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

In the matter of an appeal under and in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No: 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No: 54 of 2006.

SC Appeal No. 157/2017
SC/HCCA/LA No. 515/2016
Provincial High Court Case No.
NCP/HCCA/ANP/1051/2015(F)
DC Polonnaruwa Case No. 11714/L/2007

Marimuttu Shanmugam,
No. 3/9, 28th Mile Post, Mahasenpura,
Polonnaruwa.

PLAINTIFF

- Vs -

D.M. Gunapala,
No. 537, Wadichchale Road, Polonnaruwa.

DEFENDANT

And between

Marimuttu Shanmugam,
No. 3/9, 28th Mile Post, Mahasenpura,
Polonnaruwa.

PLAINTIFF – APPELLANT

- vs -

D.M. Gunapala,
No. 537, Wadichchale Road, Polonnaruwa.

DEFENDANT – RESPONDENT

And now between

Marimuttu Shanmugam (Deceased),
No. 3/9, 28th Mile Post, Mahasenpura, Polonnaruwa.

PLAINTIFF – APPELLANT – APPELLANT

Marimuttu Selvanayagam,
No. 3/9, 28th Mile Post, Mahasenpura, Polonnaruwa.

SUBSTITUTED PLAINTIFF – APPELLANT – APPELLANT

- vs -

D.M. Gunapala,
No. 537, Wadichchale Road, Polonnaruwa.

DEFENDANT – RESPONDENT – RESPONDENT

Before: **Vijith K. Malalgoda, PC, J**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Bhagya Herath with Sajeevi Jayasinghe for the Substituted Plaintiff – Appellant – Appellant

Sanjeewa Dassanayake with Dilini Premasiri and Nilum Devapura for the Defendant – Respondent – Respondent

Argued on: 2nd November 2021

Written Submissions: Tendered by the Substituted Plaintiff – Appellant – Appellant on 31st July 2020 and 19th November 2021

Tendered by the Defendant – Respondent – Respondent on 26th October 2021

Decided on: 6th August 2024

Obeyesekere, J

This is the sixth and hopefully the final episode of a litigation that commenced in 2007.

The Plaintiff – Appellant – Appellant [**the Plaintiff**] filed action in the District Court of Polonnaruwa on 2nd February 2007 against the Defendant – Respondent – Respondent [**the Defendant**] seeking a declaration of title in respect of the land referred to in paragraph (a) of the schedule to the plaint, and to evict the Defendant from a part of the said land referred to in paragraph (b) of the schedule to the plaint. It is admitted by the parties that the action of the Plaintiff was a *rei vindicatio* action. The Defendant having filed answer, the parties entered terms of settlement before the District Court on 30th October 2008. However, on 16th June 2011 the Defendant moved the Provincial High Court of the North Central Province holden at Anuradhapura [the High Court] by way of a revision application complaining that there were discrepancies in the survey plan that was prepared pursuant to the said settlement and seeking to set aside the said terms of settlement or in the alternative to direct that a fresh survey be carried out. The High Court did not set aside the terms of settlement but instead directed that a fresh survey be carried out. Pursuant to the Defendant seeking the leave of this Court against the said judgment of the High Court, the parties agreed for the terms of settlement to be set aside and for the matter to be sent back to the District Court for further trial.

The Plaintiff thereafter filed an amended plaint, replied to by an amended answer with a claim for damages for improvements, and a replication. Pursuant to the admissions and issues being raised, the Plaintiff led the evidence of 7 witnesses while the Defendant led the evidence of 3 witnesses. Although the District Court held by its judgment dated 27th May 2015 that the Plaintiff has established his title to the impugned land and that the Defendant was in possession of such land, the District Court held further that the Defendant can continue to be in possession of the said land until the Defendant obtains a valuation regarding the improvements made by him and the sum so determined by the valuer is paid to the Defendant.

Aggrieved, the Plaintiff filed an appeal before the High Court. The Defendant however chose not to prefer an appeal probably for the reason that the District Court judgment enabled him to continue to be in possession of the said land without any hindrance. By its judgment delivered on 13th September 2019, the High Court took the view that while the Plaintiff had failed to establish his title to the land referred to in paragraph (b) of the schedule to the plaint, the Defendant has established his entitlement to the impugned land and on that basis set aside the judgment of the District Court in its entirety.

Dissatisfied with the said judgment of the High Court, the Plaintiff sought and obtained leave to appeal from this Court on 9th August 2017 on four questions of law. While I shall advert to the said questions of law later in this judgment, it would suffice to state at the outset that the primary issue that needs to be determined in this appeal is whether the Plaintiff has discharged the burden cast on a plaintiff in a *rei vindicatio* action and if so, whether the Defendant has established a *better title* than the Plaintiff.

The *Rei Vindicatio* action

In **Mihindukulasuriya Sudath Harrison Pinto and Others v Weerappulige Piyaseeli Fernando and Others** [SC Appeal No. 57/2016; SC minutes of 11th September 2023], Samayawardhena, J having carried out an extensive examination of the law relating to a *rei vindicatio* action, stated that, *"In order to succeed in a rei vindicatio action, first and foremost, the plaintiff shall prove his ownership to the property. If he fails to prove it, his action shall fail. This principle is based on the Latin maxim "onus probandi incumbit ei qui agit", which means, the burden of proof lies with the person who brings the action."*

In arriving at the above conclusion, Samayawardhena, J has cited with approval three judgments of this Court. The first is the judgment in **De Silva v Goonetilleke** [32 NLR 217] where Chief Justice Macdonell had stated [at page 219] that, "*There is abundant authority that a party claiming a declaration of title must have title himself: "To bring the action rei vindicatio plaintiff must have ownership actually vested in him". (1 Nathan p. 362, s. 593.) ....The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."*

The second is the judgment in **Pathirana v Jayasundera** [58 NLR 169] where, Gratiaen J. declared [at page 172] that, *"In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. 'The plaintiff's ownership of the thing is of the very essence of the action.' Maasdorp's Institutes (7th Ed.) Vol. 2, 96."*

The third is the judgment delivered by G.P.S. De Silva, J (as he then was) in **Mansil v Devaya** [(1985) 2 Sri LR 46] where he stated [at page 51] that, "*In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership.*"

Samayawardhena, J has also referred to the judgment in the South African case of **De Vos v Adams and Others** [(2016) ZAWCHC 202] where Davis, J had stated as follows:

> "*Turning specifically to the rei vindicatio it is clear that there are three requirements which the owner must prove on a balance of probabilities, in order to succeed with the particular action. Firstly, the applicant must show his or her ownership in the property. In the case of immovable property it is sufficient as a result to show the title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the property at the time that the action is instituted.*"

Burden of proof in a *rei vindicatio* action

In **Mihindukulasuriya** [supra], this Court referred to with approval the following paragraph in **Wille's Principles of South African Law** [9th Edition (2007); at page 539]:

> "*To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof.* ***In the case of immovables, it is sufficient as a rule to show***

that title in the land is registered in his or her name*. Secondly,* ***the property must exist, be clearly identifiable*** *and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly,* ***the defendant must be in possession*** *or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration."* [emphasis added]

Referring to the obligation of a plaintiff in a *rei vindicatio* action to establish the title to the land, Chief Justice Dep stated in **Preethi Anura v William Silva** (SC Appeal No. 116/2014; SC Minutes of 5th June 2017), that the, "*Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability.*"

In **Theivandran v Ramanathan Chettiar** [(1986)] 2 Sri LR 219; at page 222], Chief Justice Sharvananda stated as follows:

"In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. ***Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession****."* [emphasis added]

A similar view was expressed in **Mihindukulasuriya** [supra] where it was held that, "*When the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property."*

In **Wasantha v Premaratne** (SC Appeal No. 176/2014; SC Minutes of 17th May 2021), Samayawardhena, J held that, "*Notwithstanding that in a rei vindicatio action the burden is on the plaintiff to prove title to the land no matter how fragile the case of the defendant is, the Court is not debarred from taking into consideration the evidence of the defendant in deciding whether or not the plaintiff has proved his title. Not only is the Court not*

debarred from doing so, it is in fact the duty of the Court to give due regard to the defendant's case, for otherwise there is no purpose in a rei vindicatio action in allowing the defendant to lead evidence when all he seeks is for the dismissal of the plaintiff's action."

Chief Justice G.P.S. de Silva referring to the criterion to be adopted in a *rei vindicatio* action in respect of the burden of proof stated in **Banda v Soyza** [(1998) 1 Sri LR 255; at 259] that, "*In a case such as this, the true question that a court has to consider on the question of title is, who has the superior title? The answer has to be reached upon a consideration of the totality of the evidence led in the case.*"

The above position has been summarised in **Mihindukulasuriya** [supra] in the following manner:

> "*Whilst emphasising that (a) the initial burden in a rei vindicatio action is on the plaintiff to prove ownership of the property in suit and (b) the standard of proof in a rei vindicatio action is proof on a balance of probabilities, if the plaintiff in such an action has "sufficient title" or "superior title" or "better title" than that of the defendant, the plaintiff shall succeed. No rule of thumb can be laid down in what circumstances the Court shall hold that the plaintiff has discharged his burden. Whether or not the plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.*"

This being the legal position, the District Court was satisfied that the Plaintiff had established on a balance of probability the identity of the impugned land, his title to the said land and that the Defendant was in possession of such land. The High Court however took the view that, (a) the Plaintiff has not established title in respect of the area of land that the Defendant was in possession, and (b) the Defendant is in possession of the said land in terms of a permit issued to him under the Land Development Ordinance. I shall therefore consider the evidence presented by the parties before the District Court, the findings of the learned District Judge and the findings of the High Court in answering the questions of law and in arriving at a decision in this case.

The case of the Plaintiff

The State had issued permit No. 23/241 dated 8th April 1954 in terms of the Land Development Ordinance to Kanawadipulle Marimuttu, the father of the Plaintiff, in respect of a land situated in Polonnaruwa in extent of 4A 2R. Even though a copy thereof has been tendered in evidence and referred to in the judgment of the District Court, the said permit is not available in the case record. It is however admitted that even though the extent of the said land has been specified in the permit, the boundaries of the land have not been stipulated in the permit by reference to a survey plan, due to the reason that a survey plan was not available at that time. It is in evidence that the said land occupied by Marimuttu and the surrounding village was surveyed in July 1970 and that Plan No. අ. ජ. මි. ඔළු. 18 [**P6**] was prepared pursuant thereto. According to the Final Tenement List attached thereto [**P7**] the land occupied by Marimuttu in terms of the said permit has been identified as Lot No. 19 in P6.

On 14th June 1986, the State had issued Marimuttu a grant [**P1**] in terms of the Land Development Ordinance in respect of Lot No. 19 in P6. The extent of Lot No. 19 is 5A 2R 8P. This Lot No. 19 is the land referred to in paragraph (a) of the schedule to the plaint and in respect of which a declaration of title has been sought. While it is by P1 that the land given to Marimuttu was identified for the first time by reference to a survey plan, it would be seen that the extent of the land referred to in the grant had increased by approximately 1 acre of land over and above the extent of the land given under the permit. The Land Officer attributed this discrepancy to a survey plan not being in place at the time the permit was issued to Marimuttu. I shall refer later in this judgment to the evidence relating to this discrepancy in extent as this was the primary ground relied upon by the High Court to set aside the judgment of the District Court .

Pursuant to the death of Marimuttu, his eldest son Marimuttu Shanmugam, the Plaintiff in this case had been recognised as the grantee of the said land by letter dated 11th August 2003 issued by the Divisional Secretary, Thamankaduwa [**P2**]. The name of the Plaintiff has accordingly been registered in the Land Folio [**P3**] as the grantee of the said land. Thus, on the face of it, the Plaintiff is entitled in law to the land referred to in paragraph

(a) of the schedule to the plaint by virtue of the said grant P1 and is entitled to bring this action.

The Plaintiff states that due to the situation that prevailed in the area from 1983, his father and he had not been in occupation of the said land at all times, only for the Defendant and two others to encroach upon the said land and occupy parts of the land given by P1 during their absence. The evidence bears out that the Plaintiff had brought this to the attention of the officers attached to the office of the relevant Divisional Secretary in the late 1980's. Having returned to the said land at the end of the hostilities, the Plaintiff instituted three cases in the District Court against the said persons, including this case against the Defendant seeking a declaration of title in respect of Lot No. 19 in P6 and to eject the Defendant from the land referred to in paragraph (b) of the schedule to the plaint in extent of 3R 8P, which the Plaintiff claimed formed part of the land referred to in P1 and was in the possession of the Defendant.

