

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

In the matter of an application for leave to appeal to the Supreme Court under and in terms of section 5C of the High Court of the Provinces Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC APPEAL 34/2014 SC/HCCA/LA 471/2011 CP/HCCA/KN 477/04 DC KANDY NO: P13000
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Deceased

1. P.G. Punchimanike,
33B, Galamuna, Manikhinna.
2. Waiyeli Mudiyansele Agnus,
Nikahetiya, Manikhinna.
3. Waiyeli Mudiyansele Bisomanike
Nikahetiya, Manikhinna.
4. Talagollegedara Mathusena
Galamuna, Manikhinna.
- 4A. Wahindara Mudiyansele Kasthurigedara
Heenmanike, 65, Galamuna, Manikhinna
- 4B. Waiyeli Mudiyansele Chandrika Damayanthi-
Same address
5. B.K.G. Ebert Wijeratne,
Galamuna, Manikhinna.
And 6A,7,8,9,12

Defendants/Appellants

Vs.

1. Waiyelli Mudiyansele Chandana Jayathissa,
58, Bogahakuburawatta, Udagamadda,
Menikhinna.

Plaintiff-Respondent

2. Wahindra Mudiyansele Thalkotuwegedara
Koinmanike
 3. Waiyelli Mudiyansele Cholmondeley
Jayawardana
 4. Waiyelli Mudiyansele Subadra Nilanthi
Kumari-
 5. Waiyelli Mudiyansele Chaminda Jayathilaka
 6. Co-operative Rural People's Bank, Manikhinna
- And 1,2,3,4,11 Defendants.

Defendants/Respondents

1. Waiyelli Mudiyansele Chandana Jayathissa,
58, Bogahakuburawatta, Udagamadda,
Menikhinna.

Plaintiff-Respondent-Petitioner-Appellant

Vs.

Deceased

1. P.G. Punchimanike,
33B, Galamuna, Manikhinna.
2. Waiyeli Mudiyanseleage Agnus,
Nikahetiya, Manikhinna.
3. Waiyeli Mudiyanseleage Bisomanike
Nikahetiya, Manikhinna.
4. Talagollegedara Mathusena
Galamuna, Manikhinna.
- 4A. Wahindara Mudiyanseleage Kasthurigedara
Heenmanike, 65, Galamuna, Manikhinna
- 4B. Waiyeli Mudiyanseleage Chandrika Damayanthi-
5. B.K.G. Ebert Wijeratne,
All of Galamuna, Manikhinna.
- And
- 6A. P.G. Punchimanike,
33B, Galamuna, Manikhinna
7. Waiyeli Mudiyanseleage Agnus,
Nikahetiya, Manikhinna.
8. Waiyeli Mudiyanseleage Bisomanike
Nikahetiya, Manikhinna.
9. Thalagollegedara Bisomanike,
62, Udagammadda, Manikhinna.
10. Talagollegedara Mathusena
Galamuna, Manikhinna.
12. B.K.G. Ebert Wijeratne,
Galamuna, Manikhinna.

Defendant- Appellant-Respondents

2. Wahindra Mudiyansele Thalkotuwegedara
Koinmanike- same address
3. Waiyelli Mudiyansele Cholmondeley Jayawardana-
same address
4. Waiyelli Mudiyansele Subadra Nilanthi Kumari-
same address
5. Waiyelli Mudiyansele Chaminda Jayathilaka-
same address
6. Manikhinna Co-operative Rural People's Bank,
Manikhinna,
And
1. Wahindra Mudiyansele Thalkotuwegedara
Koinmanike,
58, Bogahakuburawatta, Udagamadda,
Menikhinna.
2. Waiyelli Mudiyansele Cholmondeley Jayawardana-
same address
3. Waiyelli Mudiyansele Subadra Nilanthi Kumari-
same address
4. Waiyelli Mudiyansele Chaminda Jayathilaka-
same address
11. Manikhinna Co-operative Rural People's Bank,
Manikhinna,

Defendant-Respondents

Before: Buwaneka Aluwihare, PC, J.
Priyantha Jayawardena, PC, J.
L.T.B. Dehideniya, J.

Counsel: Manohara de Silva PC for the Plaintiff-Respondent-Appellant.
H. Withanachchi with Shantha Karunadhara for the 6th to 10th Defendant-Appellant-Respondents.

