correct when he rejected the plea of prescription. The learned High Court Judges, after considering the above matters, have affirmed the judgment of the learned District Judge. In my view there are no reasons to interfere with the judgments of both courts. I uphold both judgments of the District Court and the High Court. In view of the above conclusion reached by me the question of law raised by the Defendant-Appellant are answered in the negative.

For the above reasons I dismiss the appeal with costs.

Judge of the Supreme Court.

Chandra Ekanayake J

I agree

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree

Judge of the Supreme Court.