<u>The case of the Defendant</u>

The Defendant is the son of D. M. Thegis Appu. The Defendant states that the State had issued his father permit No. 354/272 dated 1st April 1965 [**V1**] in respect of a land situated in Polonnaruwa in extent of 1 acre. Similar to the permit issued to Marimuttu, V1 too does not contain any reference to a survey plan. V1 however refers to three of the boundaries of the land referred to therein. Upon the death of Thegis, the name of the Defendant had been registered as the permit holder [**V2**]. The position of the Defendant was twofold. The first and foremost was that the land that he and his family are in occupation is the land referred to in the permit V1 and therefore he has *good title* to such land possessed by him. The second was that he had neither encroached upon nor was he in possession of any part of the land referred to in P1. In other words, it was the position of the Defendant that the land referred to in paragraph (b) of the schedule to the plaint is the subject matter of the permit issued to his father and later to him and importantly does not form part of the land given to the Plaintiff by P1. The Defendant had stated further that he has developed the land that he is in possession of and constructed houses thereon, and that he is entitled for compensation in the event the District Court holds that he is in possession of the land referred to in P1.

Terms of Settlement

On 30th October 2008, the parties entered into a settlement, the terms of which *inter alia* are as follows:

(a) For a commission to be issued on the Surveyor General to survey the land occupied by the Defendant and determine if such land forms part of the land referred to in the grant P1;

(b) In the event it is determined by the said survey that the land that the Defendant is in possession of forms part of the land given to the Plaintiff by P1, the Defendant would vacate such land;

(c) The Plaintiff would hand over any land to which the Defendant is entitled to in terms of the permit V1 in the event the Plaintiff is in possession of such land;

(d) Parties shall equally bear the cost of such survey.

Survey No. PO/SS/Court/2010/048

Pursuant to the said commission, Government Surveyor H.M. Ranaweera Bandara at the Surveyor General's Department had carried out a survey of the land in dispute. In his report [**P5**] annexed to the survey plan that was prepared by him [**P4**] he had stated that the Plaintiff, the Defendant and the other two persons who are said to have also encroached onto the land referred to P1 were present when he visited the said land on 5th April 2010, and that the boundaries of the lands possessed by each of them had been shown by them.

Ranaweera Bandara states that he thereafter carried out a survey of Lot No. 19 of P6 and divided the said Lot No. 19 into 8 sub-lots numbered from A to H, as reflected in the survey plan P4. Lot E in extent of 4A 1R 19.09P was the land occupied by the Plaintiff. It must be noted that in terms of extent, Lot E is almost identical to the extent of land that was given to Marimuttu by a permit way back in 1954. Ranaweera Bandara has stated that the

Defendant was in occupation of two contiguous lots, namely Lot G in extent of 29.5P being a paddy field and Lot H in extent of 3R 0.94P which was a high land, with the two lots separated by a bund [නියර]. Together with the extent of the other Lots A-D and F, the total extent of the land was 5A 2R 8P, which is the extent of Lot No. 19 and setout in P1. Thus, the Court commissioned surveyor found that the land that was possessed by the Defendant was within the land area that had been granted to the Plaintiff in terms of P1.

The evidence of Ranaweera Bandara in this regard is as follows:

> "ඒ බලපත්‍රයේ 04 මායිම් ලකුණු කිරීමක් නැහැ එසේ කිරීමට අවශ්‍යතාවයක් තිබුණේ නැහැ. දිමනා පත්‍රයේ සම්පූර්ණ මැනුම් කටයුතු කරලා එහි භුක්ති විඳින අයගේ මායිම් සටහන් කිරීම් කළා. ඩී. එම්. ගුණපාල නැමැත්තා බලපත්‍රයක් ඉදිරිපත් කළා. අදාළ මායිම් විස්තරය පිළිබඳව පැහැදිලි නැහැ. **මා විසින් මනින ලද, ඉඩම තුළ පැමිණිළිකරුගේ දිමනා පත්‍රය නිශ්චිත වශයෙන්ම පැහැදිලිවම හඳුනා ගන්න පුළුවන් වුණා.** ඒ පැමිණිළිකරුගේ දිමනා පත්‍රයට අයත් පිඹුර පැ.04අ යන්නේ රතු පාටින් සඳහන් වෙනවා. **දිමනා පත්‍රයට අයත් බිම් කොටස 11714 නඩුවේ ඩී .එම්. ගුණපාල නැමැත්තා භුක්ති විඳින බවත්** ඔහු විසින් නිවස ඉදි කරලා තියෙනවා. එය කුඩා ස්ථානයක් රුඩ් 3 යි පර්චස් 9.4 ක් සහ කුඹුරු ඉඩම් වශයෙන් පර්චස් 25 ක් සහ රුඩ් 30.44 ප්‍රමානයක් බවත් 11714 නඩුවේ ඉංග්‍රිසි අක්ෂර G සහ H දරණ කොටස වශයෙන් පැහැදිලිව දක්වා තිබෙනවා. එය භුක්ති විඳින්නේ ඩී. එම්. ගුණපාල නැමැත්තාය. එහෙත් එම G සහ H කොටස් ආවරණය වෙනවාද කියා පැහැදිලිවම ප්‍රකාශ කළ නොහැකිය. අධිකාරී ප්‍රධාන පත්‍රයේ ඉඩම සහ බලපත්‍රයේ ඉඩම ඒකමතිකව පැහැදිලි නැහැ. ඒ අනුව සෘජුව හෝ බලපත්‍රය දිමක් සිදුකර නැහැ."

Thus, it was clear from P4 and P5 that Lots G and H occupied by the Defendant formed part of Lot No. 19 in respect of which the Plaintiff had been issued the grant P1. Once this report was received, the Plaintiff, acting in terms of the aforementioned terms of settlement had sought to execute a writ to eject the Defendant from the said Lots G and H. This was resisted by the Defendant and culminated in the terms of settlement being set aside by this Court with the consent of the parties.

Amended pleadings and the trial

Pursuant to the Order made by this Court on 24th October 2013 directing that the trial be proceeded with, the Plaintiff filed an amended plaint on 18th June 2014. By this time, the Plaintiff had the benefit of the survey plan P4 and the survey report P5. Thus, while reiterating the matters in the plaint that the Defendant was occupying a land that had

been given to him by the State on the grant P1, paragraph (b) of the schedule to the plaint specifically identified by reference to P4 the land that was admittedly in the possession of the Defendant.

