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

IN THE DISTRICT COURT

1. Senadheerage alias Polwattage Samaranayake,

2. Senadheerage alias Polwattage Naposinghe, (Now deceased)

3. Kathreeachchi Pinnawalage Yasohamy,
   all of No. 308, Habarakada, Homagama. (Now deceased)

SC Appeal No. 162/2014
SC/HCCA/LA No. 370/13
WP/HCCA/AV/1052/2009 (F)
D.C. Homagama Case No. 2334/L

PLAINTIFFS

- VS -

1. Vithanage alias Kathreegamage Ganawathie, of Godellawatte, Habarakada, Homagama.

2. Porage Nandawathie Perera, of No.145/2, High Level Road, Pannipitiya.

DEFENDANTS

IN THE HIGH COURT

1. Senadheerage alias Polwattage Samaranayake,

2. Senadheerage alias Polwattage Naposinghe, (Now deceased)

3. Kathreeachchi Pinnawalage Yasohamy, all of No. 308, Habarakada, Homagama. (Now deceased)

PLAINTIFF – APPELLANTS

- VS -

1. Vithanage alias Kathreegamage Ganawathie, of Godellawatte, Habarakada, Homagama.

2. Porage Nandawathie Perera, of No.145/2, High Level Road, Pannipitiya.

DEFENDANT – RESPONDENTS

IN THE SUPREME COURT

2. Porage Nandawathie Perera, of No.145/2, High Level Road, Pannipitiya.

2ND DEFENDANT – RESPONDENT – PETITIONER-APPELLANT

- VS -

1. Senadheerage alias Polwattage Samaranayake,

1st PLAINTIFF – APPELLANT – RESPONDENT- RESPONDENT

Before : P. Padman Surasena, J.
E. A. G. R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel : Dr. Sunil Cooray for 2nd Defendant – Respondent – Appellant.

S.N. Vijithsingh for 1st Plaintiff – Appellant – Respondent.

Argued on : 10.09.2022

Decided on : 16.06.2025

E. A. G. R. Amarasekara, J.

This Appeal was made by the 2nd Defendant – Respondent – Appellant, Porage Nandawathie Perera (Hereinafter sometimes referred to as the "2nd Defendant" or "Appellant"), against the Judgment of the Provincial Civil Appeal High Court of Avissawella dated 01.08.2013 which set aside Judgment of the District Court of Homagama dated 23.04.2009 in case No. 2334/L, while dismissing the Appeal made to it by the 1st Plaintiff – Appellant – Respondent – Respondent, Senadheerage alias Polwattage Samaranayake (Hereinafter sometimes referred to as "the 1st Plaintiff" or "Respondent").

This action has a checkered pre-trial history at the District Court of Homagama. Originally, as per the averments in the Plaint, the 1st, 2nd and 3rd Plaintiffs filed an action for demarcation of

southern boundary of the land described in the 1st Schedule to the Plaint against the 1st Defendant who is the owner of the land described in the 2nd Schedule to the Plaint. As per the stance taken in the said Plaint, the 2nd and the 3rd Plaintiffs were the life interest holders to the land described in the 1st Schedule to the Plaint, who are deceased now. It is stated in the said Plaint that the 1st Plaintiff has the title subject to the said life interests. The 1st Defendant filed an Answer and took up the position that it is the Plaintiff who had encroached her land and prayed for a dismissal of the Plaint.

Parties took commissions to survey the purported land in dispute and in consequence, the 2nd Defendant was reported as a person claiming a bigger part of the land. A notice was issued to the 2nd Defendant and she was added as a party (vide proceedings dated 99.08.31) and allowed to file her Answer. She also took a commission to survey the land. By this time, she had already filed her Answer dated 22.09.1998, and, while denying that the Plaintiffs have rights in the manner stated in the Plaint, she had referred to her entitlements and the Plaintiffs' entitlement originating from a Partition Decree made in Case No. 9654/P. While alleging that the Plaintiffs had encroached her lands, she had made counter claims which, among other things, included declaration of title to certain lands described in the said Answer and ejectment of the Plaintiff from those lands. She has also prayed for a cancellation of the inclusion of a land in one of the deeds in the Plaintiffs' chain of title.

