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

S.C. Appeal No. 124/2012
S.C (Spl.) L.A Case No. 30/210
C.A. Case No. 358/97 (F)
D.C. Colombo Case No. 4047/ZL

In the matter of an Application for Special Leave to Appeal.

Ranamukadewage Anoris Fernando
No. 232, Wanawasala Road,
Kelaniya.

PLAINTIFF

Vs.

1. Hewadewage Peiris Fernando
2. Nammunidewage Martin Fernando

DEFENDANTS (DECEASED)

1. Ranamukadewage Emi Nona

1.(a)Hewadewage Chandrani Kusumalatha

2.(b)Hewadewage Chandra Piyaseeli

3.(c)Hewadewage Chandrasiri Jayalath
4.(d)Hewadewage Kamala Kanthi

All of No. 243/1, Sirikotha Mawatha,
Wanawasala, Kelaniya.

SUBSTITUTED-DEFENDANTS

AND NOW BETWEEN

Ranamukadewage Anoris Fernando
No. 232, Wanawasala Road,
Kelaniya.

PLAINTIFF-APPELLANT (DECEASED)

Ranamukadewage Somasiri Karunaratne
No. 232, Wanawasala Road,
Kelaniya.

SUBSTITUTED-PLAINTIFF-APPELLANT

Vs.

1.(a)Hewadewage Chandrani
Kusumalatha

2.(b)Hewadewage Chandra Piyaseeli

3.(c)Hewadewage Chandrasiri
Jayalath
4.(d)Hewadewage Kamala Kanthi

All of No. 243/1, Sirikotha Mawatha,
Wanawasala, Kelaniya.

SUBSTITUTED-DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

Ranamukadewage Somasiri Karunaratne
No. 232, Wanawasala Road,
Kelaniya.

SUBSTITUTED-PLAINTIFF-APPELLANT-PETITIONER

Vs.

1.(a)Hewadewage Chandrani
Kusumalatha

2.(b)Hewadewage Chandra Piyaseeli

3.(c)Hewadewage Chandrasiri
Jayalath
4.(d)Hewadewage Kamala Kanthi

All of No. 243/1, Sirikotha Mawatha,
Wanawasala, Kelaniya.

**SUBSTITUTED-DEFENDANTS-
RESPONDENTS-RESPONDENTS**

BEFORE: S. E. Wanasundera P.C., J.
Sisira J. de Abrew J. and
Anil Gooneratne J.

COUNSEL: Kamran Aziz for the Substituted Plaintiff-Appellant-Appellant

Chula Bandara for the 1(a) and 2(b) Substituted Defendant-Respondent-Respondent

D. K. Dhanapala with Sarath Gunawardena for the 3(c) Defendant-Respondent-Respondent

WRITTEN SUBMISSIONS OF THE 3(C) SUBSTITUTED DEFENDANT-RESPONDENT-RESPONDENT FILED ON: 30.08.2012

WRITTEN SUBMISSIONS OF THE 1(A) & 2(B) SUBSTITUTED DEFENDANTS-RESPONDENTS FILED ON: 11.09.2012

WRITTEN SUBMISSIONS OF THE SUBSTITUTED PLAINTIFF-APPELLANT-APPELLANT FILED ON: 12.10.2012

ARGUED ON: 25.05.2015 & 01.02.2016

DECIDED ON: 26.02.2016

GOONERATNE J.

This was an action instituted in the District Court of Colombo for a declaration of title to the land described in the schedules to the amended plaint and for eviction of the Defendant-Respondents from the said lands. To state the facts very briefly, is that the land described in schedule 1 of the amended plaint was a land granted by the crown by deed No. 1322 dated 07.08.1862, and by that crown grant one Walimuni Dewage Puncha became the owner which land is morefully described in plan marked P1 bearing No. 56939. It was the position of the Plaintiff (Anoris Fernando) that ultimately he became entitled to the land in dispute by devolution of title and by deed marked P3 bearing No. 191. Original ownership by crown grant to above named 'Puncha', and on 'Puncha's death his sole heir was his daughter Enso Fernando and on Enso Fernando's death on or

about 1896, leaving as her heirs were Emi Nona, Marthelis and Charles, are all admitted facts recorded as admission in the District Court.

The position of the Defendant-Respondent was that Puncha Fernando the original crown grantee also owned a land called 'Rukgahadeniya'. On 'Puncha's death 'Enso' (sole heir of 'Puncha') the Defendants state the said 'Enso' divided both lands adjacent to each other by plan No. 199 of 24.04.1935 (V2) in favour of Emi Nona, Marthelis and Charles. By the said partition plan the lands were divided as lots 'A', 'B' & 'C ', and the 1st Defendant became entitled to the said lots in the manner pleaded in the amended answer (para 12 to 17). Parties proceeded to trial on 28 issues. The learned District Judge by his Judgment dated 28.01.1997 dismissed the Plaintiff's case, and being dissatisfied with the said judgment. Plaintiff-Appellant appealed to the Court of Appeal. The Court of Appeal affirmed the Judgment of the District Court and dismissed the appeal on 13.01.2010. The Supreme Court on 16.07.2012 granted Special Leave to Appeal from the Judgment of the Court of Appeal on the questions of law set out in paragraph 12 of the amended petition dated 13.01.2011. The said paragraph contains subparagraphs (a) to (h) and about eight questions of law as follows are suggested.

(a) Is the Judgment of the Court of Appeal contrary to law and against the weight of the evidence adduced?

(b) Have the learned Judges of the Court of Appeal misdirected themselves by failing to appreciate, that deed marked as P3 (deed No. 191 dated 18.12.1981) was a valid deed, executed in accordance with the law, whereby, Meugine Fernando transferred her share of the land to Anoris Fernando (the Plaintiff), thereby entitling the Plaintiff to the land more fully described in the plaint and that this fact alone was sufficient in establishing the Plaintiff's claim to the property concerned?

(c) Have the learned Judges of the Court of Appeal misdirected themselves in law, by requiring the Plaintiff to establish possession of the land concerned in a rei vindicatio action in addition to proving ownership of the land?

(d) Have the learned Judges of the Court of Appeal misdirected themselves by failing to appreciate, that even assuming without conceding, that the Plaintiff's evidence was untrustworthy, this fact is no ground to reject the authenticity of deed marked P3 having particular regard to the fact that there was no evidence to disprove its genuineness?

(e) In any event and without prejudice, have the learned Judges of the Court of Appeal misdirected themselves in law by failing to appreciate that document marked as P3 was duly proved, or deemed to be duly proved, having particular regard to the fact that the Defendants did not object to the said document being received as evidence at the close of the Plaintiff's case and/or at the conclusion of the trial, and that therefore the said document was duly proved for all purposes of the law?

(f) Have the learned Judges of the Court of Appeal misdirected themselves in failing to take adequate consideration of the fact, that the evidence in the case suggests that the identity of the corpuses in this case, as claimed by the parties, are completely different, having particular regard to the boundaries and extents of the lands as claimed by the Plaintiff, as opposed to the boundaries and extents as claimed by the Defendants, which evidently do not form part of one another?

(g) Have the learned Judges of the Court of Appeal therefore misdirected themselves, by failing to appreciate that the Defendants have no entitlement to the land claimed by the Plaintiff (in terms of P3), upon the premise that the land claimed by the Defendants is completely different to the land claimed by the Plaintiff?

(h) In any event, have the learned Judges of the Court of Appeal misdirected themselves in law, by failing to appreciate that the rejecting of the evidence of Siri D. Liyanasuirya, Licensed Surveyor and accepting the evidence of S. Burah, Licensed Surveyor, was unreasonable and contrary to the totality evidence as adduced by the said two (2) Licensed Surveyors, having particular regard to the fact that Plan marked as X submitted by the former, clearly sets out the correct metes and boundaries, and also having specific regard to the fact that the latter had admittedly not even surveyed the land more fully described in the schedule to the plaint?

The original court as well as the Court of Appeal considered the question of identity of the land in dispute. This is the base and most important aspect to be correctly established in any land case. Failure to correctly prove

identity of the land in dispute is fatal. Plaintiff called Surveyor Liyanasuriya to give evidence and the Defendant party relied on the evidence and plan of Surveyor Burah. The trial Judge very correctly and as well as the Court of Appeal had examined and analysed the evidence of the two Surveyors. Plaintiff maintains that the land in dispute is depicted in Survey General's plan No. 56939 dated 1862-6-14 (P1). Defendant party rejects this position and argue that the land described in plan P1 along with another land called 'Rukgahadeniya' were amalgamated and depicted in plan V2 of Survey Ranasinghe in the year 1935 which is a partition plan, and accordingly divided portions are possessed and owned by Defendant-Respondent for which Plaintiff has no claim.

I will consider the findings of the learned District Judge as regards the oral testimony of Surveyor Liyanasuriya and Surveyor Burah. It is in evidence that Surveyor Liyanasuriya, could not correctly effect a superimposition on his plan since he could not obtain the correct data. It was admitted in evidence by him that the boundaries on the west, south and east were not definite. He admitted in his evidence that his superimposition is a questionable superimposition. Trial Judge having examined both plans of the abovenamed Surveyors, observe that Surveyor Liyanasuriya's plan does not show the temporary shed within the subject matter of the case but Surveyor Burah has clearly identified same on his plan. There is reference to a 'well' where the two

surveyors give different position in their plans. Trial Judge having compared Liyanasuriya's plan X and Burah's plan V10, observes that Surveyor Burah has obtained acceptable data than Surveyor Liyanasuriya and on that basis Surveyor Burah's plan V10 is the more satisfactory plan.

Trial Judge observes that Surveyor Burah had superimposed plan 56940 on his plan V10 and had thereby identified lot described in plan No. 56393. Further plan V2 had also been superimposed on plan V10. V2 is Surveyor Ranasinghe's partition plan (V2) which shows the 3 divided lots as per the partition plan. (It is also relevant to note that original plan 56393 and its western boundary is the land shown in plan No. 56940). I observe that the learned trial Judge has considered both oral and documentary evidence of the two Surveyors and arrived at a conclusion to accept and rely on Plan V10 and V10a, being Surveyor Burah's plan. Even the Court of Appeal accept such a position and I see no valid reason to observe otherwise and take a different view. It may be for this reason that the learned counsel for the Plaintiff-Appellant submitted to court and indicated to court that he would rely on plan V10 to argue his case, whether it may be and whatever position taken on deed marked P3 would not take the Plaintiff-Respondent's case any further due to a serious lapse of identity of the land in dispute not being established by the Plaintiff-Appellant. Such a defect

cannot be cured in the appeal merely by shifting the stance of identification at a very late stage of this case, in appeal in the Appex Court.

In a partition case as well as a case pertaining to declaration of title, identity of corpus is paramount since both type of cases need to establish title to the land in dispute. In this regard the dicta in *Jayasuriya Vs. Ubaid 61 NLR 352*

Held:

> In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.

Piyasena Perera Vs. Margret Perera 1984 (1) SLR S7 held:

Held:

> The finality attached to an interlocutory decree of partition under section 48(1) of the Partition Law No. 21 of 1977 does not preclude an appeal court from interfering with such decree by way of revision of *restitutio* in *integrum* where a miscarriage of justice has occurred in this case the corpus to be partitioned had not been sufficiently identified either by means of the stated boundaries or by extent and the land of the petitioner appeared to be included in the corpus. Therefore there has been a miscarriage of justice.

The other issue that needs to be considered seriously is deed marked P3 from which Plaintiff claims to have got title from the said deed and also whether rights/title derived by Plaintiff from the aforesaid Marthelis.

Plaintiff claims that Marthelis died issueless. As stated above the devolution of title by deed V2 amongst Enso Fernando's three children Eminona, Merthelis and Charles, are admitted and parties to this suit are not at variance. Charles, Marthelis and Eminona are brothers and sister. It is from this point that the real problem surface. In deed P3 and the pedigree of Plaintiff demonstrate that Marthelis and Eminona died issueless (Eminona's husband predeceased Eminona). Deed P3 refers to the fact that the Plaintiff being a sibling of Charles and after the demise of Charles an un-administrable estate including the lands described in the schedule to P3 devolved on the Plaintiff and his sister (children of Charles). Plaintiff's sister sold her share of the land to Plaintiff and Plaintiff thereby became the owner, as the land devolved on him, both from Charles and Marthelis. (as it was represented as submitted that Marthelis died issueless and as such Charles inherited his share)

However in cross-examination of Plaintiff at the trial the position that 'Marthelis' died issueless proved to be false, and the trial Judge very correctly inter alia disbelieved the Plaintiff. The learned trial Judge observes that the land described in the crown grant and another land which were amalgamated (Rukgahadeniya) was inherited by Enso Fernando's children Marthelis, Charles and Eminona. This was Defendent's position which had not been rejected by the Plaintiff-Respondent. The Plaintiff had been cross-

examined at length by learned counsel for the Defendants. Marthelis was Plaintiff's father's brother. Plaintiff's father was 'Charles'. Plaintiff was confronted about Marthelis' marital status and it was suggested that Marthelis was married. The Marriage Certificate of Marthelis had been shown to Plaintiff and daughter of Marthelis, was present in court on the trial date. Plaintiff being confronted with such a position had been very evasive in his answers to court. Daughter's name was Geetha Wimalawathie. I will incorporate in this Judgment for purposes of clarity that part of the Judgment of the learned District Judge to demonstrate above (folio 521).

මර්තේලිස් යනු පැමිණිලිකරුගේ පියාගේ සහෝදරයෙකි. එම සහෝදරයාගේ විවාහය ගැන හෝ ඔහුට දරුවෙක් සිටි බවට පැමිණිලිකරු පිළි ගැනීමට මැලිකමක් මුල් අවස්ථාවේදී දක්වා ඇත. විත්තිය විසින් මර්තේලිස්ගේ විවාහ සහතිකය පෙන්වූ අවස්ථාවේදී ද, ඉන්පසුව විවෘත අධිකරණයේ මර්තේලිස්ගේ ගැහැණු දරුවා පෙන්වා සිටි අවස්ථාවේදී ද එම ප්‍රශ්ණාවලින් මිදීමට පැමිණිලිකරු යම් අසාර්ථක වෑයමක් දරා ඇත. පැමිණිලිකරුගේ මෙම සාක්ෂිය දෙස බලනකල ඔහු සත්‍යය එලෙසම ප්‍රකාශ කරන විශ්වාසදායක සාක්ෂිකරුවෙකු බව අධිකරණයට පිළි ගැනීමට නොහැකිවී ඇත.

ගීතා විමලාවතී යන මර්තේලිස්ගේ දුව සම්බන්ධයෙන් ද ප්‍රශ්ණ කල අවස්ථාවේදී ඔහු එම ප්‍රෂ්ණාවලට උත්තරදීමට යම් පැකිලීමක් පෙන්වා ඇත. කෙසේ වෙතත් එක් අවස්ථාවකදී පැමිණිලිකරු මෙසේ සඳහන් කර ඇත. "මම පිළිගන්නවා මර්තේලිස්ගේ අයිතිවාසිකම් වැන්දඹූ ස්ත්‍රියට සහ දුව වන ගීතා විමලාවතීට හිමිවිය

යුතු බව.” පැමිණිලිකරුගේ මෙම සාක්ෂිය සඳහන් වන්නේ 1985.12.10 වැනි දින දරණ සාක්ෂියේ 15 වැනි පිටුවේය.

The learned trial Judge no doubt was entitled to reject the evidence of Plaintiff to be unreliable and untrustworthy. As such Plaintiff has failed to discharge the burden of establishing his case on a balance of probability and the trial Judge was inclined to accept the case of the Defendants. On perusing deed P3, I find an incorrect false statement which is contrary to Plaintiff's own oral evidence demonstrated above. In the deed P3 it is stated (P3, 2nd pg.) that Marthelis died unmarried and issueless and Charles (Plaintiff's father) became sole owner of the land and premises described in the schedule to deed P3. It is from Plaintiff's father Charles, that he inherited the property in dispute in the manner stated in deed P3.

The trial Judge's position was that deed P3 was not duly proved. Whatever it may be the material contained in deed P3 in view of above on a balance of probability cannot favour the Plaintiff. Deed P3 had been executed on incorrect details and data. Plaintiff's own oral testimony establish a serious lapse in the chain of title relied upon by him. Our courts have time and again held that in an action rei vindicatio the Plaintiff should set out his title on the basis which he claims a declaration of title to the land and must prove that title to the land against the Defendant in the action. The Defendant in a rei vindicatio

action need not prove anything still less, his own title. Plaintiff cannot ask for a declaration of title in his favour merely on the strength that the Defendant's title is poor or not established. Plaintiff must establish his case. Vide Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167; Deeman Silva Vs. Silva 1997 (2) SLR 382.

The evidence adduced by the Defendant party was more reliable than the evidence called by Plaintiff. The only deed produced by the Plaintiff being deed P3 was highly questionable, and Plaintiff's Surveyor Liyanasuriya failed to establish identity of property. The Defendant in this case died at a certain stage and 1A to 1C Defendants were substituted. 1B Defendant gave evidence in detail and was subject to a lengthy cross-examination but Plaintiff's party could not demolish his case. I am convinced of the manner in which the learned trial Judge approached and accepted as proved Defendant's case. I note the following from his Judgment.

චිත්තිය විසින් හිමිකම් කියන අයුරුම පෙර කී මර්තේලිස්, චාර්ල්ස් සහ එම් අංක 199 දරණ බෙදුම් ඔප්පුව පිළිගැනීම කළ බව ද, එකී බෙදුම් ඔප්පුව අනුව චාර්ල්ස් ප්‍රනාන්දු (පැමිණිලිකරුගේ පියා) 1935 අංක 6225 යෙදූ 'වී1' ඔප්පුව මත ඔහුගේ අයිතිවාසිකම් භාර්යාව වන රෙජෝ ප්‍රනාන්දු යන අයට පවරා ඇත. පැමැණිලිකරු 'වී1' ලේඛණයේ ඔහුගේ පියාගේ අත්සන පිළිගෙන ඇත.

'වී 2' පිඹුරේ 'ඒ' කැබැල්ල හිමිකරන ලද මර්තේලිස් අංක 6273 යෙදූ ඔප්පුවෙන් ඔහුගේ අයිතිවාසිකම් ද රෙජෝ ප්‍රනාන්දුට පවරා ඇත. රෙජෝ ප්‍රනාන්දු එකී 'ඒ' සහ 'බී' ඉඩම කොටස් අංක 9180 යෙදූ ඔප්පුව මගින් (වී 7) 1 වැනි විත්තිකාර හේව දේවගේ පීරිස් ප්‍රනාන්දු ට පවරා ඇත. එම්නෝනාට 'වී 2' ලේඛණයෙන් හිමි වූ 'සී' අක්ෂරය කැබැල්ල ඇය විසින් 'වී 6' ලේඛණය මත ජේම්ස්ට විකුණන ලදී. ජේම්ස්, පීටර් ප්‍රනාන්දු නම් වූ එකම උරුමක්කරු සිටියේදී මිය ගිය අතර ඔහුගේ අයිතිවාසිකම් 'වී 7' නම් වූ අංක 1518 ඔප්පුවෙන් 1 වෙනි විත්තිකරුට හිමිකරනු ලැබ ඇත.

The question of law as per paragraph 12 of the petition are answered as follows in favour of the Defendant party.

(a) No

(b) No. The marital status of Marthelis was established and the position he died issueless was disproved as stated above. Incorrect misstatement in deed P3 cannot be considered to overcome marital status of Marthelis (admitted by Plaintiff that Marthelis was married in cross-examination). Plaintiff has not established his case on a balance of probability.

(c) Even if the Court of Appeal erred on the question of possession, on a balance of probability Plaintiff has not established title and his case.

(d) No. On a balance of probability Plaintiff's case has not been proved.

(e) No. Even if document P3 was proved as stated in this Judgment civil cases are proved on a balance of probability. Plaintiff has failed to discharge his burden of proof.

(f) No. It has resulted in a miscarriage of justice as the corpus had not been identified.

(g) No. As stated above.

(h) No.

In all the facts and circumstances of this case I am not inclined to disturb the findings of the learned District Judge and that of the Court of Appeal. Both Judgments are affirmed and this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S .E. Wanasundera P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

I agree.

JUDGE OF THE SUPREME COURT