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

S.C. Appeal No.83/2011
SC(HC) CALA Application No. 69/2011
WP/HCCA/Mt./16/2002 (F)
D.C. Moratuwa Case No. 353/L

In the matter of an application for Leave to Appeal under Section 5C (i) of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

1. Merennege Lisi alias Erine Salgado
2. Mahatellage Saman Suranga Pieris
3. Mahatellage Sujith Asanga Pieris

All of Nonis Mawatha, Molpe , Moratuwa.

4. Mahatellage Sarath Jayantha Pieris
Of No. 19/2, Thapasarama Road, Moratumulla, Moratuwa.

5. Mahatellage Jayantha Pieris
Of No. 34/288, Kirikannamulla, Yakkala.

6. Mahatellage Mallika Harriet Pieris
Of No. 10/2, Nonis Mawatha, Molpe, Moratuwa.

7. Mahatellage Renuka Nimali Pieris
Of Nonis Mawatha, Molpe, Moratuwa.

PLAINTIFFS

Vs.

1. A.M. A. Kalum Karunaratne
Of No. 326/1,
Suwarapola, Piliyandala.

2. Hapuhennedige Janet Elizabeth
Of Mola Road, Katubedda,
Moratuwa.

DEFENDANTS

AND

A.M. A. Kalum Karunaratne
Of No. 326/1,
Suwarapola, Piliyandala.

1ST DEFENDANT-APPELLANT

Vs.

1. Merennege Lisi alias Erine Salgado
2. Mahatellage Saman Suranga Pieris
3. Mahatellage Sujith Asanga Pieris

All of Nonis Mawatha, Molpe ,
Moratuwa.

4. Mahatellage Sarath Jayantha Pieris
Of No. 19/2, Thapasarama Road,
Moratumulla, Moratuwa.

5. Mahatellage Jayantha Pieris
Of No. 34/288, Kirikannamulla, Yakkala.

6. Mahatellage Mallika Harriet Pieris
Of No. 10/2, Nonis Mawatha, Molpe,
Moratuwa.

7. Mahatellage Renuka Nimali Pieris
Of Nonis Mawatha, Molpe, Moratuwa.

PLAINTIFFS-RESPONDENTS

8. Hapuhennedige Janet Elizabeth
Of Mola Road, Katubedda,
Moratuwa.

2ND DEFENDANT-RESPONDENT

AND NOW BETWEEN

A.M. A. Kalum Karunaratne
Of No. 44/10/3,
Suwarapola, Piliyandala.

1ST DEFENDANT-APPELLANT-PETITIONER

Vs.

1. Merennege Lisi alias Erine Salgado
2. Mahatellage Saman Suranga Peiris
3. Mahatellage Sujith Asanga Pieris

All of Nonis Mawatha, Molpe ,
Moratuwa.

4. Mahatellage Sarath Jayantha Pieris
Of No. 19/2, Thapasarama Road,
Moratumulla, Moratuwa.

5. Mahatellage Jayantha Pieris
Of No. 34/288, Kirikannamulla, Yakkala.

6. Mahatellage Mallika Harriet Pieris
Of No. 10/2, Nonis Mawatha, Molpe,
Moratuwa.

7. Mahatellage Renuka Nimali Pieris
Of Nonis Mawatha, Molpe, Moratuwa.

PLAINTIFFS-RESPONDENTS-RESPONDENTS

8. Hapuhennedige Janet Elizabeth
Of Mola Road, Katubedda,
Moratuwa.

2ND DEFENDANT-RESPONDENT-RESPONDENT (Deceased)

BEFORE: S. E. Wanasundara P.C., J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: R.C. Gooneratne for 1st Defendant-Appellant-Petitioner-Appellant
H. Peiris for Plaintiffs-Respondents-Respondents

ARGUED ON: 14.01.2016

DECIDED ON: 27.06.2016

GOONERATNE J.

This is a case the Plaintiff-Respondents-Respondents (hereinafter referred to as Plaintiffs) filed action in the District Court of Moratuwa, (353/L) mainly to attack a Judgment and Decree collaterally in a case (250/L) filed by the 1st Defendant-Appellant-Petitioner-Appellant where the Plaintiffs were not made a party to the action. A party to a suit could show by a separate action (as the Plaintiff) that a Judgment or Decree sought to be proved against them has

been obtained by fraud and collusion. (51 NLR 34, 40 & 41) In brief the facts of this case are as follows, as gathered from the plaint.

One Benedict Peiris was the original owner of the land described in the schedule to the plaint in extent of about 7.45 perches. Plaintiffs are the wife and children of the said Benedict. (now deceased) The 2nd Defendant was the above named Benedict's aunt and Benedict during his life time had obtained a loan of Rs. 1000/- from the 2nd Defendant and transferred the property in dispute by deed P10/V2 No. 1600 as security for the said loan. However it is apparent that even the learned District Judge takes the view that deed marked P10/V2 was an outright transfer of the property in dispute and not executed as security for the loan transaction. (conditional transfer)

It is pleaded and counsel argued that the said Benedict though executed deed marked P10/V2 in favour of his aunt Elisabeth (2nd Defendant) he continued to live and possess the property in dispute along with his family for about 23 years, after execution of deed marked P10/V2 (during 1964 to 1987). The above facts are not so much in dispute between the parties to the suit. It is also stated that the 2nd Defendant on or about 1987 filed action in case bearing No. 216 in the District Court of Panadura for a declaration of title and for eviction of the above named Benedict and others from the property in dispute but the

said action was dismissed. Nor did the 2nd Defendant appeal from the Judgment in Case No. 216.

It is important in a case of this nature to gather all the facts pertaining to the land in dispute. Benedict died in 1993. Whilst the Plaintiffs were in possession or continued to be in possession (Plaintiffs being Benedict's successors) the 2nd Defendant by deed No. 4827 of May 1995 P2/V1 transferred the property in dispute to the 1st Defendant-Appellant-Petitioner. (hereinafter referred to as the 1st Defendant) Thereafter the available material furnished to this court suggests that the 1st Defendant had attempted to evict the Plaintiffs from the land in dispute and even initiated proceedings in the Conciliation Board and even sent a quit notice (P12). However at a subsequent stage the 1st Defendant filed action bearing No. 250/Land only against the 2nd Defendant and obtained an ex-parte judgment. By obtaining a writ of execution, in the said case 1st Defendant, evicted the Plaintiffs who were not made parties to the suit in the above case No. 250/Land.

Supreme Court on 24.06.2011 granted leave to appeal on the questions of law set out in paragraphs 14(a), (b), (c) & (d) of the Petition as follows. Learned counsel for Plaintiffs suggested questions (e) & (f)

(a) Without an issue being formulated on the question of prescription can the High Court of Civil Appeals determine that the plaintiffs have prescription to the premises in suit?

(b) Does prescription begin to run from the time an action is instituted or from the (time) determination is made that the defendant occupies the premises in suit with the leave and licence of the plaintiff?

(c) Have the plaintiffs any rights to the premises in suit. If not should they have been made parties to the action bearing No. 250/L.

(d) Can the judgment in Case No. 250/L be attacked collaterally on the ground of fraud and collusion?

(e) In any event is the judgment in case No. 250/L void in law on the ground of fraud and collusion?

(f) If so is the judgment of the Civil Appeal High Court of Mount Lavinia affirming the judgment of the District Court, correct?

All the above material facts are relevant to the case in hand. It is based on the above facts, as correctly narrated by the learned District Judge that gave rise to the case in hand which ultimately resulted in an appeal to the Supreme Court. It is due to all the above facts and circumstances that the Plaintiffs filed another action bearing No. 350/Land on the premise that Plaintiffs were evicted in case No. 250/Land by a judgment obtained in the said case by fraud and collusion (observed by this court at the very outset of this Judgment). The 1st Defendant-Appellant-Petitioner was the successful Plaintiff in Case No. 250/L where serious allegations of fraud and collusions are made against him, by the Plaintiffs in the case in hand.