In his amended answer, the Defendant stated as follows:

> "මෙම විත්තිකරු භුක්ති විඳින ඉඩම් කොටස් සහ ගොඩනැගිලි එකි කොමසාරිස්වරයාගේ අංක PO/SS/Court/2010/048 දරන පිඹුරේ ලොට් අංක G සහ H ලෙස හඳුනාගෙන ඇති බවත් විත්තිකරු එකි දේපළවල භුක්තියේ සිටින බවට එකි කොමසාරිස්වරයා පැහැදිලිව වාර්තා කර ඇති බවත්ය."

> "විත්තිකරු ගරු අධිකරණයේ කොමසාරිස්වරයා වන යූ. එම්. ඒ. බී. අලහකෝන් මිනින්දෝරු වරයාගේ අංක PO/SS/Court/2010/048 දරණ පිඹුරේ ලොට් අංක G සහ H ලෙස හඳුනාගෙන ඇති දේපළට අයිතිවාසිකම් කියනු ලබන්නේ ඉඩම් සශ්‍රීක කිරීමේ ආඥා පනතේ ප්‍රතිපාදන ප්‍රකාරව විත්තිකරුට සහ ඔහුගේ පියාට 1965 දි ලබා දෙන ලද අංක 354/272 දරන බලපත්‍රය ප්‍රකාරව බවත්."

An admission was also marked that the land which is the subject matter of this appeal is Lots G and H of P4 and that the Defendant was in possession of such land [මෙම නඩුවට විෂයගත ඉඩම වන්නේ PO/SS/Court/2010/048 දරණ පිඹුරේ ලොට් අංක G සහ H දරණ කොටස් බවත් එකි කොටස් විත්තිකරු බුක්ති විඳින බවත් පිළිගනී.].

The submission of Ms. Bhagya Herath, the learned Counsel for the Plaintiff that the land in question – i.e., Lots G and H in P4 – is State land and forms part of the land referred to in the grant P1, and that the Defendant is in possession of the said land, is amply borne out by P4 and P5, as well as the following evidence of Ranaweera Bandara:

> "මා විසින් මනින ලද ඉඩම තුළ පැමිණිලිකරුගේ දිමනා පත්‍රය නිශ්චිත වශයෙන්ම පැහැදිලිවම හඳුනාගන්න පුළුවන් වුනා. ඒ පැමිණිලිකරුගේ දිමනා පත්‍රයට අයත් පිඹුර පැ.04 අ යන්නේ රතු පාටින් සඳහන් වෙනවා. නඩුවේ ඉංග්‍රීසි අක්ෂර G සහ H දරණ කොටස වශයෙන් පැහැදිලිව දක්වා තිබෙනවා. එය භුක්ති විඳින්නේ ඩී .එම්. ගුණපාල නැමැත්තාය".

Thus, it was the position of the learned Counsel for the Plaintiff that with the entire land referred to in P4 coming within the extent of land referred to in P1, the Plaintiff had successfully discharged the obligation cast on a plaintiff in a *rei vindicatio* action, they being identifying the land in dispute, establishing title thereto and that the defendant was in possession of such land. While I am in agreement with Ms. Herath that there is no

dispute with regard to the identity of the land in dispute and that the Defendant is in possession of such land, the only outstanding issue in this appeal is whether Lots G and H formed part of the grant issued to the Plaintiff or the permit issued to the Defendant. This would determine title to the land.

The judgment of the District Court and the High Court

The learned District Judge has first, and I must say correctly identified the two questions that he had to decide in the following manner:

1. විත්තිකරු බුක්ති විඳින ඉඩම පැමිණිලිකරුගේ දීමනාපත්‍රයේ ඉඩමට අයිති කොටසක් වන්නේද?

2. එම ඉඩම් කොටස විත්තිකරුට ලබාදී ඇති බලපත්‍රයේ ඉඩම් කොටස වන්නේද

The learned District Judge has thereafter examined the documents P1 – P7 tendered by the Plaintiff and the evidence led on his behalf and concluded that, "එබැවින් පැ.01 සිට පැ.07 - (අ) දක්වා ලේඛන පරීශීලනය කිරීමේදී අධිකරණයට තහවුරු වන ප්‍රධානතම කරුණ වන්නේ පැ.01 දරණ දීමනා පත්‍රයේ සඳහන් විෂය වස්තුවට විත්තිකරු භුක්ති විඳින මෙම නඩුවේ හබගත ඉඩම් කොටසද අයත් වන බවයි."

The learned District Judge has finally considered whether the said Lots G and H form part of the land granted to the Defendant by the permit V1 and whether the Defendant has a *better title* to Lots G and H than the Plaintiff. It is only thereafter that the learned District Judge has concluded, for reasons to which I shall advert to later, that title to the said lots G and H are with the Plaintiff and that the said lots do not form part of the land given to the Defendant by V1.

At the hearing before the High Court, the Defendant challenged the judgment on the following principal grounds:

(a) The District Court failed to consider that the Plaintiff had no right to have a grant issued in his name for a land which is in extent over and above the extent stated in the permit;

(b) The learned District Judge erred when he accepted the validity of the grant issued to the Plaintiff with regard to the subject matter of the case;

(c) The District Court had no jurisdiction to hear and determine this matter in view of the provisions of Section 23 of the Interpretation Ordinance.

By its judgment delivered on 13th September 2016, the High Court set aside the judgment of the District Court on the following grounds:

(a) Considering the evidence of the witnesses, it is clear that the Defendant has been in possession of the impugned Lots G and H for a considerable period of time on the permit issued to him;

(b) The permit issued to the Defendant is valid in law and the State has acknowledged the validity of the permit V1 by registering the name of the Defendant as the permit holder after the issuance of the grant;

(c) In terms of the Land Development Ordinance, a permit is issued in the first instance and a grant is issued only thereafter. In this case, the Plaintiff's father had been issued a permit in respect of 4A 2R and in view of the considerable discrepancy with the extent of the land referred to in the grant, it is clear that the grant for an extent of 5A 2R 8P has been issued by mistake. Therefore, the Plaintiff has failed to establish title for a land over and above an extent of 4A 2R;

(d) The Defendant has established that lots G and H is the land referred to in V1 and the Defendant therefore has a right to occupy such land;

(e) As contended by the Defendant, the District Court had no jurisdiction to resolve the dispute in this case.

Questions of law

It is in the above circumstances that leave to appeal was granted in respect of the following questions of law:

1) Did the High Court err in law when it held that Section 23 of the Interpretation Ordinance operates as a bar in making a pronouncement in this instance?

