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

In the matter of an application for leave to appeal in terms of Section 5(C)(1) of The High Court of the Provinces (Special Provisions) Act No.54 of 2006.

PinchaDewageHeebatHemachandra

No.354V, AbeysekaraMawatha, PolpithiMukalana, Kadana.

12A Defendant- Petitioner-Petitioner-Appellant

SC Appeal 6/2011

WP/HCCA/GPH/30/09(LA)

DC Gampaha 26636/P

Vs

HewadewageAlpin Nona

No. 380A, PolpithiMukalana, Kadana.

Plaintiff-Respondent-Respondent-Respondent

1. SuduwaHewagePiyasena

No 10, AbeysekaraMawatha, PolpithiMukalana, Kadana

2. PriyanthaNilminiGalabadage

AbeysekaraMawatha, PolpithiMukalana, Kadana

3. Galabadadewage Mable

AbeysekaraMawatha, PolpithiMukalana, Kadana

4A. HewadewageAlpin Nona alias Alginnona

380A,PolpithiMukalana, Kadana

5A. HewadewageAlpin Nona alias Alginnona

380A, PolpithiMukalana, Kadana

6. SuduwadewageJelin Nona

No.642, Paranankara, Wattala.

7. SuduwadewageAjonona

C/O, Mr. Bawar, Uggalboda,Polpithi Mukalana, Kadana

8. H.D. Isonona

Uggalboda,Polpithi Mukalana, Kadana

9. SD Siriyawathi

C/O B.D. Abeysekara, Gonahena, Kadawatha.

10. SD Gunaratne

WalpolaBatuwatta.

11A. Pincha Dewage Ratnawathi

Polpithi Mukalana, Kadana

12A. P.D. Ariyaratne

Polpithi Mukalana, Kadana

Defendant-Respondent-Respondent-Respondents

Before : Eva WanasunderaPC, J

Sisira J De Abrew J

UpalyAbeyratne J

Counsel : RanjanSuwadaratne for the 12A Defendant-Petitioner-Petitioner-Appellant.

PalithaRanatungafor thePlaintiff- Respondent-Respondent-Respondent

No appearance for the Defendant-Respondent-Respondent-Respondents

Argued on : 7.12.2015

Written Submissions

tendered on : By the 12A Defendant-Petitioner-Petitioner-Appellant on 4.4.2011

By the Plaintiff-Respondent-Respondent-Respondents on 18.4.2014

Decided on : 31.3 .2016

Sisira J De Abrew

Plaintiff-Respondent-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondent) filed action bearing No.26636/P against the defendants to partition a land called 'Gonnagahawatta'.

12th defendant also filed his statement of claim. After the death of the 12th defendant, 12A Defendant-Petitioner- Petitioner-Appellant (hereinafter referred to as the 12A Defendant-Appellant) was substituted in the place of 12th defendant.

12A Defendant-Appellant appeared in court on 19.3.1992 and 16.7.1992 and he noted down the next date of trial which was 24.11.1992. On 24.11.1992, 12A Defendant-Appellant did not appear in court and the case was taken up for trial and thereafter interlocutory decree was entered. Thereafter on **1.6.2007** (after 14 years)12A Defendant-Appellant filed petition and affidavit in terms of Section 48(4) of the Partition Law No 21 of 1997 moving to set aside the interlocutory decree on the ground that he could not appear in court on 24.11.1992 as he got infected with chicken-pox on 22.11.1992. After an inquiry the learned District Judge, by his order dated 29.5.2009 dismissed the application of the 12A Defendant-Appellant. Being aggrieved by the said, the 12A Defendant-Appellant appealed to the Civil Appellate High Court and Civil Appellate High Court, by its

order dated 7.9.2010 affirming the order of the learned District Judge dismissed the appeal.

Being aggrieved by the said order of the Civil Appellate High Court the 12A Defendant-Appellant has appealed to this court. This court by its order dated 24.1.2011, granted leave to appeal on the question of law set out in paragraph 18(b) and (c) of the petition of appeal dated 18.10.2010 which are set out below.

1. Have the Hon. High Court Judges erred in law by dismissing the leave to appeal application without considering the fact that the trial judge had no reasons to disbelieve the petitioner's evidence specifically with regard to his sickness which prevented him from appearing in court on the trial date after taking all other steps to get ready for the trial?
2. Have the Hon. High Court Judges of the Western Province holden at Gampaha erred in law by failing to consider the fact that the trial judge has failed to evaluate and/or duly asses the evidence led at the inquiry in arriving at his decision against which the said leave to appeal application is preferred in entering their judgment on 7th September 2009?

The main contention of the 12A Defendant-Appellant was that he got infected with chicken pox on 22.11.1992 and as such on 24.11.1992 he could not come to court. The learned District Judge having considered his evidence, however, dismissed his application. The learned District Judge, it appears from his order, has disbelieved his evidence. I now advert to the contention of the12A Defendant-Appellant. Has he produced to the satisfaction of the learned District Judge that he in fact suffered from chicken pox on 24.11.1992? According to his evidence he lives with his brother and wife in his house. If he was suffering from chicken pox on 24.11.1992, he could have easily sent a message to his Attorney-at-Law through his wife and/or

his brother. But he had not taken this step. Further did he call his wife and brother as witnesses to prove that he was suffering from chicken pox on 24.11.1992? The answer is in the negative. If his wife and brother were called as witnesses they could have said whether or not they too were infected with chicken pox. When I consider all these matters, I am of the opinion that the learned District judge was correct when he said that the 12A Defendant-Appellant has not given evidence to satisfy court. The learned District Judge rejected the application of the 12A Defendant-Appellant to enter the case. I have to state here that the learned District Judge came to the above conclusion after observing the demeanour of deportment of the witnesses. This court did not have the opportunity of observing the demeanour of deportment of the witnesses which the trail court had. When the trail judge has made an order after observing the demeanour of deportment of the witnesses, the appellate court would not disturb such a decision unless it is perverse. This view is supported by the judicial decisions in Fraad Vs Brown 20 NLR 282 wherein Privy Council stated thus: "It is rare that a decision of a Judge so express, so explicit upon a point of fact purely, is overruled by a Court of Appeal, because the Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance".

In Alwis Vs Piyasena Fernando [1993] 1SLR 119 GPS de Silva CJ held this: "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

Leraned counsel appearing for the 12A Defendant-Appellant submitted that the learned District judge should have accepted the evidence of the 12A Defendant-Appellant since it has not been challenged by the other side. There is no rule in law that court should accept evidence of witnesses whose evidence is not challenged. Court is entitled to reject evidence of witnesses even if their evidence is not challenged if their evidence is not true and unacceptable. I therefore reject the above contention of learned counsel for the 12A Defendant-Appellant. For the above reasons, I hold that the orders of the learned District Judge and the Civil Appellate High Court are correct. I therefore refuse to interfere with the aforementioned orders. For the above reasons, I answer the questions of law raised by the 12A Defendant-Appellant in the negative. For the above reasons, I dismiss the appeal of the 12A Defendant-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.