The prayer to plaint in the case in hand seeks the following substantive relief.

(a) To declare that deed No. 4827 of 23.05.1995 in favour of the 1st Defendant is invalid/void and as such he is not entitled to property rights.

(b) To declare that Plaintiffs are not entitled to be evicted based on the judgment entered against the 2nd Defendant in case No. 250/L wherein the Plaintiff was not a party to that action.

(c) That the Judgment (250/L) in the above case was obtained by fraud/collusion.

(d) In view of (c) above Judgment be declared null and void.

(e) Plaintiffs be restored to possession, as they were illegally dispossessed consequent to the above Judgment.

The 1st Defendant of course maintains that he is a bona fide purchaser and he, got title from the 2nd Defendant who transferred the property in dispute by deed P10 to the 1st Defendant, and that there was no fraud or collusion in the process of ejecting the Plaintiffs. Parties proceeded to trial on 18 issues. The 2nd Defendant Janet Elizabeth filed action against late Benedict before the above cases in case No. 216 in the District Court of Panadura, on or about 1987. Evidence reveal that Benedict during his life time executed Deed No. 1600 P10 in favour of the 2nd Defendant. Trial Judge having analysed the evidence arrived at a conclusion that deed P10 is an outright transfer, and no indication that it is executed as security for a loan. However Benedict and family continued to

possess the land in dispute after execution of deed X1, as a licencee, with the leave and licence of the 2nd Defendant Janet Elizabeth. However the 2nd Defendant having filed case No. 216 against Benedict which was dismissed would necessarily mean as observed by the learned District Judge, that the licence to possess the property in dispute would be at an end or terminated. Irrespective of the outcome of case No. 216. I observe and concur with the views of the lower court that the licence to possess was terminated, with such action being filed. Such possession could even be terminated by a normal letter issued by the licensor to the licencee. There is no need for any formality, as these are arrangements between parties may be on informal agreements and arrangements.

It is in evidence that the Plaintiff party continued to possess the land in dispute after the dismissal of the action in case No. 216/L (dismissal on 03.09.1992) oral evidence reveal that the 1st Defendant claiming to be the owner of the property in dispute by deed marked P2/V1 executed on May 1995, made attempts to induce the Plaintiffs to hand over the land in dispute to him and even sent letter P12 and also sought the intervention of the Mediation Board by P13. Letter P12 letter written by the 1st Defendant demonstrates in no uncertain terms that the 1st Defendant claims to be the owner, and specific reference is made in P12 to the 1st Plaintiff's occupation and demands that possession be

handed over to the 1st Defendant before 15th January 1996. P12 further states that failure to hand over possession would result in legal action. This letter written by the 1st Defendant to 1st Plaintiff is a quit notice. Having sent letter P12 and initiating Mediation Board proceedings as referred to in P13 no doubt demonstrates that 1st Defendant's grievance was with the Plaintiff party. P12 & P13 cannot be taken lightly and court is entitled to infer or form an opinion as in the ordinary course of events and business as to what should have followed. It should have been and it need to be an action in court to obtain relief against the Plaintiff party who were in occupation. 1st Defendant's own evidence reveal Plaintiffs were in possession. It did not happen in that way. It took a different turn and 1st Defendant filed action only against the 2nd Defendant. 1st Defendant knowingly and willingly or deliberately seems to have kept the Plaintiff party in the dark, and left them out of the level playing field.

Conduct and attitude of the 1st Defendant was in one way to abuse the process of court and on the other hand <u>fraudulently and craftily</u> to evict the Plaintiff party and in the process obtained an ex-parte Judgment against the 2nd Defendant who had parted with title by that time. What followed after Judgment was to use the statutory machinery by obtaining a writ of execution to eject the Plaintiff party who were not parties to the suit. Items of evidence taken in it's entirely and taken in a chronological order suggest wilful fraudulent

conduct on the part of the 1st defendant and he acted collusively with the 2nd Defendant to evict Plaintiff party. I take note of the following items of evidence to connect P12/P13.

ප්‍ර: එසේ ඉන්න විට මොනව හෝ දැනගන්න ලැබුනද?

උ: කැලුම් කරුණාරත්නට මේ ඉඩම විකුණු බව දැනගන්න ලැබුනා. මා කැලුම් කරුණාරත්නගෙන් ඒ බව දැනගත්තා

ප්‍ර: එතකොට තමන් කැලුම්ට කිව්වාද ?

උ: මා කිව්වා මේක අපට අයිති ඉඩමක් නඩු කියා මේ ඉඩම අයිතිවුනේ ඒ නිසා අපි යන්නෙ නැහැ කියා අපි කිව්වා

ප්‍ර: ඊට පසු කැලුම් කරුණාරත්න මොනව හෝ කළාද ?

උ: ඊට පසුව ලිපියක් එව්වා

(i.e. P12) (Proceedings of 2002.1.23 page 6 lines 12 to 19)

Contest between the 1st & 2nd Defendant was only a show or a sham in a case No. 250/L, Court could infer all the circumstances although there is no direct evidence. It is demonstrably fraudulent.

Once fraud and collusion is apparent it entitles the party who suffered as a result to challenge the proceedings in a separate action.

In any event therefore, as the decree in 250/L was obtained by fraud and collusion not only is the decree void on this ground also, it entitles the plaintiffs to challenge the proceedings in a separate action.

As was pointed out in Sirisena and Others Vs. Kobbekaduwa Minister of Agriculture and Lands 80 NLR 1 at page 66 quoting Denning LJ in Lazarus Estates Limited Vs. Bearely 1956 1 AER 341 at page 345 "No judgment of a court or order of a minister can be made to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is specifically pleaded and proved. But once it is proved it vitiates judgments, contracts and all transactions whatsoever."

Woodroffe & Amir Ali in their celebrated treatise. "The Law of Evidence" 14th Edition Volume 2 at page 1263 quoting Petharam CJ in Mahomad Golab Vs. Mahomad Sulliman (1894) 21 C 612 at 619 states the law thus:- "The principle upon which these decisions rest is that where a decree has been obtained by a fraud practiced upon the other side, by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit and not only by an application made in the suit in which the application was passed to the court by which it was passed".

E.R.S.R. Coomaraswamy in his treatise "The Law of Evidence", 2nd Edition, Volume 1 page 597 also states that a separate action could be brought." The most natural course for a party to a judgment who seeks to impeach it for fraud and collusion is by application to the court which pronounced the judgment to set it aside, or to bring a regular action".

The 1st Defendant as stated above demonstrably set in motion the grounds to file a court action, against the Plaintiffs. P12 & P13 are more than sufficient to conclude in that way as he was aware that Plaintiffs were in possession, and not the 2nd Defendant. 1ST Defendant having got title from the 2nd Defendant claims to be the owner of the property in dispute, had an obstacle placed before him. i.e possession of the property in the hands of the Plaintiffs (vide P12). Thus a cause of action accrued to him against the Plaintiff party and the definition of cause of action under Section 5 of the Civil Procedure Code is

not exhaustive to deny him a right to sue. A cause of action means that a particular act on the part of the Defendant which gives the Plaintiff his cause of complaint – Jackson Vs. Spittel (1870 L R S C P.542). But the 1st Defendant craftily without making Plaintiffs parties to the suit deliberately and fraudulently kept them out of the scene, very well knowing or having arranged with the 2nd Defendant to lead ex-parte evidence. It is a collusive action. Quit notice P12 and mediation attempt (P13) to get possession are legally acceptable steps in the process. Having done so and 1st Defendant's failure to file action against the Plaintiff is a deliberate attempt to obtain possession by fraud.

Plaintiff party strongly argue that the Judgment and Decree in Case 250/L is a nullity as it was obtained by fraud and collusion. They are entitled in law to attack the said decree collaterally. As such the Judgment and Decree in Case No. 353/L restoring them to possession is valid in law. Plaintiff party was in possession for 23 years and the 2nd Defendant attempt to evict them by Case No. 216 D.C Panadura was dismissed. There was no appeal from the Judgment in case No. 216. Thereafter even after Benedict's demise, the family as the Plaintiff party continued to reside until they were ejected by the execution of the impugned writ in case No. 250/L. The Judgment in Case No. 250/L was procured by misleading court fraudulently and collusively. That position is supported by 2nd Defendant not filing answer and allowing ex-parte evidence to

be led. Nor was the 2nd Defendant in possession when possession was handed over (P7). When fraud and collusion is apparent Judgment is a nullity and same could be canvassed in a separate action.

I agree with the submissions of learned counsel for the Plaintiffs that Section 328 of the Code is designed for speedy justice but it does not exclude a separate action. Both remedies may be available to the Plaintiffs to either proceed under Section 328 of the Civil Procedure Code or file a separate action. However Plaintiffs are challenging the validity of the Decree and Judgment in Case No. 250/L. As such the remedy under Section 328 may not be available. One of the principal submissions of learned counsel for the Plaintiffs was that Judgment and Decree in 250/L case is a nullity and void, as the Plaintiffs who were in actual possession was not a party. I agree that this was done deliberately.

IN *Jayalath Vs. Abdul Razak 56 NLR 145 ….”* Execution proceedings are collateral to the Judgment and no inquiry into the regularity or validity of the Judgment can be permitted in such proceedings. The case of *Isabella Perera Hamine Vs. Emliy Perera Hamie 1990 (1) SLR 8* provides more clarity. *S.N. Silva J.* (former C.J as he was then) held in proceedings under Section 52(1) of the Partition Law, that when a person was ejected by a writ emanating from a void order he could come by way of a separate action as he was challenging the

"antecedent validity of the writ of execution itself". i.e the order from which writ emanated as distinct from the "manner of execution" of writ. In such a case the proper application was by a separate action. Invoking the inherent powers of court under Section 839 of the Civil Procedure Code and Section 328 was not open to him. The above position is supported in several earlier judgments as *Marjan Vs. Burah 51 NLR 34; at 40/41. Jayasinghe Vs. Mercantile Credit Ltd. 1982 (2) SLR 495.* Court has inherent power to order restoration as "court will not permit a suitor to suffer by its wrongful act, vide *Sirinivasi Thero Vs. Suddasi Thero 63 NLR 31 at 34*.

Were the Plaintiffs not possessing in their own right? Benedict Possessed after he transferred the property to 2nd Defendant on deed P10, may be as a licencee. But subsequent to Judgment or upon filing Case No. 216/L it took a different turn, and not as licencee. Plaintiffs possessed adversely to the 2nd Defendant on their "own account" and not on account of 2nd Defendant.

The very fact of filing case No. 216/L against Benedict ipso facto terminated the licence and after the Judgment in the said case Plaintiffs continued possession went against or contrary to 2nd Defendant character and it changed to adverse possession. Plaintiffs' possession was in their own right.

The nature of possession of Benedict and that of the Plaintiffs was possession on their own right and not possession on account of 2nd Defendant. (Based on the result of case No. 216) As such learned District Judge was correct in observing in his Judgment that the Plaintiffs were on their way to prescribe the land in dispute. 1st Plaintiff's evidence was as follows:

ප්‍ර: ඔය නඩු තීන්දුවට පසුව තමන් ඒ ඉඩමෙන් අයින් උනාද?

උ: ඒ ඉඩම අපි බුක්ති විඳපු විදියට බුක්ති වින්ද? (continued possession without interruption on their own right, as above).

I am unable to accept the argument of 1st Defendant-Appellant that a new meaning would be given to the word 'fraud' if the Judgment in an action can be challenged collaterally. Civil Procedure Code as referred to in Section 17 enacts that non joinder of parties would not defeat the action but court will deal with the matter in controversy as far as rights and interest of the parties before it. It is unfortunate that the 1st Defendant-Appellant-Appellant does not deal with the quit notice (P12) and the Mediation Board notice P13 in their oral or written submissions. The procedural law should not be misunderstood in the way the 1st Defendant argues his case. Procedural Law is in no way inferior to the substantive law. An application of Section 17 of the Civil Procedure Code has

nothing to do with a case where fraud and collusion takes place to oust a party from a case which is done deliberately. I have discussed several decided cases in this judgment where courts have in no uncertain terms held that in such a situation it could be dealt with by a separate action, Misjoinder or non-joinder is another aspect of procedural law but unconnected to fraud: One cannot ignore the reason to despatch quit notice P12 and mediation notice P13. P12 & P13 should be the applicable ground and reason to bring an action by the 1st Defendant (as discussed above) and not to keep the Plaintiff in the dark. It goes beyond procedural irregularity.

There is no need to prove a case by direct evidence alone. Facts and facts in issue should culminate in such a way for a judge to arrive at a conclusion in favour of a party to a suit. Where all the items of evidence are collected and arranged in a chronological order and such events taken together it could be established on a balance of probability, that a party is entitled to relief in a civil case and case itself will be at its conclusion. The learned trial Judge has in his Judgment considered all material/primary important facts and arrived at a conclusion in favour of the Plaintiff. This court is not in a position to disturb those findings of the learned District Judge, on primary facts. An agreement or arrangement could be either express or implied. Based on a balance of all probabilities, I hold that the learned District Judge was correct in arriving at a

conclusion on fraud and collusion, act being the nature of the action based on all relevant and primary facts.

The question of law are answered as follows:

(a) There was no issue raised at the trial based on prescription. The observation of the Civil Appellate High Court on prescription is incorrect but prescription commenced to run on the dismissal of the action in case No. 216/L.

(b) As in (a) above

(c) Plaintiffs possessed the land in dispute on their own right from the institution and dismissal of case No. 216.

(d) Yes it can be attacked collaterally on grounds of fraud and collusion by a separate action.

(e) Yes, void in law.

(f) Yes correct.

In all the facts and circumstances of this case I observe that fraud and collusion of the Petitioner (1st Defendant) had been well established in this case. Nor was any denial by the Petitioner (1st Defendant) of his own quit notice (P12) and the initiative taken by him to evict the Plaintiffs by resorting to mediation procedure (P13). Having done so and even in his oral evidence admitting long

possession of Plaintiffs and the absence of 2nd Defendant on the land in dispute, could not have been in the ordinary normal course of events to keep the Plaintiff party in the dark by not making them parties to the suit. It is no error or procedural irregularity to have done so or state it's a curable defect, but fraud and a collusive act on the part of the 1st Defendant was done deliberately. Irrespective of how the question of title could be approached, long possession of Plaintiffs party cannot be denied. Original owner Benedict continued to reside even after Judgment in case 216 until his death in 1993. 1st to 7th Plaintiffs being Benedict's heirs continued to stay up to the time of ejectment by the execution of the impugned writ in case No. 250/L on 05.09.1999 (Fiscal's report P7).

The right to bring a separate action has been discussed in this Judgment. Further Section 44 of the Evidence Ordinance recognise such a right. Numerous case law support such position. I have also no hesitation in endorsing trial Judge's views. The change of character of Benedict's possession and that of the Plaintiffs are also taken note by this court based on Case No. 216/L, which was a Judgment not subject to an appeal, by any aggrieved party. Further in Case No. 216/L the 1st Defendant was not a party and question of 'res judicata' would never arise.

I agree with the conclusions of the learned High Court Judge in dismissing the appeal. Subject to the views expressed above I affirm the Judgment of the District Court. This appeal stands dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundara P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C. J.

I agree.

JUDGE OF THE SUPREME COURT