2) Did the High Court err in law when it held that the District Court has no jurisdiction to hear and determine the issue under consideration in view of Article 35 of the Constitution?

3) Did the High Court err in law by failing to appreciate that the District Court had held that the Defendant had failed to discharge his evidentiary burden to prove his right/entitlement to hold the subject land by virtue of any rights arising via the alleged permit issued to him – vide V1?

4) Did the High Court err in law by failing to appreciate that the District Court erred when it held that the Defendant is entitled to claim compensation for the alleged improvements without an iota of evidence to justify such finding?

I must state that what is being impugned in this appeal is not the decision of the President to issue Marimuttu a grant in respect of Lot No. 19 which includes lots G and H. Instead, the dispute between the parties finally comes down to whether the State has issued the grant P1 and the permit V1 in respect of one and the same land. The applicability of Section 23 of the Interpretation Ordinance and Article 35, and whether such provisions fetter the power of Court to grant any relief would arise for consideration only where a finding is reached that the State has issued the grant P1 and the permit V1 in respect of the same land.

<u>The findings of the District Court</u>

The District Court, having arrived at a preliminary finding that the Plaintiff has established his title to lots G and H, considered the following grounds in arriving at its conclusion that the Defendant is not entitled to lots G and H by virtue of the permit V1:

(1) The Defendant's own evidence;

(2) The sequence of events;

(3) Discrepancy in the extent of land between the permit and grant;

(4) Discrepancies in the boundaries between V1 on the one hand, and P4 & P6 on the other.

The Defendant's evidence

The first ground relied upon by the District Court as to why in its view the Defendant is not entitled to lots G and H by virtue of V1 was the evidence of the Defendant himself. While under cross examination, the Defendant admitted that the land he is in possession of comes within the grant P1, as borne out by the following questions and answers:

ප්‍ර: ඒ මැනුමේ "එච් සහ පි" කොටස් තමයි තමුන් භුක්ති විඳිනවා කියලා ඉදිරිපත් කර තිබෙන්නේ?
උ: එහෙමයි.
ප්‍ර: ඒක තමුන් පිළිගන්නවා?
උ: එහෙමයි.
ප්‍ර: **එතකොට තමුන්ට පිළිගන්න වෙනවා තමුන් ඉන්නේ පැමිණිලිකරුට අයත් දිමනා පතුගත ඉඩමේ කියලා?**
උ: **ඔව්.**
ප්‍ර: ඒ අනුව කිසිදු අවස්ථාවක වී.01 බලපත්‍රගත ඉඩම මැනලා හඳුනා ගන්න කටයුතු කලේ නැහැ?
උ: නැහැ.
ප්‍ර: **තමුන් පදිංචි වෙලා ඉන්න ඉඩම කුඹුරු ඉඩමක් හැටියට ෂන්මුගම්ට දිලා තිබෙනවා කියලා දන්නවාද?** [Shanmugam is the Plaintiff]
උ: **එහෙමයි.**

While I shall discuss separately the discrepancies between the boundaries of the land given to the Plaintiff when compared with the boundaries of Lots G and H, the Defendant in cross examination stated further as follows:

ප්‍ර: තමුන් පදිංචි වෙලා ඉන්නේ එච් සහ පි කියන කොටස් වල?
උ: එහෙමයි.
ප්‍ර: ඒ කොටස්වල දෙපැත්තකට ඇලක් පාරක් පෙන්නලා නැහැ කියලා මම යෝජනා කරනවා?
උ: පිඹුරු අනුව පෙන්නලා නැහැ.
ප්‍ර: **ඒ අනුව තමුන්ගේ වී.01 බලපත්‍රය මේ පැ. 04 (අ) පිඹුරේ එච් සහ පි සඳහා අදාල බලපත්‍රය නෙමෙයි කියලා මම යෝජනා කරනවා?**
උ: **ඒක මම දන්නෙ නැහැ.**

Thus, the Defendant himself was not certain if Lots G and H formed part of the land given to him under the permit V1, nor did the Defendant move for a commission to have the boundaries of V1 superimposed on P6, even though that was one of the grounds on which the Defendant sought to set aside the terms of settlement way back in 2011.

I must also observe that while in his evidence-in-chief Ranaweera Bandara stated that "පැ. 01 දරණ දිමනා පත්‍රයට අදාළ ඉඩමයි, වී 01 ලේඛනයට අදාළ ඉඩමයි එකම ඉඩමක් ද කියලා මට හරියට කියන්න බැහැ කියලා මම කිව්වා. මේ ඉඩම්වල සිතියම් අංක වෙනස්. **වී. 01 බලපත්‍රවල තිබෙන මායිම් කිසිවක් පැ. 01 බලපත්‍රයේ සඳහන් වන්නේ නැහැ**", during cross examination, in response to the question "වී 01 දරණ උපලේඛනයට අදාළ ඉඩම ඔබ විසින් මැනුම් කරන ලද ඉඩම තුල පිහිට ඉඩමක්ද නැද්ද කියන්න ඔබට නිශ්චිතව කියන්න පුළුවන්ද?", his reply was "නොහැකියි".

It is on the above evidence that the District Court concluded as follows:

"විත්තිකරුට බලපත්‍රයක් නිකුත් කර තිබුණද, එකි බලපත්‍රයේ සඳහන් ඉඩම ඔහු විසින් භුක්ති විඳින බව කියා සිටියද, එම බලපත්‍රය මත අදාල ඉඩම් කොටස ඔහුට හිමිවිය යුතු බවට උත්තරයේ හා සෙසු සෑම අවස්ථාවකම සඳහන් කර තිබුණද පැමිණිල්ල ඔහුගෙන් හරස් ප්‍රශ්න අසන අවස්ථාවේදි ඔහු පැහැදිලිව පිළිගෙන ඇති කරුණ නම් මෙම ආරවුල් ගත ඉඩම් කොටස පැ.01 ප්‍රදාන පත්‍රයෙන් පැමිණිලිකරුට බැහැර කර ඇති ඉඩමට අයත්වන බවයි."

Sequence of events

The second ground relied upon by the District Court is that the claim of the Defendant is not supported by the sequence of events. I have already stated that Marimuttu was issued a permit in 1954 for a land in extent of 4A 2R, that the Defendant's father was issued the permit V1 for a land in extent of 1A in 1965 and that the survey plan P6 depicting Lot No. 19 as having an extent of 5A 2R 8P was prepared in 1970. The Defendant is asking Court to accept that with the entire land being 5A 2R 8P, and with Marimuttu being in possession of 4A 2R out of this larger land, the balance 1A is what was given by V1 to the Defendant's father in 1965.

If the claim of the Defendant is to be accepted, soon after V1 was issued in 1965, the predecessors of the Plaintiff and the Defendant must have been in possession of two separate but adjoining lands, given the situation of lots G and H in P4. However, the ground reality is that the boundaries of the permit V1 do not refer in any manner to any

of the boundaries of P1, although according to P4, at least two boundaries of lots G and H were adjacent to lot E in P4. The discrepancies in the boundaries are a matter that I will discuss later in detail.

There is another reason why the claim of the Defendant that he and his father have been in exclusive possession of the land now identified as Lots G and H since 1965 cannot be accepted. The Final Village Plan P6 was prepared in July 1970. The evidence of A. P. G. Gamage, the Land Development Officer, Divisional Secretary's Office, Thamankaduwa was that, (a) P6 was prepared for the purpose of issuing the grant, (b) the lots in P6 were demarcated on the basis of the possession that was enjoyed by those on the ground, (c) the extent of land enjoyed by Marimuttu at the time the grant was issued was 5A 2R 8P, and (d) this extent is reflected in Lot No. 19. The relevant evidence is re-produced below:

ප්‍ර: දිමනාපත්‍රය දෙන අවස්ථාවේ දි නැවත මැනිමක් කල බවට කරුණු අනාවරණය වෙනවද?
උ: එහෙමයි.
ප්‍ර. දිමනාපත්‍රය නිකුත් කිරීමේ දි ඊට ආදාළව කරන ලද මැනිම් අනුව ඉඩමේ ප්‍රමාණය කොපමණද?
උ: අක්කර 05 යි, රූඩ් 02 යි, පර්චස් 08යි.

"දිමනාපත්‍රයක් නිකුත් කිරීමට පෙර දිමනාපත්‍රධාරියාට අවසර පත්‍රයක් නිකුත් කිරීම අත්‍යාවශ්‍යයි. පැ.01 දරණ දිමනාපත්‍රය නිකුත් කිරීමට පෙර විධිමත් පරිදි කේ.මාරිමුත්තු හට පැ.07 දරණ අවසර පත්‍රය නිකුත් කරලා තිබුණා. මේ ඉඩම සඳහා කේ.මාරිමුත්තු හට අයිතිවාසිකම් පවතින්නේ 1954.04.08 වන දින සිට. **පැ.01 දරණ දිමනාපත්‍රය නිකුත් කිරීමේ දි එය නිකුත් කරලා තිබෙන්නේ මේ ඉඩම මැන හඳුනා ගැනිමෙන් පසුවයි.** එහි පිඹුරු අංක අ.ප.පි.පෙ 18 ලෙසත්, කැබලි අංක 19 ලෙසත් සඳහන් වෙනවා. මෙහි ප්‍රමාණය වශයෙන් අක්කර 05 යි, රූඩ් 02 යි, පර්චස් 08 ක් වශයෙන් සඳහන් වෙනවා."

G L Manoj, a Technical Officer at the Surveyor General's Department, referring to P7 [the tenement list attached to P6] had stated as follows:

"ප්‍ර. පැ.7 කියන ලේඛනය සකස් කරගන්න පාදක කර ගන්නේ මුල් ලේඛනයේ දිනය 1970.07.21?
උ. එසේය.
ප්‍ර. ඒ වනවිට එම ඉඩම් කොටසේ බුක්තියේ සිටියේ කවුද කියලා ලේඛන ආශ්‍රිතව ඔබට කියන්න පුළුවන්ද?
උ. ලේඛනයේ සඳහන් ආකාරයට කේ.මාරිමුත්තු නමැත්තෙක් සඳහා දිමනා පත්‍රයක් සකස් කර තිබෙනවා.
ප්‍ර. ඒ අවස්ථාව වනවිට ඉඩමේ බුක්තියේ සිටියේ කවුද කියලා ලේඛන අනුව කියන්න පුළුවන්ද?
උ. දිමනා පත්‍රයක් ලබා දිමේදි දිස්ත්‍රික් මිනින්දොරු කාර්යාලයේ කාර්ය භාරය වන්නේ එම ඉඩමේ වෙසෙන පුද්ගලයාට දිමනා පත්‍රයක් නිකුත් කිරීම සඳහා අදාල පුද්ගලයාගේ නම තොරතුරු ලබා ගන්නවා.

පැ.7 ලේඛනය ප්‍රකාරව ලොට් අංක 19 දරණ කොටසේ හිටියා කියලා සඳහන් වන්නේ මාරිමුත්තු නමැත්තෙක්"

Thus, it is on the basis of Marimuttu's possession on the ground that the said land came to be demarcated as Lot No. 19 having an extent of 5A 2R 8P. The allocation of extra land is not a mistake on the part of any officer. This is also the explanation for the increase of the extent of land in P1 over and above what was given initially by the permit to Marimuttu. The fact that Marimuttu was in possession in 1970 of the entire land of 5A 2R 8P rebuts the position of the Defendant that the land referred to in lots G and H is the land given to his father in 1965 and which land the Defendants claim they have enjoyed since then. Furthermore, if the Defendant and/or his father were in possession of the impugned land [i.e. what has now been identified as lots G and H], P6 would have reflected their presence. Not only was the impugned land [lots G and H] not demarcated as a separate lot, P7 which is the Tenement List attached to P6 has no reference at all to the Defendant's father.

The District Court therefore arrived at the conclusion that a grant is issued to the person in possession of the land in terms of the permit and the fact that a grant was issued to Marimuttu means that he was the person in possession of the said 5A 2R 8P at the time the said land was surveyed in 1970, with the result that the land referred to in V1 is not lots G and H.

<u>The discrepancy in extent between the permit issued in 1954 and the grant P1</u>

This brings me to the third ground and the primary argument of Mr. Sanjeeva Dassanayake, the learned Counsel for the Defendant, that being the discrepancy in the extent of the land between the permit initially issued to Marimuttu and the subsequent grant V1. There is no dispute that the difference in extent of land between the permit and the grant issued to Marimuttu is almost 1A or an increase of 23% over and above the extent specified in the permit issued to Marimuttu. The learned Counsel for the Defendant submitted that as a permit is a precursor to a grant, a permit and grant forms part of one process, and therefore the land that the Plaintiff is entitled to in terms of the grant must be limited to the extent given in the permit. It was his position that even though it has been admitted before the District Court that Lots G and H are situated within Lot No. 19 in P6 and forms part of the land given to the Plaintiff in terms of P1, the Plaintiff

cannot claim title to the extent of land [that being lots G and H] which is over and above what was given in terms of a permit in 1954. This was the principle reason relied upon by the High Court in arriving at its conclusion that the Plaintiff does not have title in respect of the said 1A of land.

In terms of the Land Development Ordinance, a permit is granted in the first instance on condition that the permit holder develop the land and it is only after the conditions of the permit are satisfied that a grant is issued for that land. For that reason, the permit and the grant are part of one process, and as held in **Agosinno vs Divisional Secretary, Thamankaduwa and Others** [SC Appeal No. 30/2004; SC Minutes of 23rd March 2005] where any issues arise relating to succession, a nomination made under the permit would continue to be valid even after a grant has been issued. However, I am unable to accept the argument that the extent of land in a permit and a grant must be identical. I have already referred to the fact that the land given in terms of the permit to Marimuttu was not issued in terms of a survey plan but the grant has been issued in terms of survey plan P6 prepared in 1970 on the basis of possession with the boundaries specifically identified and demarcated.

W A Thilak Shantha, Colonisation Officer who was called by the Defendant stated as follows:

> "මගේ අත්දැකීම් අනුව සාමාන්‍යයෙන් දිමනා පත්‍රයක් නිකුත් කරන්න පෙර බලපත්‍රයක් නිකුත් කිරීම අනිවාර්‍යයෙන් සිදුවිය යුතුයි. බලපත්‍රයක් පදනම් කරගෙන තමයි දිමනා පත්‍රයක් නිකුත් කරන්නේ. බලපත්‍රයක් නිකුත් කරන අවස්ථාවේදි **ඒ ඉඩම් කට්ටයේ පදිංචි පුද්ගලයා කවුද, කියා සොයා බලනවා.** යම්කිසි තැනැත්තෙක් ප්‍රායෝගිකව ඉඩම් කැබැල්ලක් බුක්ති විඳින්නේ නැතිව බලපත්‍රයක් නිකුත් වීම සිදුවෙන්නේ නැහැ. මගේ පලපුරුද්ද අනුව පදිංචියක් හෝ බුක්තියක් නැතිව බලපත්‍රයක් නිකුත් කරන්නේ නැහැ. **දිමනා පත්‍රය නිකුත් කිරීම සඳහා බලපත්‍රයක් ප්‍රදානය කර තියෙන ඉඩම මැනුම් කටයුතු සිදුකරලා තමා දිමනා පත්‍රයක් නිකුත් කරන්නේ.** ඉඩම් කච්චේරියකින් ඉඩමක් බැහැර කිරීමට කටයුතු කරන්නේ කට්ට කැඩීමේ සැළැස්මක් සකස් කරලා ඉඩමේ මායිම් ඇතුලත් කරලා බලපත්‍රයක් ලබා දෙනවා. බලපත්‍රයක් නිකුත් කරන්න පෙර ජනපද ඉඩම බෙදාදෙන අවස්ථාවේදි ඒ වගේ ක්‍රියාවලියක් ද සිදුව තිබිය යුතුයි. දිමනා පත්‍රයක් නිකුත් කරන්නේ බලපත්‍රයක් පදනම් කරගෙන. යම් හෙයකින් බලපත්‍රයක් තියෙන ඉඩම් කොටසක ප්‍රමාණයේ වෙනසක් වෙන්න පුලුවන්. බලපත්‍රයේ තියෙන ප්‍රමාණයට වඩා අඩුවෙන්නත් පුලුවන් වැඩිවෙන්නත් පුලුවන් අඩුවීමත් 10% ක ප්‍රමාණයක් වැඩිවීමත් 10% ප්‍රමාණයක්. එතකොට වෙනස්වීමේ පරාසය 10% ක් පමණ තමා කියා සිටින්නේ. **මගේ රාජකාරී ක්ෂේතය තුල ඉඩම් වල 10% ප්‍රමාණය ඉක්මවා ගිය අවස්ථා මම දැකලා තියෙනවා** ඒ වගේම 10% ප්‍රමාණය ට අඩු අවස්ථාත් දැකලා තියෙනවා. **එසේ වෙන්න හේතුව බලපත්‍රලාභින් ඉඩම්**

සංවර්ධනය කලාට පසුව ගල් දමා මැනීම් සිදුකරනවා. ඒ අවස්ථාවේ බුක්ති විඳින ප්‍රමාණය කට්ටකරුවන් විසින් පෙන්වා දෙනවා. ඒ අවස්ථාවේදි තමා මිනින්දෝරු මහතුන් 10% වැඩිපුර පෙන්වා දෙන ප්‍රමාණයට සැලැස්මෙන් ඇතුලත් කරනවා. දිමනා පත්‍රයක් දෙන්න තමා මැනුමක් මැනුමක් සිදු කරන්නේ."

The High Court has not considered the above evidence before it ruled out the possibility of there being a difference in extent between the permit and the grant issued to Marimuttu. Nor has the High Court considered the fact that Marimuttu was given a grant for 5A 2R 8P since he was in possession of the said land, and that Marimuttu is entitled to the entirety of the land referred to in P1.

Discrepancies in the boundaries

The fourth ground relied upon by the District Court are the discrepancies in the boundaries of the land possessed by the Defendant. If the position of the Defendant that the 1 acre of land given to him under V1 is the land now identified as Lots G and H is to be accepted, then, with Lots G and H being adjoining lands to the 4A 2R land given on the permit to Marimuttu, the said lands must share at least one common boundary.

According to P1, the land given to the Plaintiff is Lot No. 19 of P6. In terms of the tenement list P7, the said land is bounded as follows:

North – Lot 21 of P6, with Lot No. 21 described as "*a new clearing – reservation for drainage channel*";
East – Lot No. 38 of P6 being a paddy field allotted to P.M. Ran Banda and Lot No. 39 described as a "*forest with ruins*" with an extent of 1A 3R 18P of forest and the balance 1R 5P being ruins;
South – Lot 15 of P6 [roadway]
West – Lot 20 of P6, with Lot No. 20 being a paddy field allotted to D. P. Pasuntha.

P6 does not show any drainage channels or canals running through Lot No. 19, thus shutting the door to the possibility of any land situated within Lot No. 19 having a canal as a boundary.

According to P4 prepared in 2010, lots G and H are contiguous lots but separated by a bund [තියර]. Once combined, these two lots (a) are triangular in shape, (b) are situated on the south eastern boundary of Lot No. 19, and (c) have the following boundaries:

North – Lot No. 19 of P6
East – Lot No. 39 of P6
South – Lot No. 15 being the roadway
West – Lot No. 19 of P6

The permit V1 issued in 1965 to the Defendant however contains the following boundaries:

North – Canal and road
East – land occupied illegally by Ran Banda
South – Canal and road
West – boundary not mentioned

Thus, it would be seen that:

(a) The land given to the Defendant's father by V1 in 1965 had a canal and a road to the North whereas lots G and H which are situated within Lot No. 19 and on the south eastern boundary of Lot No. 19, does not have a canal and a road to its north nor a canal to the south. Instead the northern boundary of Lots G and H is the land given to Marimuttu;

(b) Even though Lot No. 38 of P6 had been allotted to Ran Banda, and the eastern boundary of V1 is also a land occupied illegally by Ran Banda, the eastern boundary of lots G and H is not lot No. 38 but instead is lot No. 39 of P6;

(c) The land given to the Defendant's father by V1 had a roadway and a canal on the south whereas for lots G and H, it is only a road;

(d) At least two boundaries of the land given to the Defendant's father by V1 are canals, whereas none of the boundaries of Lots G and H are canals or waterways;

(e) Even though by the time V1 was issued in 1965, Marimuttu had already been issued a permit, V1 does not refer to a border possessed by Marimuttu on a permit.

With the boundaries being entirely different, the only conclusion that can be arrived at is that Lots G and H which are currently occupied by the Defendant is not the land referred to in V1. It is on the above basis that the learned District Judge arrived at the following conclusions:

"එසේ වුවත් එම බලපත්‍රයේ සඳහන් විෂය වස්තුව කුමන ස්ථානයක පිහිටියේද යන්න සම්බන්ධයෙන් නිශ්චිතතාවයක් සහ පැහැදිලි කිරීමක් අධිකරණය ඉදිරියේ නොමැත. ඉදිරිපත් කර ඇති බලපත්‍රයද පිඹුරු අංකයක්, ලොට් අංකයක් නිවැරදිව සඳහන්ව නොමැත. බිම් ප්‍රමාණය පමණක් නිශ්චිතව සඳහන්වේ. එමෙන්ම මායිම් අතරින් මායිම් 3 ක් පමණක් සඳහන්ව ඇති අතර එකි මායිම්ද පැමිණිලිකරු භුක්ති විඳින ඉඩමේ මායිම් සමඟ ගැලපීමක් හෝ සැසඳීමක් මෙම නඩුවට අදාලව කැඳවා ඇති මැනුම් වාර්තාව අනුව තහවුරු නොවේ."

"ඒ අනුව මානක වරයා වෙත විත්තිකරු ඉදිරිපත් කර ඇති වී.1 බලපත්‍රයේ සඳහන් ඉඩම ලෙස එම ඉඩම හඳුනාගැනීමක් සිදුකර නොමැත."

එම සාක්ෂි සලකා බැලීමේදි විත්තිකරු ඉදිරිපත් කර ඇති වී.1 බලපත්‍රයේ ඉඩම පැ.1 බලපත්‍රයේ ඉඩම තුල අන්තර්ගත වන බවට අධිකරණයට අනුමතියකට එළැඹිය නොහැකිය. එමෙන්ම එකි බලපත්‍රයේ සඳහන් ඉඩම නිසි පරිදි හඳුනා ගැනීමට හැකියාවක් එමගින් උදා වී නොමැත. එසේ වුවත් ඉසව් ගත ඉඩම් පැ.1 දිමනා පත්‍රයේ උපලේඛනගත ඉඩම් වන බවට ප්‍රමාණවත් සාක්ෂි ඉදිරිපත් වී ඇති බව පැහැදිලි වේ."

Although the District Court has referred to these discrepancies, the High Court has failed to consider the discrepancies in the boundaries.

Taking into consideration the evidence that is available before me, I am in agreement with the findings of the learned District Judge that the Plaintiff has discharged the burden cast on him to establish on a balance of probability that lots G and H have been given to the Plaintiff by grant P1, that the Defendant is in possession of the said lots, and that the Defendant has not been able to establish that he has a *better title* than the Plaintiff to Lots G and H. The High Court however has failed to consider any of the above matters even though it has concluded that *considering the evidence of the witnesses, it is quite clear that the defendant possesses lots G and H on the permit issued to him in terms of the Land Development Ordinance*. In the above circumstances, I am of the view that the

third question of law must be answered in the affirmative. Accordingly, the necessity to consider the first two questions of law does not arise.

Is the Defendant entitled for compensation for improvements

In his answer, the Defendant moved for compensation in a sum of Rs. 2 million for improvements effected by him in the event of the District Court holding that the land occupied by the Defendant is part of the land given to the Plaintiff. This amount was increased to Rs. 6 million in the amended answer, even though it was admitted that no improvements had taken place after the institution of action. While the evidence disclosed that the Defendant has constructed two houses on the said land and developed the said land, the Defendant has failed to lead any independent evidence of the value of such houses. That is a burden that the Defendant was required to discharge, which admittedly the Defendant has failed to do. The learned District Judge has held that the Defendant is entitled to be compensated for such improvements but since there is no valuation, had concluded that until the Defendant establishes such value, the Defendant can continue to possess the said land. I am of the view that the failure of the Defendant to prove his claim should not inure to his benefit, and for that reason, I regret I am unable to agree with the conclusion of the learned District Judge that the Defendant can continue to possess the land until the value of the improvements effected is established by the Defendant. The finding of the learned District Judge that the Defendant is entitled to possess the impugned land until such land is valued by a Government Surveyor and until such payment is made by the Plaintiff is therefore set aside.

Conclusion

In the above circumstances, I answer the 3rd question of law in the affirmative. The necessity to answer the 1st and 2nd questions of law therefore does not arise. With regard to the 4th question of law, I am of the view that although the Defendant may be entitled to claim compensation for improvements, the Defendant has failed to establish the value of such improvements.

The judgment of the High Court is accordingly set aside and the judgment of the District Court is affirmed, subject to the aforementioned variation. I make no order for costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT