IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006 against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5 of the said Act.

S C Appeal No. 107/2016

SC/HCCA/LA No. 149/16

WP/HCCA/KAL/197/2010/F

DC Panadura case No. 1838/L

1. Balapu Waduge Sunil Mendis,
   No. 77/1,
   Kahapola,
   Madapatha.

PLAINTIFF - RESPONDENT - APPELLANT

-Vs-

2. Kathtagoda Widanelage Douglas Fernando,
   No. 108,
   Kahapola,
   Madapatha.

DEFENDANT - APPELLANT – RESPONDENT

Before: PRASANNA JAYAWARDENA PC J

P PADMAN SURASENA J

E A G R AMARASEKARA J

Counsel: Dr. S F A Cooray for the Plaintiff - Respondent - Appellant

Pradeep Perera for the Defendant - Appellant - Respondent

Argued on: 18-02-2019

Decided on: 30-07-2019

P Padman Surasena J

The Plaintiff - Respondent - Appellant (hereinafter sometimes referred to as the Plaintiff) filed plaint in the District Court of Panadura seeking to recover the possession of the land in extent of 8.28 perches (0.0210 Hectares) described in the amended schedule of the amended plaint dated 19th June 2006.

The Defendant - Appellant - Respondent (hereinafter sometimes referred to as the Defendant) filed his answer dated 27th November 2006. The Defendant in his answer has taken up the position;

1) that there is no such land in extent of 8.28 perches as described in the schedule to the plaint, (no such land physically exists);
2) that the land described in the schedule to the plaint is a land in extent of approximately 8 Kurunis of paddy;
3) that the Defendant owns undivided rights of the said land and cultivates and possesses the said land by virtue of the deed No. 18715 attested on 16th May 1995 by Malani Weerasinghe Notary Public;

4) that the land referred to in the documents produced marked **P 2** to **P 6** is not the land described in the schedule to the plaint but a separate and different land the extent of which is 3.5 perches;
5) that the land described in the schedule to the plaint is the land cultivated and possessed by the Defendant; and
6) that there are old longstanding fences in the said land and that the Defendant at no time forcibly built a fresh fence.

The Defendant had prayed that the plaint be dismissed.

The Plaintiff has thereafter filed a replication dated 19th March 2007 stating that the land described in the schedule to the plaint is not the land referred to in the deed bearing No. 18751 attested on 16.05.1995 by Malani Weerasinghe Notary Public referred to by the Defendant.

At the conclusion of the trial, the learned District Judge by his judgment dated 23rd November 2010, has delivered judgment in favour of the Plaintiff holding that the Plaintiff is entitled to the possession of the land described in the Plaint. The learned District Judge had also directed that a decree in favour of the Plaintiff be entered.

The Defendant being aggrieved with the said order of the learned District Judge, has appealed to the Provincial High Court canvassing the said order.

At the conclusion of the argument of the said appeal, the Provincial High Court by its judgment dated 10th March 2016, has set aside the judgment of the learned District Judge and directed that the plaint be dismissed with costs.

The Provincial High Court in its judgment has taken the view;

I. that the evidence led by the Plaintiff has shown that the land in suit is a land in extent of 3.5 perches,
II. that the Plaintiff in his evidence has claimed a land in extent of 3.5 perches,
III. that in the absence of any evidence to prove that the extent of the land in suit is 8.28 perches, the trial Court could not have entered a judgment in favour of the Plaintiff as it had done,
IV. that as the evidence led does not lead to the identification of the corpus pertaining to the case, the Plaintiff has failed to prove his case and
V. that in the above circumstances, the judgment of the District Court cannot be allowed to stand.

In the course of the submissions, neither party brought to the notice of this Court that the parties had agitated before the Provincial High Court, any other point other than the point relating to the failure to identify the corpus. Thus, this Court would conclude that the point decided by the Provincial High Court is the only point raised by the Defendant in the Provincial High Court.

Licensed Surveyor Gamini Malwenna upon a commission issued by the District Court has surveyed the land relevant to this case on 23rd August 2005.

Having been called by the Plaintiff, to give evidence before the District Court, the said Surveyor in the course of his evidence has produced (marked **P 15**), the survey plan (No. 2961) which had been prepared by him upon the Commission issued by Court. It would be helpful to summarize the parts of his evidence relevant for the decision of this case. The said items of evidence are as follows.

i. It was the Plaintiff, his wife and the mother of his wife who showed him the land relevant to the case and it is that land he surveyed upon the commission issued by Court.
ii. He found that it is a somewhat uncultivated land.

iii. The Defendant had objected to the survey being carried out by him.

iv. The Defendant did not make any claim to the said land.

The survey plan (**P 15**) clearly shows that the land possessed by the Defendant is the land bordering the northern boundary of the land, which was surveyed pertaining to this case.

The learned counsel who appeared for the Defendant, in the course of the cross examination of the witnesses had repeatedly elicited from them that the land claimed by the Plaintiff in the original plaint is a land in extent of 3.5 perches. This item of oral evidence appears to have influenced the Provincial High Court to conclude that according to the evidence led in the trial, the land relevant to this case has to be a land in extent of 3.5 perches and not a land in extent of 8.28 perches.

It would be relevant to note that the surveyor has stated in his evidence that the Plaintiff was residing on the disputed portion of the land. His report indicates that there was a fence, which appeared to have been put up about one year ago. (The Plaintiff had stated that the Defendant had put up that fence forcibly.)

The Defendant has not contested the conduct of survey on the Commission issued by Court. Further, it is a remarkable feature in this case that the Defendant had chosen not to adduce any evidence before the District Court. He has been content only with the cross examination of the witnesses called to give evidence on behalf of the Plaintiff. When one scrutinizes the survey plan (**P 15**), it can clearly be seen that the land, which has been surveyed, on the commission issued by the Court is a land in extent of 0.0310 Hectares. The learned counsel for the plaintiff submitted to this court that 0.0310 Hectares, when converted into perches would be much more than 3.5 perches. Learned counsel for the defendant did not controvert this calculation.

Moreover, one cannot observe anything in the said plan, which is indicative of the fact that the land, which has been surveyed for the purpose of this case, is a land in extent of only 3.5 perches. Thus, it is clear that the attempts made during the cross examination of the surveyor by the learned counsel who appeared for the Defendant in the District Court to show that the land which has been surveyed is a land in extent of 3.5 perches cannot succeed.

As has been stated before, the learned High Court Judges have taken the view that the original court could not have entered judgment in respect of 8.28 perch land since the Plaintiff in his evidence had only claimed the possession of a 3½ perch land. It is on that basis that the learned Judges of the High Court had held that the corpus of this action has not been identified and therefore the Plaintiff has not proved his case.

The learned High Court Judge has referred to the Plaintiff's evidence page 110 of the brief in this regard. It is to be noted that the answer given in page 110 of the brief flows from the questions and answers given in page 109. At page 109, the Plaintiff was questioned with regard to the schedule of the original plaint, which had erroneously referred to the extent as 'around 3½ of perches'. Even in other places it appears that the Plaintiff was questioned about marked documents, which refers to the extent of the corpus as 3½ perches. However, the said documents are documents prepared prior to the survey. This Court observes that the learned District judge who heard the case had been cautious not to treat the said answers as referring to a claim of 3½ of perches only. However, the learned High Court Judge appears to

have considered the quoted question and answer[1] in isolation and also out of its context and interpreted it as referring to a claim for a 3½ perch land. Thus, it is the view of this Court that the learned Judges of the High Court have misconceived the facts.

It is true that the Plaintiff had referred to the extent of the land as 'around 3½ perches' in the original plaint. By using the word 'around' it is explicit that the Plaintiff was unaware of the exact extent in terms of number of perches. There was no reference to any existing plan also at the time of filling the plaint. However, he has described the four boundaries of the land he had claimed in this possessory action. A commission was taken out and accordingly the plan No. 2961 (**P 15**) was made by Gamini Malwenna, licensed surveyor. The boundaries of this plan are compatible with the boundaries referred to in the schedule to the original plaint. The Plaint was accordingly amended without objection to describe the extent as 0.0210 hectares or 8.28 perches (actually, it should be 8.302 perches). After such amendment is effected to a plaint, no one can say that the claim by the Plaintiff is for some other land and not the land depicted in such plan. This

[1] quoted question and answer in the judgment.

is particularly so because the Plaintiff has referred to the said plan in his amended plaint to describe the land.

It is also true that even in some of the documents amongst **P 1** to **P 16** marked in support of the Plaintiff's case, the extent of the land is mentioned as 3½ perches. However, all such references had taken place prior to the preparation of the survey plan. It is pertinent to note that in his evidence in chief the Plaintiff has clearly stated that he knew the extent as 3½ kurunies but not the exact number of perches (vide page 91 of the brief).

The wife of the Plaintiff also has explained that the description of the land as 3½ perches was due to the ignorance of the Plaintiff and the land is of 3½ kurunies in extent. Her evidence indicates that 3½ kurunies were referred to as 3½ perches. She also had stated that they showed the land they cultivated to the surveyor. The surveyor had given evidence to state that he surveyed the land shown on behalf of the Plaintiff.

The Plaintiff had called some more witnesses to prove his case but the Defendant had not placed any evidence before the original court. The evidence led before the District court indicates that the reference to the extent in the original plaint and some other documents as 3½ perches were

done without knowing the exact amount in perches and prior to a plan being made. It appears that the said witnesses have been confused by a misconception that 3½ kurunies were equivalent to 3½ perches. However, one must not lose sight of fact that the plaint was amended to describe the land as per the plan prepared by the surveyor. The learned District Judge after considering all the evidence led before Court held in favour of the Plaintiff. The evidence supports the view taken by the learned District Judge. Thus, his conclusion is not perverse. In spite of the above position, the learned High Court Judge taking certain answers out of context and without considering all the evidence led in its totality, overturned the findings of the facts by the learned District Judge.

Thus, it is clear that the evidence adduced on behalf of the Plaintiff in this case, has positively established that the land surveyed as shown by the Plaintiff in this case, is a land, which is in extent of approximately 8.28 perches. Therefore, the assertion of the High Court that the land surveyed is a land in extent of 3.5 perches and that the Plaintiff has not proved his case, cannot be permitted to stand.

For the foregoing reasons, this Court decides to set aside the judgment of the High Court dated 10th March 2016 and proceeds to allow the appeal. This Court further directs that the judgment of the District Court dated 23rd November 2010 be restored. Learned District Judge of Panadura is hereby directed to enter the decree accordingly. Appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

PRASANNA JAYAWARDENA PC J

I agree,

JUDGE OF THE SUPREME COURT

E A G R AMARASEKARA J

I agree,

JUDGE OF THE SUPREME COURT