Argued on: 11th February 2019

Written Submissions: 30th June 2014, 22 September 2015 & 04th April 2019

Decided on: 13.01.2023

JUDGEMENT

Aluwihare PC. J.,

- (1) This matter relates to a partition action. The parcel of land in question, described in the second schedule to the Plaint, is a divided portion of a larger land called *Bogahakumburehena*. The corpus is depicted as Lot No. 1 in Plan No. 86/87B, prepared by S.M.K.B. Mawalagedara, Licensed Surveyor, for the previous partition action bearing No. P/7799 (P15), which lot was left unallotted in the Final Decree of that action, [i.e P/7799]. The said Lot 1 is

shown as Lots 1 and 2 in the Preliminary Plan No. EL/ 529 dated 5th July 1994, which was prepared for the instant case (P16).

- (2) The learned District Judge delivered judgement and made order to partition the corpus as prayed for by the Plaintiff.
- (3) Aggrieved by the said judgement the 6A, 7th, 8th, 9th, 10th and 12th Defendant-Appellant-Respondents who also claimed title to the corpus (hereinafter sometimes referred to as the “Defendants”) preferred an appeal before the Civil Appellate High Court of the Central Province., the learned Judges of the Civil Appellate High Court delivering the judgment, set aside the judgement of the District Court and directed that decree be entered as prayed for by the Appellants, namely the 6A, 7th, 8th, 9th, 10th and 12th Defendant-Appellant-Respondents before this court.
- (4) Aggrieved by the said judgment the Plaintiff Respondent-Petitioner-Appellant [Herein after referred to as the Plaintiff] moved by way of leave to appeal to the and this Court granted leave to appeal on the questions of law set out in sub- paragraphs (d) to (i) of Paragraph 17 of the Petition dated 21st November 2011;

The questions of law are as follows;

(d) Did the High Court of Civil Appeals err with regard to the flow of title of the Plaintiff-Respondent?

(e) Did the High Court of Civil Appeals err by being misdirected in respect of the documents 10V4 and 10V6- P20, 21, 22?

(f) Did the High Court of Civil Appeals err by being misdirected to consider that the 6A, 7, 8, 9, 10 and 12 Defendants failed to raise a specific issue in respect of P20, P21 and P22?

(g) Did the High Court of Civil Appeals err by failing to consider the evidence which are in the Petitioner's favour?

(h) Did the High Court err by holding that any title passed by virtue of fiscal conveyance 10V6 (deed 24349) dated 17th September 1968 when the transferor had no title at that time as the transference had sold his entitlement by deed No. 6810 dated 27th June 1958?

(i) Did the High Court of Civil Appeals err by misdirecting itself as to the identification of the corpus while both parties have admitted in respect of the identification of the corpus?

- (5) After considering the appeal, the learned judges of the High Court of Civil Appeals had arrived at the following conclusions which are material to determine the issues before us,
- (a) The plaintiff or the 1st to 4th Defendants have failed to establish any interest to the unallotted portion [lots 1 plan No. 86/87B]
 - (b) That the title of Siyathu to the corpus had been seized, on the strength of the judgement in case No. L 6625 and sold by the fiscal conveyance.

The claim of the Plaintiff [Appellant]

- (6) There had been no dispute as to the identity of the corpus. Both parties admitted that the land described in the 1st schedule to the Plaint, namely *Bogahakumburehena* in extent of two amunams of paddy sowing, was owned by one Talagollegedara Appu. By Deed No. 10198 dated 2nd June 1909 (P7), he gifted his rights to said land to his six children in equal shares. The six children were; (1) PUNCHIRALA, (2) MUDALIHAMY, (3) KIRIHAMY, (4) SIYATHU, (5) UKKU MENIKA and (6) PUNCHI MENIKA. However, both, Mudalihamy(2) and Ukku Menika(5) had died intestate and issueless and each of the surviving four children[i.e.. (1), (3), (4) and (6)] became entitled to an undivided 1/4th share of the land. [For ease of reference, the

number assigned to each of Thalagollegedera Appu's children referred to above, is carried throughout this judgement]