Without taking a proper objection to say that this type of claim in reconvention cannot be brought in an action filed for the demarcation of boundaries as they are not cross claims that can be set off against the claim of the Plaintiff, the Plaintiff had tendered an amended Plaint which converted his original Plaint to an action in the nature of *rei vindicatio* action, among other things, claiming title to the land in the 3rd Schedule to the Plaint and ejection of the 1st and 2nd Defendants. As the original 2nd Plaintiff, Naposinghe, who had only a life interest as per the stance of the Plaintiffs, had been removed from the caption due to his death in this amended Plaint.

It appears that no one has taken a keen interest to object to this amended Plaint on the basis that it converts the nature of the original action to a completely a different type of action. The above indicates why I stated that this matter has a checkered pre-trial history.

The trial before the District Court commenced on 05.11.2002 by recording five admissions and 28 issues. The 1st Plaintiff had given evidence for the Plaintiffs' case and the 1st Defendant had given evidence for her case. The 2nd Defendant, licensed surveyor M.M.S. Fernando, an Officer from the Land Registry, M. Salinda and a Court Clerk, Weerasinghe, had given evidence to establish the 2nd Defendant's case.

After considering the evidence of the witnesses, the documents marked at the trial including the plans and reports marked by the Parties and the Partition Decree referred to by the 2nd Defendant along with the other documentary evidence, the learned District Judge delivered her Judgment with sufficient reasons dismissing the Plaintiff's action and the 1st Defendant's action and held in favour of the 2nd Defendant granting several reliefs in her cross claim. As per the said Judgment the learned District Judge also had identified what is due to the Plaintiff through his chain of title after the Partition Decree in Case No. 9654/P marked 2V2 at the trial. Thus, in fact his rights are not prejudiced and, as prayer (h) of the 2nd Defendant's prayer also is granted, said entitlement of the Plaintiff is secured through the decision of the learned District Judge.

However, being dissatisfied with the said Judgment of the learned District Judge, the Plaintiffs appealed to the Provincial High Court of Avissawella, and the learned High Court Judges, while dismissing the appeal, also set aside the Judgment of the learned District Judge which was in favour of the 2nd Defendant.

Learned High Court Judges have made their observations regarding the District Court allowing the 2nd Defendant to make a cross claim in another capacity referring to **Muttunayagam v Britto 22 N L R 329**. The Counsel for the Plaintiff even before this Court has referred to the said case law as well as to **Nadarajah v Daniel (1999) 1 Sri L R 240** and **Silva v Perera 17 N L R 206** to contend that a cross claim should be of a kind that can be set off or adjusted with the claim of the Plaintiff. This appears to be one factor that affected the mind of the learned High Court Judges to make their conclusions. However, as I mentioned above, the Plaintiffs have not raised an objection and maintained such an objection in the original Court. Instead, the Plaintiffs had filed an amended Plaint, changing the nature of their action, which too was not objected. The amendment to the Plaint amends the original Plaint and, thereafter, the Plaintiff cannot take up the position that his Plaint was in the nature of an action for boundary demarcation and the cross claim of the 2nd Defendant is not according to law as per the

decisions mentioned above. The Plaintiff cannot approbate and reprobate. Even the High Court Judges have stated that one cannot approbate and reprobate, but it appears that the said contention has influenced their mind to come to the conclusion they made. As it stands at the end, after the amendment to the Plaint, which relates back to the date of the Plaint as it amends the original Plaint, the Plaintiffs action was in the nature of a *rei vindicatio* action and the 2nd Defendant also claims title, except for one portion identified by the 2nd Defendant while giving that portion to the Plaintiff. Thus, there was no incompatibility of the 2nd Defendant's cross claim with the claim of the Plaintiffs as the Plaint was amended.

On the other hand, if any misjoinder of cause of action or parties have occurred due to the Answer of the 2nd Defendant or the amendment of the Plaint, it had to be taken up before the trial commenced. Misjoinder or non-joinder cannot defeat an action - vide **T. A. Dingiri Appuhamy v Talakolawewa Pangnananda Thero 67 N L R 89,** and **Cader v Marikar 37 N L R 257**.

The learned High Court Judges as well as the learned District Court Judge has referred to **Hanaffi V Nallamma (1998) 1 Sri L R 73,** which clearly held that once issues are raised, the case is not tried on pleadings, pleadings recede to the background. As Parties raised their issues before the learned District Judge in this matter, the decision had to be based on those issues. Thus, the learned District Judge had decided on the issues so framed. Thus, the matters concerning the amendment of the Plaint or the non-compatibility of the cross claim, as far as the facts relating to the matter at hand are concerned, should not be a ground to set aside the Judgment of the District Court.

Only other ground that can be found as per the Judgment of the learned High Court Judges to set aside the District Court Judgment is stated in the following paragraph of the said Judgment:

"*It is also to be noted that earlier. There had been a case between 1st Appellants father and the 2nd Respondent with regard to the same corpus. Therefore the 2nd Respondent has no right to claim the same corpus that has been adjudicated either in another case which is Res Judicata."* (In the above quoted paragraph, it appears that the Appellant is the Plaintiff and the 2nd Respondent is the 2nd Defendant)

Nowhere in the High Court Judgment, is it revealed which case has been filed before. The case number or the nature of the case or any documentary evidence placed in this regard before the learned High Court Judges or the number given to the relevant issue raised at the trial is not mentioned. It must be noted, among the 28 issues that has been raised, there is not a single issue raised based on Res Judicata. Thus, the learned High Court Judges have gone beyond the scope of the case presented at the trial before the learned District Judge. On the other hand, the learned District Judge has considered the effect of the Partition Decree marked 2V1. 2V4 is an Amended Decree between the 2nd Defendant and one K. Kusumawathie who is not a party to this action, and as per the evidence at the trial, it was an action to evict the person who occupied the 2nd Defendant's house. 2V7 is an order of a Primary Court in a Section 66 application No. 71134/E between the 2nd Defendant and the 1st Plaintiff's predecessor, which is a temporary order till relief is sought and granted from a proper forum. None of these can establish that the matter had been decided between Parties previously. It appears that the Plaintiffs, in their amended Plaint, have referred to one case No. 4063 L filed before the same District Court, but no document relating to that case has been produced in evidence to prove that the cause of action has become Res Judicata between Parties. This error seems to be the main reason to set aside the District Court Judgment which was in favour of the 2nd Defendant.

Thus, the learned High Court Judges erred as explained above, and the said Judgment has to be set aside.

Leave was granted for the questions of law mentioned in paragraphs 24 (a), (b), (c), (f) and (i) in the Petition dated 09.09.2013 (vide minutes dated 10.09.2014), which are as follows:

(a) *Did the High Court err in holding (at p.9 in "B") that the District Court erred in adding the 2nd Defendant as a party to this action, entitling her to file answer and contest this action?*

Answered in the Affirmative.

(b) *Did the High Court err in applying in this appeal (at p.9 in "B") the principle of law that "One cannot approbate and reprobate at the same time", which principle has no application to the facts and circumstances of this case?*

It is answered that the High Court failed to apply it correctly, though there is a reference to that principle.

(c) *Did the High Court err in holding (at p.10 in "B") as follows: "It is also to be noted that earlier there had been a case between the 1st (Plaintiff) Appellant's father (the 2nd Plaintiff) and the 2nd (Defendant) Respondent with regard to the same corpus. Therefore the 2nd (Defendant) Respondent has no right to claim the same corpus that has been adjudicated earlier in another case which is Res Judicata."?*

Answered in the Affirmative.

(f) Has the High Court erred in applying the principle of Res Judicata to the facts of this case in light of the fact that the case for the Plaintiffs (as per paragraph 6 of their plaint [p.88] and paragraph 6 of the amended plaint [p.122]) was that title to lot 9 passed from the 2nd Plaintiff to the 1st Plaintiff by a deed executed as far back as in 1987, and therefore the 1st Plaintiff by a deed executed as far as in 1987, and therefore the 1st Plaintiff not a successor in title of the 2nd Plaintiff against whom order 2V7 was made only later, namely in 1997?

Answered in the Affirmative for the reasons stated in the Judgment above.

(i) *Did the High Court err in holding (at p. 10 in "B") that the findings of the learned trial Judge with regard to the rights of the 2nd Defendant Respondent Petitioner should be set aside "as the [Plaintiff] Appellants filed a rei vindicatio action claiming title to the subject matter, where the 2nd Defendant Respondent is not competent to put in a claim against them in reconvention in another capacity."?*

Answered in the Affirmative.

Hence this appeal is allowed. The Judgment of the Provincial High Court of Avissawella dated 01.08.2013 is set aside and the Judgment of the Learned District Judge of Homagama dated 23.04.2009 is affirmed.

The 2nd Defendant - Appellant is entitled to costs of all three Courts.

Appeal Allowed with costs as above.

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Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

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Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

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Judge of the Supreme Court