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

Noel Devaeve Saravanamuthu of Kalmunai
Presently residing at No. 9, Centennial Avenue, Kane Cove N S W 2066, Australia.
By his Attorney, William Arthur Wijayarajah Canagasabai, No. 53, Rest House Road, Kalmunai.

Plaintiff

D.C. Kalmunai
Case No. 2184/L.

Vs.

1. Thambimuthu Packiyam
2. Ratnam Valarmathy
Both of Yard Road, Kalmunai

Defendants.

AND

1. Thambimuthu Packiyam
2. Ratnam Valarmathy
Both of Yard Road, Kalmunai

D*efendants-Appellants*.

High Court Case No:
EP/HCCA/KAL/11/2008

Vs.

Noel Devaeve Saravanamuthu of Kalmunai
Presently residing at No. 9, Centennial Avenue, Kane Cove N S W 2066, Australia.
By his Attorney, William Arthur Wijayarajah Canagasabai, No. 53, Rest House Road, Kalmunai.

Plaintiff-Respondent

AND NOW

In the matter of a Application of Leave to Appeal in terms of Section 5(C)1) of the

High Court of the Provinces (Special Provisions) (Amendment) Act o. 54 of 2006 read together with Article 127 of the Constitution.

Noel Devaeve Saravanamuthu of Kalmunai
Presently residing at No. 9, Centennial Avenue, Kane Cove N S W 2066, Australia.
By his Attorney, William Arthur Wijayarajah Canagasabai, No. 53, Rest House Road, Kalmunai.

Plaintiff-Respondent-Petitioner

S.C. Appeal 102/10
SC/HCCA/ LA 87/10

Vs.

1. Thambimuthu Packiyam
2. Ratnam Valarmathy
   Both of Yard Road, Kalmunai

Defendants-Appellants-Respondents.

Before **Shiranee Tilakawardene, J.**

K.Sripavan, J.

S.I. Imam, J.

Counsel V. Puvitharan with F.X. Vijekumar for the Plaintiff-Respondent-Petitioner.
K.S. Ratnavale with S.M.M. Samsudeen for the Defendants-Appellants- Respondents

Argued on : 10.10.2011

Written Submissions
Filed : By the Appellant on – 14.11.2011

By the Respondents on – 22.12.2011

Decided on : 25.01.2012

SRIPAVAN. J.

The Plaintiff-Respondent-Petitioner (hereinafter referred to as the Appellant) instituted action in the District Court of Kalmunai against both the Defendants-Appellants-Respondents (hereinafter referred to as the Respondents) for declaration of title to the land morefully described in the schedule to the Plaint, ejectment of the Respondents, together with others who claim through the Respondents from the said land, for damages and costs. The Respondents in their answer admitted their residence and the situation of the land as averred in the Plaint but denied that any cause of action has arisen for the Appellant to sue them. In paragraph 4 of the answer, the Respondents stated that the land is the same as described in the schedule to the Plaint, but described in the answer according to their deed.

At the conclusion of the trial, the learned District Judge, by his judgment dated 07.05.2002 granted reliefs as prayed for in the Plaint. On an appeal preferred by the Respondents against the said judgment, the Provincial High Court of the Eastern Province holden at Kalmunai, exercising Civil Appellate jurisdiction, on 17.12.2009 ordered a re-trial on the basis that both Counsel had failed to draw the attention of Court to the discrepancy between the schedules to the Plaint and of the Answer.

The Appellant filed a motion dated 16.12.2010 before the High Court seeking to have the order for re-trial set aside on the ground that it was a per-incuriam order.and to have it at least varied directing the learned District Judge for re-trial only on the question of identifying the corpus. The said

application was refused by Court on 19.12.2010 on the basis that the Court has already delivered a final order and is defunct thereafter.

The Appellant sought leave to appeal against the orders of the High Court made on 17.12.2009 and 19.02.2010. Leave was granted on 23.09.2010 on the questions set out in paragraph 22 of the Petition dated 19th March 2010. However, in the course of the argument, both Counsel agreed to limit their submissions to the following questions only:-

(a) Is the Order of the High Court dated 17th December 2009 made "per incuriam ?"

(b) Can the High Court order for re-trial without specifically setting aside the judgment of the District Court?

(c) Can the High Court order for re-trial when it affirms the judgment of the District Court?

(d) Has the High Court made the order for re-trial in regard to the identification of the corpus in forgetfulness of the admissions made by the Respondents in paragraph 4 of their answer?

(e) Can the High Court order for re-trial when there was no issue on the question of identification of the corpus?

It must be remembered that the jurisdiction of the Court is limited to the dispute presented for adjudication by the contesting parties. Learned Counsel for the appellant brought to the notice of Court Sections 23 and 58 of the Evidence Ordinance and argued that in terms of the pleadings there was no issue as to the identity of the corpus.

Section 23 of the Evidence Ordinance reads thus:-

> *"23. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be give..".*

Section 58 of the Evidence Ordinance is as follows:-

> *"58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings…"*

In view of the specific admission made by the Respondents in paragraph 4 of the answer there was no dispute amongst the parties as to the identification of the corpus even though the corpus is described differently in the answer. It is observed that no issue was raised before the District Court as to the identity of the corpus. The High Court sought to deal with the point that had not been an issue before the learned District Judge.

Neither the District Court nor the High Court heard the parties on the question of the identification of the corpus. Learned Counsel for the Respondents in his written submissions filed belatedly, took up the position that the proxy of the Appellant was signed on 7th January 1997 whereas the

Power of Attorney was executed on 10th January 1997, namely, three days after the signing of the proxy. However, the learned High Court Judge after rejecting the said Power of Attorney found another Power of Attorney executed on September 1996. This Court is precluded from examining matters of fact that were not challenged before the learned District Judge. It is to be emphasized that this Court did not grant leave on the matter relating to the Power of Attorney filed by the Appellant in the District Court.

The High Court having concluded that Appellants' evidence was more reliable than the Respondents had ordered retrial without any legal basis. It is observed that the High Court in making the order for a re-trial failed to set aside the judgment of the learned District Judge referred to above.

Considering the totality of the evidence led by parties before the District Court, I set aside the orders of the High Court dated 17th December 2009 and 19th February 2010 and affirm the judgment of the District Court of Kalmunai dated 7th May 2002. The questions of law on which leave was granted are answered as follows:-

(a) Is the Order of the High Court dated 17th December 2009 made "per incuriam ?" - Yes

(b) Can the High Court order for re-trial without specifically setting aside the judgment of the District Court? – No.

(c) Can the High Court order for re-trial when it affirms the judgment of the District Court? - No.

(d) Has the High Court made the order for re-trial in regard to the identification of the corpus in forgetfulness of the admissions made by the Respondents in paragraph 4 of their answer? – Yes.

(e) Can the High Court order for re-trial when there was no issue on the question of identification of the corpus? – No.

The appeal is accordingly allowed. The parties to the appeal shall bear their own costs.

Judge of the Supreme Court.

Tilakawardene, J.

I agree.

Judge of the Supreme Court

Imam, J.

I agree.

Judge of the Supreme Court

Amaratunge, J.,

I agree.

JUDGE OF THE SUPRME COURT

S.I. IMAM, J.,

I agree.

JUDGE OF THE SUPREME COURT