- (7) It is also common ground that the undivided 1/4th share of Punchirala (1), after his death, devolved on his child the 5th Defendant [Aloysius] and that Kirihamy (3) by Deed No. 10510 dated 21st August 1967 conveyed half of his undivided 1/4th share to the 5th Defendant [Alloysious], who thus, became entitled to an undivided 3/8th share of *Bogahakumburehena*.
- (8) According to the Plaintiff, the abovementioned Kirihamy (3) sold and transferred the balance half of his undivided 1/4th share (1/8th) by Deed No. 9606 dated 30th May 1919 (P18) to one Kiri Ethana and she in turn, by Deed No. 29848 (P19) transferred the said share to the Siyathu(4), who thus became entitled to an undivided 3/8th share of *Bogahakumburehena*. It appears that there is no dispute that at one point in time Siyathu accrued title to 3/8th of the corpus.
- (9) To place it in context; it is reiterated that the present partition action was to partition the land depicted as Lot No. 1 in Plan No. 86/87B which was kept unallotted in the earlier Partition action[P7799] and this lot represents the 3/8 share of Siyathu(4), the devolution which both the Plaintiff on one hand and the 6A-10th and the 12th Defendants on the other, are disputing.
- (10) On the perusal of the proceedings of the action P/7799(vide page 455 of the Brief), it appears that Lot No.1 was left unallotted on the basis that the Fiscal Conveyance [10V6] had not been tendered in evidence. Hence the share of Siyathu and Kiri Ethana from whom Siyathu had accrued further rights to *Bogahakumburehena*, was left unallotted.

The Respective positions of the Plaintiff and the 6A-10th & the 12 Defendants

- (11) The **Plaintiff** avers that Siyathu (4), in 1958, by Deed No. 6810 (P20) sold and transferred his undivided 3/8th share to one W.M.B.K.G. Ranatunga, who, in 1966, by Deed No. 6180 (P21) sold the said 3/8th share to the Plaintiff's father, Punchi Appuhamy.
- (12) It is the Plaintiff's contention that, on the death of Punchi Appuhamy, his rights to the corpus, devolved on his children, that is, the Plaintiff and the 2nd to 4th Defendants, subject to the life interest of the 1st Defendant, Koin Menike (the widow of Punchi Appuhamy).
- (13) It is further averred that Punchi Menika's (6) rights to *Bogahakumburehena* (an undivided 1/4th share) devolved on her child Tikiri Menika who by Deed No. 1301 dated 7th May 1969, sold and transferred the same to the Punchi Appuhamy, the Plaintiff's father . Punchi Appuhamy had transferred the said 1/4th share, to his wife, the 1st Defendant, by Deed No. 5973 in 1973 and thus the 1st Defendant had rights to an undivided 1/4th share of *Bogahakumburehena*.

The claim of the 6A-10th and 12th Defendant- Respondents

- (14) The 6A to the 10th and 12th Defendants also claimed title to the corpus from Siyathu(4). In their Statement of Claim, it is averred that, the 5th Defendant Alloysious [Punchirala's (1) son] who was a minor, through Kirihamy (3), as his next friend, instituted action bearing No.6625/L, against Siyathu (4), for a declaration of title to an undivided 1/4th share of three lands originally owned by Talagollegedara Appu, namely, *Bogahakumburegedera watta*, *Bogahakumburehena* and *Kosgahayatatennehena*.
- (15) The District Court entered judgment and decree in favour of the 5th Defendant Aloysius (10D4), and Siyathu was ordered to pay costs. It is stated that since Siyathu(4) failed to pay costs a writ of execution was issued and his interests in the 3 aforementioned lands were seized and auctioned in

order to recover the costs. At the auction held by the Fiscal in execution of the writ, the rights, title and interest of Siyathu(4) in all 3 lands were sold and purchased by Kirihamy(3) in 1967. The sale was confirmed by the District Court on 9th January 1968 (vide page 492 of the Appeal Brief) and the Fiscal's Conveyance No. 24349 (marked 10V6- at page 490 of the Appeal Brief) was executed in favour of Kirihamy (6).

- (16) It is thus contended that Kirihamy (3) purchased Siyathu's rights to *Bogahakumburehena* (an undivided 3/8th share), and upon Kirihamy's death, his interests devolved on his heirs, that is the 6th -10th Defendants and the 12th Defendant, and that each of them were entitled to Siyathu's share from Lot No. 1 in *Bogahakumburehena*.

The points of contention

- (17) The learned President's Counsel on behalf of the Plaintiff contended that at the time the Fiscal sale took place on 27th November 1967, and the Fiscal Conveyance [10V6] was executed on 9th January 1968, Siyathu had no title to *Bogahakumburehena* as by then, by Deed No. 6810 dated 27th June 1958, Siyathu had already sold his 3/8th share in the said land to W.M.B.K.G. Ranatunga. It was argued, therefore, that Kirihamy (3) did not acquire any title to the said land by the Fiscal sale and as such the claim of the competing Defendants should fail.
- (18) The main contention, on the other hand, of the learned Counsel for the 6A-10th and 12th Defendants was that the title deeds relied on by the Plaintiff, namely Deeds No. 6810 (P20), 6180 (P21) and 6197 (P22), all refer to a land called *Egodawatte* of about 3 pelas and 1 amunam in extent whereas, the corpus that was subject to partition; Lot No.1 in Plan 86/87B, is a divided portion of *Bogahakumburahena*, and not *Egodawatte*.

- (19) It is argued, therefore, that, Siyathu's interests in *Bogahakumburahena* had devolved on the 6A-10th and 12th Defendants under and by virtue of the Fiscal's Conveyance marked 10V6, while Siyathu's interests in *Egodawatte* had devolved on the Plaintiff and the 1st to 4th Respondents under and by virtue of Deeds P20 and P21. Hence, it is submitted that neither the Plaintiff nor the 1st to 4th Respondents have any title to the said Lot No.1 of Bogahakumuburahena.
- (20) The learned Counsel on behalf of the competing Defendants also highlighted the fact that in the execution of the writ against Siyathu for non-payment of costs in Case No. L/6625, Punchi Appuhamy [from whom the Plaintiff and the 1st to 4th Defendants derive their title], made claims to the properties seized and at the proceedings at the Claims Inquiry (at page 512 of the Appeal Brief), it is recorded that Punchi Appuhamy did not claim any interests in the lands seized, i.e., *Bogahakumbure Watta*, *Bogahakumburehena*, and *Kosgahayatatennehena*. It is stated that he only claimed a land called *Egodawatte* which was not seized. Mr Walgampaya who appeared for Punchi Appuhamy had informed court that the claim made, as a prohibitory notice had been posted on *Egodawatta*. Concluding the proceedings, the District Court made the following order, "*The judgement creditor will be entitled to sell the judgement debtor's interest in the lands called Bogahakumburegedera Watta, Bogahakumburehena and Kosgahayatattannahena, but not any portion of the land called Egodawatte belonging to the Claimants*". The Plaintiff, however, contends that *Egodawatte* is but another name for *Bogahakumburehena*.
- (21) This case, therefore, revolves around a solitary question; that is, whether the rights of Siyathu(4) with respect to *Bogahakumburehena* devolved on

Punchi Appuhamy on Deeds Nos. 6810 (P20) and 6180 (P21) or whether those rights were seized in the execution of the Decree in Case No. L/6625 and were sold to Kirihamy.

(22) Although this court granted leave to appeal on six questions of law, the thrust of the argument on behalf of the Plaintiff-Appellant, was on two issues;

(1) That the High Court **erred in holding** that Kirihamy, [the predecessor in title of the 5th Defendant] obtained Siyathu's share by fiscal conveyance, when in fact, Siyathu did not have title to the land at the time the fiscal conveyance was executed.

(2) That the High Court **erred in holding** that the Plaintiff's title deeds do not relate to the corpus but to a different land called "Egodawatte".

The (1) above, is the question of law referred to in sub-paragraph (h) of Paragraph 17 of the Petition on which leave to appeal had been granted, whereas (2) above touches the question of law referred to in sub-paragraph (e) of 17.

The Questions of Law

(23) In view of the submission aforesaid, I wish to deal with the questions of law raised on behalf of the Plaintiff- Appellant referred to in the preceding paragraph.

(24) The main thrust of the argument of the learned President's Counsel was that, the 5th Defendant Alloysious instituted action against Siyathu(4) and others claiming undivided 1/4th of Bogahakumburahena upon death of his father Punchirala(1) and when Siyathu defaulted payment of costs ordered by

court, fiscal conveyance was executed in 1968 over Siyathu's rights in three lands inclusive of Bogahakumburahena and it was Kirihamy (3) who purchased those rights. However, it was pointed out that, prior to the fiscal conveyance, in 1958 by deed no.6810[P20], Siyathu(4) had sold his 3/8th share to W.M.B. Ranathunga and as such Kirihamy(3) did not get any title to the said lands. It was thus argued that the High Court erred and misdirected itself by not considering this aspect.

- (25) Perusal of the schedule to the deed No. 6810[P20], it appears what has been sold by Siyathu(4) to Ranathunga is a land called "Egodawatte" and the schedule further states " Egodawatte forms part and parcel of all three contiguous lands called- (1) Boghakumburegedarawatte, (2) Gederagawakumbura and (3) Egodawatte Registered in E 365/212" . It is to be noted that the name Bogahakumburehena is nowhere mentioned in this deed. Yet, the, learned President's Counsel argued that the boundaries describing the land Siyathu sold by Deed 6810[P20] and the land described in the 2nd schedule to the plaint [that was sought to be partitioned] in the instant case are identical and as such both refer to one and the same land.
- (26) This court considered the contention of the learned President's Counsel for the Plaintiff and in that regard the following observations are made;
- (a) The 1st Schedule to the Plaint in the present case describes the larger land [presumably which was the subject matter in the Partition action P/7799] as "Bogahakuburahena" in extent of 2 Amunams of paddy sowing.
 - (b) Even in the case L/6625 filed on behalf of the 5th Defendant Alloysious way back in 1961, the land is described as Bogahakumburahena, a land in extent of 2 Amunams of paddy sowing.

- (c) The schedule of Deed No. 6810 on which the Plaintiff relied to support his claim, however, describes the land as “Egodawatte”, in extent of one Amunam of paddy sowing.
- (d) Partition action P/7799 was instituted in 1970 [P23] and Deed no. 6810 was executed in 1958. As such if Siyathu sold his rights of Bogahakuburahena to Ranathunga by the said deed, it necessarily would have been an undivided portion of Bogahakuburahena. If that was the case the boundaries referred to in the schedule of the deed 6810 must tally with the boundaries of Bogahakumburahena depicted in plan No.86/87. In **Deed no.6810, the Eastern boundary** is stated as, the lands of Mudunkothgedera Sundera, Kirihamy and the ditch and fence of Tikiri Menika, whereas the **Eastern boundary** according to the **Plan No.86/87** are the lands of ‘Dingirala and Bajjurala’. Western boundary of the land according to Deed No.6810 is Pangollewatthe of C.P.H Dharmaratne whereas according the Plan No.86/87, it is ‘Heenhami’s land’ and land of Alice Dharmarathne.
- (e) Interestingly, the southern boundary of the land referred to in Deed No. 6810 is depicted as ‘Ima of Bogahakuburegedera-gawa-kumbura’ of the vendor Siyathu, which is an indication, in my view, that Siyathu owned other property or properties in that name.
- (f) It is also to be noted that in Deed no 6810 executed by Siyathu, he does not say as to how he became entitled to property called Egodawatte. As far as the land Bogahakumburahena was concerned, he become a co-owner along with his siblings by virtue of Deed No. 10198 dated 2nd June 1909 (P7), when his father gifted his rights to said land to his six children in equal shares.
- (g) The most crucial evidence, as far as I see it, comes from the claim inquiry in case No. L.6625 dated 11th July 1967.[Pg 512 of the appeal

brief]. The Claimant W.M. Punchi Appuhamy the Plaintiff's father, who was present before court stated that he does not claim any interest in the lands called -Bogahakuburegederawatte

-**Bogahakuburehena** and

- Kosgahayatathennehena referred to as

lands seized. He claimed a land called Egodawatte and his Attorney informed court that 'Egodawatte is a different land.

- (27) Considering the above this court cannot fault the findings by the learned judges of the High of Civil Appeals in arriving at the findings that the Plaintiff's title deeds do not relate to the corpus, but to a land called "Egodawatte".
- (28) In the circumstances referred to above, I answer the two issues referred to in paragraph 22 above [question of law (h) and (f)] in the negative.
- (29) Accordingly I hold that; the rights of Siyathu(4) with respect to *Bogahakumburehena* did not devolve on Punchi Appuhamy on Deeds Nos. 6810 (P20) and 6180 (P21) and I hold further that the rights of Siyathu were seized in the execution of the Decree in Case No. L/6625 and were sold to Kirihamy.
- (30) Furthermore, the learned Judges of the High Court of Civil Appeals were correct in arriving at the conclusion that the plaintiff or the 1st to 4th Defendants have failed to establish any interest to the unallotted portion, i.e., lots 1 of plan No. 86/87B.

(31) I do not see any merit in the questions of law referred to in sub-paragraphs (d) (f) (g) and (i) of Paragraph 17 of the petition and the said questions are also answered in the negative.

Accordingly, the appeal is dismissed, subject to costs

Appeal Dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE L. T. B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT