

**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
5C(1) of the High Court of the
Provinces (Special Provisions) Act
No.54 of 2006.***

SC Appeal No: 146/2015

SC. HCCA.LA No. 67/2015.
WP/HCCA/GAM/76/2008(F).
D.C. Gampaha No.34855/L

Gurunnanselage Dona Sandya
Manohari Wimalatunga of
No.32, Elapitiwala,
Ragama.

PLAINTIFF

-VS-

Rajathewa Mohotti Appuhamilage
Nihal Seneviratne of
Thiriwanegama,
Kalagedihena.

DEFENDANT

AND BETWEEN

Rajathewa Mohotti Appuhamilage
Nihal Seneviratne of

Thiriwanegama,
Kalagedihena.

DEFENDANT -APPELLANT

-VS-

Gurunnanselage Dona Sandya
Manohari Wimalatunga of
No.32, Elapitiwala,
Ragama.

PLAINTIFF -RESPONDENT

AND NOW BETWEEN

Gurunnanselage Dona Sandya
Manohari Wimalatunga of
No.32, Elapitiwala,
Ragama.

PLAINTIFF-RESPONDENT-

APPELLANT

-VS-

Rajathewa Mohotti Appuhamilage
Nihal Seneviratne of
Thiriwanegama,
Kalagedihena.

DEFENDANT -APPELLANT

RESPONDENT

BEFORE : L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.
ACHALA WENGAPPULI, J.

COUNSEL : V. Kulathunga for the Plaintiff- Respondent-Appellant.
S.N. Vijithsingh for the Defendant- Appellant- Respondent.

ARGUED ON : 12th November 2021.

WRITTEN SUBMISSIONS : Plaintiff- Respondent-Appellant on the 12th of
October 2015.
Defendant- Appellant- Respondent on the 30th
November 2015.

DECIDED ON : 22nd July 2022.

S. THURAIRAJA, PC, J.

This is an appeal filed by the Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as Plaintiff) arising from the judgment of the Provincial High Court of the Western Province (Colombo), delivered in an appeal from the judgement of the District Court of Gampaha. This matter was supported before this Court on 31.08.2015 and leave was granted on the following questions of law referred to in paragraph 11(b) to (f) of the Petition dated 27.02.2015 as follows:

- b) The Learned High Court Judges have failed to consider the fact that the Licensed Surveyor has very clearly stated that he has correctly identified the land morefully described in the schedules to the plaint, by the Plan marked P6 and the Report marked P7.
- c) The Learned High Court Judges have failed to consider the fact that the Licensed Surveyor has superimposed the plans marked P1 and P2 appearing in the plaint and came to the correct conclusion that Lot No. 1 to 18 are the extent in the lands described in the schedules of the plaint.
- d) The Learned High Court Judges have failed to consider the plan marked P6 and its Surveyor's evidence with regard to the identification of the land morefully described in the schedules of the plaint and its effect.
- e) The Honorable High Court Judges have erred in law by disregarding the amicable partition by plan no.1286 marked P1 and the operative part of the deed marked P3 and P5.
- f) The Honorable High Court Judges have been misdirected and set aside the entire judgement of the District Court of Gampaha whereas the Defendant has not claimed any title to the land morefully described in the 2nd schedule to the plaint.

Further, the Counsel for the Defendant-Appellant-Respondent (hereinafter sometimes referred to as Defendant) raised incidental questions on the basis of which special leave to appeal has been granted by this Court, are set out below;

1. Whether there was an issue before the District Court about the amicable partition.
2. Whether the land which is the subject matter of this application has been properly identified.

In answering this question of law, I find it pertinent to lay out the facts of the case followed by an examination of the relevant provisions and concepts of law.

The Facts

The Plaintiff instituted this action bearing no. 34855/L in the District Court of Gampaha on 13th February 1992 mainly for a declaration of title to the lands morefully described in the 1st to 3rd schedules to the Plaint, for the ejection of the Defendant and for damages. Plaintiff stated by his Plaint as follows:

- I. The Plaintiff asked for a declaration of title and ejection of the Defendant from the Lot No. 2 and 5 of "Nagahawatta" shown in plan no. 1286 marked as 'P1' appears at page 183 of the brief marked as 'X'.
- II. The Plaintiff also prayed for a declaration of title and ejection of the Defendant from the paddy field called "Pokune Kumbura Pillewa and Wewekumbura" of plan no. 1278 marked as 'P2' appears at page 185 of the brief marked as 'X'.
- III. The Plaintiff stated that father of the Plaintiff, Mr. Mithreepala alias Mahinda Nanayakkara became the owner of Lot No.2 of the said plan bearing no. 1286, land morefully depicted in the said plan no.1278 and the Lot no. 5 of the plan marked bearing no.1286 by Deeds marked P3, P4 and P5 respectively.
- IV. The said Mahinda Nanayakkara has died in 1984 and his estate was administrated in the District Court of Colombo case bearing no. 29660/T and his title devolved on the heirs of the deceased.
- V. Thereafter the legal heirs of the said Mahinda Nanayakkara has transferred their shares to the Plaintiff by deed marked P10.
- VI. Then the Defendant unlawfully entered in to the lands on 15th of November 1991 morefully described in the 1st, 2nd and 3rd Schedules of the Plaint.

As discussed above, the Plaintiff set out her title to the said lands emanating from said Mahinda Nanayakkara and claimed that the Defendant together with his parents and family had entered the land in or about 1991 and constructed a house thereon and is in illegal and unlawful possession of the land since such time.

The Defendant filed answer denying the averments contained in the Plaint and set out his chain of title to the said land by pleading inter alia that his father Rajathewa Mohotti Appuhamilage Wijesinghe had derived title from the deeds marked V3 to V7 commencing from the years 1961 to 1976 to the land, which is morefully described in the schedule to the answer, and after demise of his father, he together with his family members inherited the same. The Defendant also claimed that he had acquired a prescriptive title and prayed for a dismissal of the Plaintiff's action.

Thereafter the case was fixed for trial and after the trial the learned Judge of the District Court answered the issues in favour of the Plaintiff and entered the judgment accordingly.

Thus the Defendant had preferred an appeal to the Provincial High Court of the Western Province (Civil Appeals) holden at Gampaha. The learned High Court Judges delivered the judgment on 19.01.2015 dismissing the Plaintiff's action based on the non-identification of the land, differences in the superimposition, amicable partition of the land among other such grounds.

Being aggrieved by the judgment of the Provincial High Court of the Western Province (Civil Appeals) Holden at Gampaha the Plaintiff has filed a Petition dated 27th February 2015 before this Court, and leave was granted as has been specified above.

Questions of Law raised

Upon perusal of the facts, I find it pertinent to summarize the Questions of law raised in this case into two main issues as identification of the corpus and the issue of amicable partition.

However as there are five specific questions of law, I find it pertinent to answer each question of law giving due consideration to the circumstances pertaining to each, in this case this can more comprehensively achieved by firstly answering the 4th question of law.

In a declaration of title or *rei vindicatio* action, if the subject matter is admitted no further proof of the identity of the corpus is required, for no party is burdened with adducing further proof of an admitted fact. The subject matter of this action is set out in the plaint and the Defendant in his answer sought a declaration of title in his favour for the premises from which the Plaintiff wanted him ejected.

The Plaintiff in this case prayed for a declaration of title to three contiguous allotments of lands described in the 1st, 2nd and 3rd schedules to the Plaint. These three contiguous lands are described and depicted in two plans bearing No.1286 dated 12.4.1983 prepared by T.A. Ranasinghe Thambugalla Licensed Surveyor, which was marked as P-1 and Plan No.1278 dated 16.3.1983 prepared by T.A. Ranasinghe Thambugalla Licensed Surveyor, which was marked as P-2 in the course of the trial. Lands described in the 1st and 3rd Schedules to the Plaint refers to Plan P-1 (depicted as Lot 2 and 5 respectively) and the land in the 2nd Schedule refers to Plan marked P-2.

Plaintiff stated that the Plaintiff's predecessor, Mahinda Nanayakkara obtained title to the said three allotments of land from three different deeds. Title to the land described in the first schedule to the plaint, namely Lot No. 2 in Plan marked P-1 was obtained by Deed No.4007 marked as P-3 and the title to the land described in the second schedule in P-2 was obtained by Deed No.4004 marked as P-4. Title to the land described in the third schedule namely Lot 5 in P-1 was obtained by Deed No.4006 marked as P-5.

Accordingly, the said three contiguous allotments of land were owned by the said Mahinda Nanayakkara in 1983 by the said three deeds marked P-3, P-4 and P-5,

all executed in the same year. As per the said Deeds, the vendors in Deed P-3 and P-5 had amicably partitioned the land described in the first schedule in both deeds and Lot 2 had been allotted to one Raja Thewa Mohotti Appuhamilage Edwin Singho in lieu of his undivided 31/72 shares and Lot 5 in that plan which was allotted to 8 persons having undivided shares, being heirs of one Raja Thewa Mohotti Appuhamilage Don Juanis Appuhamy, was later turned into a divided and defined allotment as a result of the amicable partition done by the said Plan P-1. Hence, Plaintiff claimed that common ownership had been terminated since 1983.

Defendant in his answer pleaded title to a land called "Nagahawatte" described in the schedule to the Answer which described as follows;

“බස්නාහිර පළාතේ ගම්පහ දිස්ත්‍රික්කයේ සියනෑ කෝරළේ මැද පත්තුවේ කිරිවානේගම යන ගම තිබෙන නාගහවත්ත කියන වී බුසල් දෙකක පමණ වපසරියට මායිම්;

උතුරට ගී කියන අප්පු සිට සහ තව අයට අයිති ඉඩමද, නැගෙනහිරට එම අප්පු සිංඤ්ජාට අයිති පොකුණේ කුඹුරද, දකුණට අඹගොඩ ලියනගේ ලවනිස් අප්පුට සහ තව අයට අයිති වත්තද, බස්නාහිරට ගී කියන අප්පු සිංඤ්ජාට අයිති වත්තද, යන මේ තුල පිහිටි ගහකොළ පලතුරු ආදී සියලු දේත් වේ. “

For the purpose of reference, the English translation of the above paragraph is reproduced as follows;

"Nagahawatta in the village of Kiriwanegama in the middle of Siyane Korale in the Gampaha District of the Western Province borders about two bushels of paddy; trees and plantations standing thereon and bounded as;

on the North by land of Geekiyanage Appusingho and others, East by Pokunekumbura of the said Appusingho, South by land of Ambegoda Liyanage Lawanis Appu and others, West by land of Geekiyanage Appu Singho.."

According to the said description of the land, Nagahawatte is a land of about 2 Bushels paddy sowing and the original owner to the same land had been one Raja Thewa Mohotti Appuhamilage Baron Seneviratne alias Appuhamy who was the paternal grandfather of the Defendant.

Plaintiff in order to establish the chain of title to the land called Nagahawatte adduced the Deed marked P-3 which had been executed in 1983 and the part A of the Schedule therein describes a land of two Bushels as follows.

"The land called Nagahawatta situated at Thiriwanegama in Meda Pattu of Siyane Korale in the District of Gampaha (Formerly District of Colombo) Western Province and bounded on the North by land of Geekiyanage Appusingho and others, East by Pokunekumbura of the said Appusingho, South by land of Ambegoda Liyanage Lawanis Appu and others, West by land of Geekiyanage Appu Singho, containing in extent about two Bushels of Paddy sowing ground and registered under E 205/106. "

With these translations, it appears that the land claimed by the Defendant based on his title deeds in the answer is almost identical to the land claimed by the Plaintiff morefully described in the 2nd schedule to the Plaint, albeit in a different language.

In the recitals of P-3 it describes the Vendor's title and pedigree as follows;

"I, Raja Thewa Mohotti Appuhamilage Edwin Singho of..... (..... vendor) am the owner of an undivided 31/72 share of the land and premises described in the Schedule A hereto under and by virtue of Deed of Gift No.6800 dated 31st October 1961 attested by D.F.S. Wijayasinghe Notary Public.

Whereas I the said Vendor have amicably partitioned the said premises described in Schedule A hereto with the other co-owners of

the said premises according to Plan No. 1286 dated 12th April 1983 made by T.A. Ranasinghe Thambugala Licensed Surveyor.

And whereas I the said Vendor for and in lieu of my 31/72 share of the said premises described in the schedule A hereto have been allotted and am in possession of Lot 2 depicted in the said Plan of the said premises which said Lot 2 is described in the schedule B hereto and is hereinafter referred to as the said premises: "

Part B of the Schedule of the said Deed marked P-3 depicts the transferred property to the predecessor of the Plaintiff as follows.

"All that Lot 2 depicted in the said Plan No.1286 dated 12th April 1983 made by T.A. Ranasinghe Thambugala Licensed Surveyor of the land called Nagahamulawatta described in the Schedule Schedule A hereto and situated at Thiriwanegama aforesaid which said Lot 2 is bounded according to the said Plan on the North-East by Lot 1, South-East by field of R.M.A. Wijesinghe and others, South-West by Lots 5,4 and 3, North-West by land of R.N.A. Karunaratne, containing in extent one rood and five decimal eight five perches (A.0-R.1-P.05.85). "

As per the above mentioned facts it can be observed that the land described in the Answer of the Defendant is identical to the land described and claimed by the Plaintiff as per the Deed marked P-3 in boundaries as well as in extents. Further, the vendor of the said P-3 had only transferred a lesser extent which is described in the Part B of the Schedule to the P-3 on the basis that in lieu of his undivided share, he together with the other co-owners had amicably divided the land and he had become entitle to Lot 2 of Plan P-1.

However, it must be noted that there was no deed produced to establish the fact that the co-ownership had come to an end in the year 1983 and there was hardly

any time for the said portion of the land to be acquired by a separate entity at the time of instituting the action as the action had been instituted in the year 1992 before a ten years' period had lapsed.

As per the page 81 of the brief, T.A. Ranasinghe Thambugalla Licensed Surveyor was called as a witness to give evidence in the trial. In his evidence he was questioned regarding Survey Plan No.1286 dated 12.4.1983 (P-1) prepared by him and he specifically stated that he does not possess any document to prove that the other co-owners have given their consent for the preparation of P-1 or the other co-owners were present when the amicable partition was done. The relevant portion was reproduced as follows;

ප්‍ර : නමුත් ඒ පාර්ශවකරුවන් මේ ඉඩම බෙදා වෙන් කර ගන්න කැමතියි කියලා, කිසිම අත්සනක් සඳහන් වෙලා නැහැ?

උ : නැහැ.

ප්‍ර : පාර්ශවකරුවන්ගේ එකඟත්වය උඩ එකඟවුනා කියලා මොනම සාක්ෂියක්වත් නැහැ.

උ : නැහැ.

For the purpose of reference, English translation of the above paragraph is as follows;

Q- But there is no signature that those parties want to divide this land?

A-No.

Q- There is no evidence that the parties agreed on the agreement.

A-No.

With the said testimony, it is irrelevant to apply the amicable partition entered between the parties by Plan no.1286 marked P1 and the operative part of the Deed marked P3 and P5 as these were entered without the representation of all co-owners

who are legally entitle to the ownership of this land. Hence, I answer the 4th question of law negatively.

The Defendant in his answer averred that he is in possession of the said land described in the schedule to his answer and that the original owner of it was one Raja Thewa Mohotti Appuhamilage Don Baron Seneviratne who transferred an undivided 31/72 share to one R.M.A. Wijesinghe (Defendant's father) by Deed No. 6814 dated 6.11.1961 (V-3), who in turn transferred same to one K.P. Somapla by Deed No.15562 dated 10.12.1969 (V-4) and said Somapala re-transferred same to said R.M.A. Wijesinghe (Defendant's father) by Deed of Transfer No.475 dated 10.8.1970 (V-5). Said Wijesinghe by Deed of Transfer No.476 dated 10.8.1970 (V-6) transferred the same to the said Somapala and said Somapala by Deed No. 5327 dated 2.11.1976 (V-7) to the Defendant's father R.M.A. Wijesinghe who died intestate without any further transfers and hence the property was inherited by his wife and his children including the Defendant and four others as legal heirs of the said deceased Wijesinghe. Defendant further claimed that he was in possession of that land, and averred that the Plaintiff's action be dismissed with costs.

In the course of the trial Plaintiff's brother namely, Gurunnaselage Vijith Priyantha Wimalathunga gave evidence since he was the person who looked after the land described in the 1st-3rd schedules to the Plaint. Title Deeds which were discussed above were marked and the Survey Plan bearing No. 1333 dated 12.03.1997 prepared by R.M.J. Ranasinghe Licensed Surveyor was marked as P-6 where both lands depicted in P-1 and P-2 were surveyed and superimposed. Under cross-examination R.M.J. Ranasinghe Licensed Surveyor had admitted the fact that he could not identify the lands which are described in the schedule to the Plaint, but he had depicted a land which was shown to him by the Plaintiff (page 73 of the brief).

ප්‍ර : ඔබගේ වාර්තාව බලන්න. ඒ වාර්තාවේ 6 වෙනි අනුඡේදයේ තිබෙනවා. (පැ 7 වාර්තාවේ එම ඡේදය කියවයි). අධිෂ්ඨාපනය කර පිඹුරක් සෑදීම කියලා තියෙනවා?

උ : ඔව්.

(එකී ඡේදය''වී - 1' වගයෙන් ලකුණු කරයි).

ප්‍ර : ඊට පස්සේ ඔබ කියලා තිබෙනවා පැමිණිලිකරුවන් පෙන්වූ අන්දමට එම ඒකාබද්ධ වූ ඉඩම (කියවයි)

උ : ඔව්.

ප්‍ර : ඔබ කරලා තිබෙන්නේ පැමිණිලිකරුවන් පෙන්වූ අන්දමට තමයි.

උ : ඔව්.(එම කොටස් වී- 2 වගයෙන් ලකුණු කරයි.)

ප්‍ර : ඔබගේ වාර්තාව අනුව අධිෂ්ඨාපනය කරලා නෑ.

උ : ඔව්.

For the purpose of reference, the English translation of the above paragraph is as follows;

Q- Look at your report. That is in paragraph 6 of the report. (Reads that paragraph in P-7 of the report).

It states that you determined to superimpose and prepare a plan?

A-Yes.

(The passage is marked as "V-1").

Q- Then you have said that as shown by the plaintiffs that the combined land..... (Reads)

A-Yes.

Q- You have done as the plaintiffs have shown.

A-Yes. (Those parts are marked as V-2.)

In this context, though the Plaintiff relied on the P6 and P7, I am of the view that the Licensed Surveyor has not correctly identified the land morefully described in the schedules to the Plaint, by the Plan marked P6 and the Report marked P7.

The action for a declaration of title has been considered in several landmark decisions in Sri Lanka. As it was held in **Wanigaratne Vs. Juwanis Appuhamy (65 NLR 167)**, *"it is trite law that Plaintiff should set out his title on the basis on which he claims a declaration of title to the land. The burden rests on the Plaintiff to prove that title"*.

Further, in **Jamaldeen Abdul Latheef and V. Abdul Majeed Mohamed Mansoor and Another (2010 2SLR 333)** it was held as follows;

"It is trite law that the identity of the property with respect to which a vindicatory action is instituted is a fundamental to the success of the action as the proof of the ownership (dominion) of the owner (dominus). Where the property sought to be vindicated consists of a land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditions method. In a rei vindicatio action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated, the action ought to be dismissed without more."

As enumerated above to succeed in a rei vindication action, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment. In the present case, I am of the view that the Plaintiff has failed to prove his title of the property to the subject matter in dispute. Hence, I answer the 2nd and 3rd questions of law negatively.

Further, R.M.J. Ranasinghe Licensed Surveyor further states in his evidence that the land surveyed by him is in excess of 2 Roods and 11 Perches.

ප්‍ර : ඔබ විස්තර කරල තිබෙන ඉඩම අක්කර 1 රූඩ් 2 පර්චස් 32.53 ක්.

උ : ඔව්.

ප්‍ර : රූඩ් දෙකයි පර්චස් 11ක් විතර ඔබගේ පිඹුරේ වැඩියි ඉඩම් කොටස?

උ : ඔව්.

For the purpose of reference, the English translation of the above paragraph is as follows;

Q- The land you have described is 1 Acre 2 Roods and 32.53 Perches.

A-Yes.

Q- Do you have more than 2 Roods and 11 Perches of land in your plan?

A-Yes.

In this context Plaintiff has failed to prove how the extent increased by a substantial amount at a time when there was a plan prepared 9 years ago (i.e., 1983). Further as per the Plaintiff's Predecessor's Testamentary proceedings before the District Court of Colombo, the Inventory filed on behalf of the late Mr. Mahinda Nanayakkara listed three immovable properties under the list of property described as follows:

1. කලුගෙඩිහේන (අ.0-රූ.0-ප.3.38)- Kalagedihena (A0-R0-P3.38)
2. නාගහවත්ත (අ.0-රූ.0-ප.11.75)-Nagahawatta (A0-RO-P11.75)
3. නාගහවත්ත (අ.0-රූ.1-ප.5.85)-Nagahawatta (A0-R1-P5.85)

Hence, there is a clear difference in between the Survey Plan bearing No. 1333 dated 12.03.1997 prepared by R.M.J. Ranasinghe Licensed Surveyor and the Inventory

filed on behalf of the late Mr. Mahinda Nanayakkara. In this context I answer the 1st question of law negatively.

Finally, I find that the 5th question of law cannot stand upon answering all above questions in the negative. Ultimately, as all necessary elements for a remedy have failed, there is no salvageable section of the District Court Judgment that the High Court could have preserved in favour of the Defendant. As such I answer the 5th question of law negatively.

Prescription

In view of my answers to the substantive questions of law raised on which special leave has been granted by this Court, it is unnecessary to decide which is whether learned District Judge has not duly evaluated the evidence on the question of prescription as stated in the 8th paragraph of his Answer adduced by the Defendant. Further issue of prescription has not been raised as a substantive question of law before this Court when this matter was considered for granting of leave. I therefore do not wish to go into this question in depth. In a *rei vindicatio* action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated and the action ought to be dismissed without more.

Decision

In all the circumstances of this case, I dismiss the appeal answering negatively, for the substantive questions 1, 2, 3, 4 and 5 on which special leave had been granted by this Court. I am of the view that the learned trial judge had misdirected herself when she arrived at the conclusion that the Plaintiff had established the chain of title to the land and therefore, the judgment is erroneous. Hence, I am of the view that the judgment entered in the High Court dismissing the Plaintiff's action is correct in law in a context where the Plaintiff has failed to prove his title to the land which he claimed.

In these circumstances I affirm the judgment of the High Court of Civil Appeal and dismiss this Appeal with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.

I agree

JUDGE OF THE SUPREME COURT