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

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provision) (Amendment) Act No. 54 of 2006.

S.C. Appeal No. 69/2013

SC(SPL) LA No. 07/2012

CA 257/97(F)

D.C. Kurunegala 4009/L

Aluth Muhandiramge Somawathie

(Deceased)

PLAINTIFF

1. (A) Sumanasiri Harischandra
2. (B) Susila Mukthalatha
3. (C) Chithra Dharmalatha
4. (D) Liliat Chandrawathie
5. (E) Piyaseli Sarathchandra
6. (F) Jayasiri Nimalchandra
7. (G) M. Aratchilage Ariyaseeli
8. (H) Gayani Fonseka
9. (I) Pradeep Premachandra
10. (J) Dilhani Fonseka

All of Keppetiwalana, Alawwa.

SUBSTITUTED PLAINTIFFS

Vs

Amarapathy Mudiyanselage

Podishingo (Deceased)

DEFENDANT

1. (A) Lucy Nona
2. (B) Amarapathy M. Senarathne
3. (C) A. M. Indra Amarapathy
4. (D) A.M.M.J. Amarapathy
5. (E) A.M. Jane Nona Amarapathy
6. (F) A. M. Ashoka Chandrawathie
7. (G) A.M. Wijeratne
8. (H) A.M.Premawathie
9. (I) J.T. Somawathie
10. (J) A.M.Ramulatha Sriyakantha
11. (K) A.M.Ranjith Senaratne
12. (L) A.M. Pushparaj Chaminda
13. (M) A.M. Priyantha Damayanthi
14. (N) A.M. Samantha Amarapathy
15. (O) A.M. Dhammika Amarapathy
16. (P) A.M. Wijesiri Amarapathy

All of Keppetiwalana, Alawwa.

SUBSTITUTED DEFENDANTS

AND BETWEEN

1. Amarapathy Mudiyanselage M.J. Amarapathy,
   Ihala Keppitiwalana, Alawwa.

1(D) SUBSTITUTED

DEFENDANT-APPELLANT

Vs

1. (A) Sumanasiri Harischandra
2. (B) Susila Mukthalatha
3. (C) Chithra Dharmalatha
4. (D) Liliat Chandrawathie
5. (E) Piyaseli Sarathchandra
6. (F) Jayasiri Nimalchandra
7. (G) M. Aratchilage Ariyaseeli
8. (H) Gayani Fonseka
9. (I) Pradeep Premachandra
10. (J) Dilhani Fonseka

All of Keppetiwalana, Alawwa.

SUBSTITUTED PLAINTIFF-RESPONDENTS

1. (A) Lucy Nona
2. (B) Amarapathy M. Senarathne
3. (C) A. M. Indra Amarapathy
4. (D) A.M.M.J. Amarapathy
5. (E) A.M. Jane Nona Amarapathy
6. (F) A. M. Ashoka Chandrawathie
7. (G) A.M. Wijeratne
8. (H) A.M.Premawathie
9. (I) J.T. Somawathie
10. (J) A.M.Ramulatha Sriyakantha

11. (K) A.M.Ranjith Senaratne
12. (L) A.M. Pushparaj Chaminda
13. (M) A.M. Priyantha Damayanthi
14. (N) A.M. Samantha Amarapathy
15. (O) A.M. Dhammika Amarapathy
16. (P) A.M. Wijesiri Amarapathy

All of Keppetiwalana, Alawwa.

SUBSTITUTED DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. (A) Sumanasiri Harischandra
2. (B) Susila Mukthalatha
3. (C) Chithra Dharmalatha
4. (D) Liliat Chandrawathie
5. (E) Piyaseli Sarathchandra
6. (F) Jayasiri Nimalchandra
7. (G) M. Aratchilage Ariyaseeli
8. (H) Gayani Fonseka
9. (I) Pradeep Premachandra
10. (J) Dilhani Fonseka

All of Keppetiwalana, Alawwa.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS

Vs

Amarapathy Mudiyanselage M.J. Amarapathy,

Ihala Keppitiwalana, Alawwa.

1(D) SUBSTITUTED

DEFENDANT-APPELLANT

1. (A) Lucy Nona
2. (B) Amarapathy M. Senarathne (Deceased)
3. 1(B) Amarapathy Mudiyanselage Priyantha Padmakumari Senarathne
4. 2(B) Amarapathy Mudiyanselage Piyumi Pushpa Amarapathy
5. (C) A. M. Indra Amarapathy (Deceased)
6. 1(C) Amarapathy Mudiyanselage Jane Nona
7. 2(C) Amarapathy Mudiyanselage Premawathie
8. 3(C) Amarapathy Mudiyanselage Anulawathie
9. 4(C) Amarapathy Mudiyanselage Chandrawathie
10. 5(C) Amarapathy Mudiyanselage Wijeratne
11. (D) A.M.M.J. Amarapathy
12. (E) A.M. Jane Nona Amarapathy

13. (F) A. M. Ashoka Chandrawathie
14. (G) A.M. Wijeratne
15. (H) A.M.Premawathie
16. (I) J.T. Somawathie
17. (J) A.M.Ramulatha Sriyakantha
18. (K) A.M.Ranjith Senaratne
19. (L) A.M. Pushparaj Chaminda
20. (M) A.M. Priyantha Damayanthi
21. (N) A.M. Samantha Amarapathy
22. (O) A.M. Dhammika Amarapathy
23. (P) A.M. Wijesiri Amarapathy

All of Keppetiwalana, Alawwa.

SUBSTITUTED DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**
A.H.M.D. NAWAZ, J AND
ACHALA WENGAPPULI, J

COUNSEL: W. Dayaratne, PC with Ms. Ranjika Jayawardena for the Substituted Plaintiff-Respondent-Appellants.
Manohara De Silva, PC with Ms. P. Wickramaratne and Hirosha Munasinghe for the 1(D) Substituted Defendant-Appellant-Respondent.

WRITTEN SUBMISSIONS: Substituted Plaintiff-Respondent-Appellant on 19th July 2013 and 04th July 2023.

1D Substituted Defendant-Appellant-Respondent on 18th November 2013.

Substituted Defendant-Appellant-Respondent on 04th July 2023.

ARGUED ON: 16th May 2023.

DECIDED ON: 15th February 2024.

S. THURAIRAJA, PC, J.

This case is one that has traversed the halls of these courts for several years. The action was first instituted in 1972 by the original Plaintiff (hereinafter referred to as the "Plaintiff") in the District Court of Kurunegala against the original Defendant (hereinafter referred to as the "Defendant") for a declaration of title to the land called "Damunugahamulawatta", ejectment of the original Defendant from the said land, restoration of possession and damages.

The learned District Judge, by judgment dated 29th March 1976, held in favour of the Plaintiff. The Defendant preferred an appeal to the Court of Appeal, following which, by judgment dated 25th October 1984, the learned Court of Appeal Judges set aside the judgment of the District Court and sent the case back for a trial de-novo on the basis that the learned District Court Judge had not taken into consideration the documents marked "D1" to "D8" in evidence.

Following the second trial, the learned District Judge, by judgment dated 28th April 1997, held in favour of the Plaintiff. The Substituted 1D Defendant-Appellant-Respondent preferred an appeal to the Court of Appeal. The learned Judge of the Court of Appeal, by judgment dated 02nd December 2011, set aside the District Court judgment on the grounds that the Plaintiff had failed to properly discharge the burden of proof to establish title and identity of the land in dispute. Finally, being aggrieved

by the Court of Appeal judgment, the Substituted Plaintiff-Respondent-Appellants appealed to the Supreme Court. Leave to appeal was granted by this Court on 6th May 2013 on the following questions of law:

a) Did His Lordship of the Court of Appeal err in law when he held that as the Plaintiff failed to read her documents in evidence at the conclusion of her case she has failed to prove her title when there was no objection raised by the Defendant for any of the documents of the Plaintiff marked in evidence? [sic]
b) Did His Lordship of the Court of Appeal err in law when his Lordship held that the Petitioner had failed to identify the corpus?
c) Did his Lordship of the Court of Appeal err in law when he held that the Lease Agreement marked V7 dated 26/02/1963 is valid?
d) Did His Lordship of the Court of appeal seriously misdirect himself when he held that the deeds marked V2 and V3 are need not be proved under section 68 of the Evidence Ordinance as the Plaintiff did not object for those documents when the Defendants read those documents in evidence at the conclusion of their case?
e) Did His Lordship of the Court of Appeal seriously misdirect himself when his Lordship held that the Plaintiff's action should be dismissed as there was a valid lease at the time of filing this action and held that 1(F) Substituted /Defendant/Respondent had title to the property which are two contradictory positions?

Factual Matrix

It is usually my practice to lay out the facts of the case inasmuch description as needed and available prior to the analysis from my perspective and the ultimate decision, especially if the narration of events and facts of one party appear drastically different from the other(s).

However, to quote the Plaintiff's own written submission in the District Court, *"[t]he issue that this Court has to decide is a simple one, though an attempt is being made to complicate it*." I believe both parties are culpable of this fallacy; the questions of law themselves, for instance, appear overly convoluted and ambiguous, despite the court's directive to the Counsel to refine and crystallise the questions of law afresh. While I do not wish to divulge into the perils of inadequate and imprecise legal drafting in this judgment, I believe there is much to be said about its correlation to delayed and ineffective access to justice.

To return to the instant case, I have attempted, to the best of my capabilities, to simplify the facts of the case as told by the parties in presenting them as a precursor to the analysis. The land in question, "Damunugahamulawatta" is described in Schedule A to the amended plaint in the extent of 2R.10P depicted as Lots 5D1 and 5E1, and the pedigree of the said land is as follows: one Abdul Jabbar became the owner of the property described in Schedule B to the plaint in the extend of 4 Kurakkan Lahas (KL) by virtue of Deed No. 22528 dated 13th October 1919 and attested by S.P.S. Jayawardena Notary Public. Following the passing of Jabbar in 1925, his estate was administered in the testamentary case bearing No. 3039/T, and the property devolved on his widow, Hajji Umma, and his son, Mohamadu Kalideen (alias 'Halideen'). Following the passing of Hajji Umma, Halideen became the sole owner of the property.

According to the Petitioner, Halideen transferred the entirety of the property to the original Plaintiff by virtue of Deed No. 462 dated 30th January 1969 and attested by P.S. Suriyarachchi Notary Public (marked "P8"). The Petitioner states that, on the same day, the original Defendant forcibly entered the land illegally and unlawfully, causing damage to the Plaintiff.

According to the Respondents, prior to the agreement between Halideen and the Plaintiff, Halideen had executed four lease agreements for the land with one Ausadahamy, the original Defendant's brother, and subsequently, with the original Defendant in the manner tabulated below.

06th November 1959	Deed of Lease bearing No. 6305 between Halideen and Ausadahamy	1959 – 1962 (3 years)
22nd March 1960	Deed of Lease bearing No. 6716 between Halideen and Ausadahamy	1962 – 1964 (2 years)
29th November 1960	Deed of Lease bearing No. 7287 between Halideen and Ausadahamy	1964 – 1970 (6 years)
26th February 1963	Deed of Lease bearing No. 9601 between Halideen and Podisingho (original Defendant) (marked "V7")	1970 – 1980 (10 years)

Following the passing of the original Defendant, one Ashoka Chandrawathie was substituted in his place as the 7E Substituted-Defendant (now 1(F) Substituted-Defendant-Respondent-Respondent) on 17th January 1986 in terms of Section 398(1) of the Civil Procedure Code. When the retrial proceedings in the District Court commenced on 01st December 1992, the Substituted Defendants also moved to allow the 1(F) Substituted Defendant-Respondent-Respondent (hereinafter referred to as the "1(F) Substituted Defendant") to intervene and be made an independent party in terms of Section 18 of the Civil Procedure Code. It was the position of the Substituted Defendants that, in fact, Halideen had transferred the property described in Schedule

A to Podisingho's daughter, the 1(F) Substituted-Defendant, prior to the deed executed with the Plaintiff in the following manner:

23rd December 1964	Deed of Transfer bearing No. 10861 between Halideen and 1(F) Substituted-Defendant (marked "V2")	2/3 of the land
11th April 1967	Deed of Transfer bearing No. 12644 between Halideen and 1(F) Substituted-Defendant (marked "V3")	1/6 of the land

The learned District Judge disallowed the said application by order dated 04th April 1993 on the basis that the 1(F) Substituted Defendant's failure in entering this application at the time she was substituted in place of the original Defendant, and only making such request 6 years after this period, is a request made with the purpose of delaying the case, and is, therefore, contravention of Section 18 of the Civil Procedure Code.

In the Court of Appeal judgment, the learned Court of Appeal Judge held that the Plaintiff had failed to discharge the burden of proving proper title and establishing identity, as well as that the Plaintiff had not proven title due to the Plaintiff's failure to read documents in evidence, including Deeds "P1" to "P8", at the closure of the case.

Simultaneously, the learned Court of Appeal Judge accepted Deeds "V2" and "V3" produced by the 1(F) Substituted-Defendant on the basis that the Plaintiff did not object to these documents in evidence at the conclusion of the case.

Proof of Title

This is evidently a *rei vindicatio* action, and it is settled law that in order to succeed in a rei vindication action, the Plaintiff must, firstly, prove ownership of the property and, secondly, that the defendant is in possession of the property. The burden of proof is placed on the Plaintiff to prove ownership on a balance of probabilities.

In ***Luwis Singho and Others v. Ponnamperuma [1996] 2 S.L.R. 320*** [page 324] it was stated by Wigneswaran J. that,

> *"No doubt actions for declaration of title and ejectment (as is the present case) and vindicatory actions are brought for the same purpose of recovery of property. But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that ; (i) the Plaintiff is the owner of the land in question i.e. he has the dominium and, (ii) that the land is in the possession of the Defendant."*

The standard of the burden proof placed on the Plaintiff has been extensively discussed, such as in ***Preethi Anura v. William Silva (SC Appeal No. SC/LA/116/2014, Minutes of the Supreme Court on 5th June 2017),*** where Dep. C.J. stated:

> *"In a rei vindicatio action, the Plaintiff has to establish the title to the land. 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 a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the Plaintiff discharged the burden on balance of probability."*

Samayawardhena J's discussion in ***Premawathie v. Jayasena (SC Appeal No. 176/2014, Minutes of the Supreme Court on 17th May 2021)*** is an important reference, wherein he states:

> *"It is well settled law that in a rei vindicatio action the burden is on the Plaintiff to prove title to the land in suit irrespective of weaknesses in the Defendant's case. H.N.G. Fernando J. (later C.J.) in Pathirana v. Jayasundara (1955) 58 NLR 169 at 171 required "strict proof of the Plaintiff's title".*
>
> *But this shall not be understood that a Plaintiff in a rei vindicatio action shall prove his title beyond reasonable doubt such as in a criminal prosecution, or on a high degree of proof as in a partition action.* ***The standard of proof of title is on a balance of probabilities as in any other civil suit. The stringent proof of chain of title, which is the norm in a partition action to prove the pedigree, is not required in a rei vindicatio action****."*
>
> *[Emphasis added.]*

Samayawardhena J further elaborated upon the circumstances in which the Court shall hold that the Plaintiff has discharged his burden, establishing that this determination is dependent upon the totality of the evidence presented in each case:

> *"The Court shall not protect rank trespassers and promote unlawful occupation to the detriment of the legitimate rights of lawful landowners by setting an excessively higher standard of proof in a rei vindicatio action than what is expected in an ordinary civil suit.*
>
> *Bearing in mind the burden of proof cast upon the Plaintiff in a rei vindicatio action, if the Plaintiff in such a case has "sufficient title" or "superior title" than that of the Defendant, the Plaintiff shall succeed.* ***No rule of thumb can be laid down on 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*."*

[Emphasis added.]

Counsel for the Plaintiff in this instant case, in reference to deeds "V2" and "V3", submitted the argument that despite the failure of the adverse party to object when documents are read in evidence, it is mandatory that deeds marked subject to proof are proved in terms of Section 68 of the Evidence Ordinance.

Section 68 of the Evidence Ordinance reads:

"If a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive and subject to the process of the court and capable of giving evidence."

It is curious to note that, in fact, neither the Plaintiff nor the Defendant called for an attesting witness in order to prove the title deeds submitted by the respective parties.

However, it is also pertinent to consider that these deeds were executed more than fifty years ago, which therefore brings into operation another relevant provision from the Evidence Ordinance.

Section 90 of the Evidence Ordinance reads:

"Where any document purporting or proved to be thirty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's

handwriting and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

Further, while there have been seemingly conflicting views on the application of section 68 in the past, fortunately, the Civil Procedure Code (Amendment) Act, No. 17 of 2022, has settled this matter; sections 2 and 3 read as follows:

(2) (1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, ***it shall not be necessary to adduce formal proof of the execution or genuineness of any deed, or document which is required by law to be attested****, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless–*

(a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

(b) the court requires such proof:

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

[...]

(3) Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or appeal pending on the date of coming into operation of this Act –

(a) *(i) if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or*

(ii) if the opposing party has ***objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence****, the court shall admit such deed or document as evidence without requiring further proof;*

[Emphasis added.]

Perusal of the evidence submitted in the instant case shows that the Plaintiff submitted the documents marked "P1" to "P8", which include, inter alia, Deed No. 22528 in evidence of Abdul Jabar's ownership of the property, inventory of the administration and devolution of the estate to Halideen in the testamentary case bearing No. 3039/T, and the Deed of Sale bearing No. 462 executed between Halideen and the Plaintiff for the transfer of the property. Furthermore, the title deeds were not marked subject to proof nor challenged by the Substituted Defendants.

In ***Cinemas Limited v. Sounderarajan [1998] 2 S. L. R. 16*** Jayasuriya, J. held that;

"In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal - S. 154 CPC (explanation)."

As such, in the application of section 2(1) and section 3 of the Civil Procedure Code (Amendment) Act together with section 90 of the Evidence Ordinance, and the totality of evidence produced by the Plaintiff, I am of the opinion that the Plaintiff has sufficiently proved, on a balance of probabilities, ownership of title to the property.

I do not discern that the Plaintiff's failure to read documents in evidence at the conclusion of the case in the District Court corresponds to the Plaintiff's failure to establish title by those documents in evidence. While in agreement with the learned Judge of the Court of Appeal that this is a serious lapse on the part of the trial court, the practice of reading documents in evidence at the closing of a case has been discussed by Marsoof J in ***Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor 2010 2 SLR 333*** [page 204] as follows:

> *"There remains, however, one more matter on which learned counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27 April 1993.*
>
> *This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial.* ***There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our Courts.****"*
>
> *[Emphasis added.]*

In light of the aforementioned circumstances, facts, and evidence, I answer the first question of law affirmatively.

Identity of Corpus

It is trite law that the identity of the property in a *rei vindicatio* action is as fundamental to the success of the action as the proof of the ownership (dominium) of the owner

(dominus); the owner must prove on a balance of probabilities not only his or her ownership in the property but also that the property exists and is clearly identifiable.

I once again quote Marsoof J in the case of ***Jamaldeen Abdul Latheef v. Abdul Majeed Mohamed Mansoor 2010 2 SLR 333*** on the importance of this principle:

> *"The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision."*

In the instant case, it is clear that the Plaintiff has successfully identified the corpus; the land described in the schedule to the amended plaint is as follows:

> *"වයඹ පළාතේ කුරුණෑගල දිස්ත්‍රික්කයේ දඹදෙනි හත්පත්තුවේ දඹදෙනි උවුකහ කෝරළේ කැප්පිටිවලාන ගමෙහි පිහිටි දමුනුගහමුලවත්ත කුරක්කත් ලාස් හතරක වපසරයකින් යුත් ඉඩමේ උතුරට - මීගහමුලවත්ත, නැගෙනහිරට - අඹගහමුලවත්ත හා වෙහෙරගාවවත්ත, දකුණට - දෙල්ල්ගහමුලවත්ත, බස්නාහිරට - රජයේ ඉඩම් අගල යන මායිම් තුල එෆ් 143/2 වශයෙන් ලියාපදිංචි වී ඇති ඉඩම. මෙම ඉඩම 1919 ජුනි සෙ 27 දින මිනුම්පති කාර්යාලයේ නිකුත් කර ඇති පිඹුරු අංක 450 අනව මායිම් වේ.*

එකී පිඹුරු අංක 450 හි පෙන්වා ඇති එකී දමුනුගහමුල වත්ත නැමැති ඉඩම් රූඩ් දෙකයි පර්චස් දහයක් (ඇ.0 රූ2 පර්.10) විශාල ලොට් අංක 5ඩී1 සහ 5ඊ1 ට මායිම් උතුරට - මීගහමුලවත්ත එකී පිඹුරේ අංක 450 කැබලි අංක 8 දරණ ඉඩමද, නැගෙනහිරට - අඹගහමුලවත්ත හෙවත් වෙහෙරගාව වත්ත (එකී පිඹුරේ ලොට් අංක 18 ද) දකුණට - අලව්ව ගිරිඋල්ල බස් මාර්ගයද, බස්නාහිරට - එකී පිඹුරේ 5ඩී සහ 5ඊ් ද වේ. ලියාපදිංචිය එෆ් 683/178.''

[ALL that land called 'Damunugahamulawatta' situated in the village of Keppitiwalana, Dambadeni Udukaha Korale, Dambadeni Hatpattu, Kurunegala District in Wayamba Province and extended in the extent of 07 Kurakkan Lahas is bounded on the North- Meegahamulawatta, on the East-Ambagahamulawatta and Weheragawawatta, on the South- Delgahamulawatta, On the West- ditch of the state lands and registered as F 143/2. This land is bounded as per Plan No. 450 issued dated 27th June 1919 by the Surveyor General's Office.

All that Lots No. 5D1 and 5E1 of the aforesaid 'Damunugahamulawatta' depicted in the aforesaid Plan No.450 extended in the extent of Two Roods and Ten Perches (A: 0 – R: 2 – P: 10) is bounded on the North- the land bearing Lot No. 8 of aforesaid Plan No.450 of Meegahamulawatta, on the East- Ambagahamulawatta alias Weheragawawatta (Lot No.18 of the aforesaid plan) on the South - Alawwa-Giriulla Bus Route on the West-5D and 5E of the said plan. Registered under F 683/178."]

The title deed produced by the Plaintiff marked "P8" describes the land in the same manner. Further, the land was surveyed by Court Commissioner A.M. Weber who prepared and produced Plan No. 1566 dated 29th October 1991 (marked "X") and subsequent report marked "X1". The following extracts from the plan and report confirm the identity of the subject matter:

"කුරුණෑගල දිස්ත්‍රික්කයේ, දඹදෙනි හත්පත්තුවේ, දඹදෙනි උඩුකහ දකුණ කෝරළේ සැප්පිටිවලාන ගමෙහි පිහිටා තිබෙන "දමුණුගහමුලවත්ත" නැමැති ඉඩම මා විසින් මැන අවසාන ගම් පිඹුරු 450 හි 5D1 සහ 5E1 වැනි කැබළි පිහිටුවා අධිෂ්ඨාපනය කර සාදන ලද බිම් කැබලි දෙකකින් යුත්

["I have surveyed the land called "Damunugahamulawatta" situated in the village Keppitiwalana, Dambadeni Udukaha Korale-South, Dambadeni Hatpattu in Kurunegala District contained 2 lots superimposed and prepared by utilizing the 5D1 and 5E1 of the Final Village Plan no. 450.]

Hence, I find no reason to disagree with the conclusions of the learned District Court Judge pertaining to the Plaintiff's identification of the corpus, as stated below:

"අංක 450 දරණ පිඹුරේ කැබලි අංක 5ඩී1 හා 5ඊ1 හාල්දීන්ට හිමි වී තිබූ බවට සැකයෙන් තොරව ඔප්පු කර ඇති අතර, එම අයිතිය හා එහි මායිම් සහ සකස් කරන ලද පිඹුර අනුව එනම් 5ඩී1 හා 5ඊ1 1979.01.30 දින අංක 462 දරණ ඔප්පුවෙන් පැමිණිලිකරුට පවරා ඇති බවට පැමිණිල්ලේ සාක්ෂි වලින් මනාව තහවුරු වී ඇති අතර, විත්තිය ද එය පිළිගෙන ඇත. ඒ අනුව පැමිණිල්ලේ නඩුකරය සාක්ෂි සම්බරතාවය මත ඔප්පුකර ඇති බවට නිගමනය කරමි."

["Beyond reasonable doubt, it has been proved that Lot No. 5D1 and 5E1 of Plan No. 450 belonged to Halideen and the Plaintiff's evidence strongly supports as per the said ownership, its boundaries, and the plan prepared i.e., by Deed No. 462 dated 30.01.1979 that the Lots 5D1 and 5E1 have been transferred to the plaintiff and the defence has also accepted it. Accordingly, I decide that the Plaintiff has successfully proven its case based on the balance of probability."]

As such, I answer to the second question of law affirmatively.

Lease Agreement

The third question of law pertains to the validity of "V7", the lease agreement bearing Deed No. 9601 between the original Defendant, Podisingho, and Halideen dated 26th February 1963 commencing from 1970 to 1980 for a period of 10 years, and specifically whether the two deeds must be proved in terms of Section 68 of the Evidence Ordinance.

It is, once again, settled law 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 Siyaneris v. Udenis de Silva (1951) 52 NLR 289 the Privy Council held:

> *"In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant."*

In ***Theivandran v. Ramanathan Chettiar [1986] 2 Sri LR 219 at 222***, Sharvananda C.J. stated:

> *"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."*

Despite the fact that the lease agreement between Podisingho and Halideen was signed in 1963, the deed would not come into operation until 1970, by which point

Halideen no longer possessed title to the property. Further, it is an admitted fact that the prior three lease agreements from the period between 1959 and 1970 were executed between Halideen and the Defendant's brother, Ausadahamy and not the original Defendant himself. I fail to understand the Defendant's claim for his rights as a lessee when, in fact, the Defendant was not a party to the lease agreements, specifically Deed No. 7287 in operation from 1964 to 1970, at all.

In these above-mentioned circumstances, I answer the third question of law affirmatively.

Deeds belonging to the 1(F) Substituted Defendant

The fourth question of law draws attention to the two deeds marked "V2" and "V3" which, according to the Substituted-Defendants, made the 1(F) Substituted Defendant owner to the property denoted as the subject matter in this instant case.

From my point of view, this creates several gaps in the narrative. It is indeed curious that the original Defendant, in the action instituted against him in 1972, would plead for his rights as a lessee under the lease agreement between himself and Halideen and not for declaration of title and/or ownership, when by that time, the property had allegedly been transferred to his daughter several years ago; even more fascinating is the fact that Ausadahamy should continue to occupy property as a lessee alongside his brother, the Defendant, up until 1970 under the lease agreement wherein Halideen retains ownership and not the 1(F) Substituted-Defendant.

Nevertheless, in this instant case, there are no grounds upon which the 1(F) Defendant can claim ownership of the land. It is settled law that a defendant who enters into a land in a subordinate character such as a tenant, lessee or licensee of the plaintiff is

estopped from disputing the title of the plaintiff to the land as per section 116 of the Evidence Ordinance, which enacts:

> *"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."*

In ***Ruberu v. Wijesooriya [1998] 1 Sri LR 58 at 60***, Gunawardana J. held:

> *"**Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it.** The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title."*

[Emphasis added.]

Moreover, as discussed within the factual matrix, the application by the 1(F) Substituted Defendant (named "7E Defendant" in the judgement by the District Court) to be added as an independent party was refused by the learned District Court Judge, whose inferences I find no discerning reason to disagree with, as stated:

> *"මෙම නඩුවේ මුල් විත්තිකරුවු පොඩිසිංඤෝ 1985 මැයි මස මියගොස් ඇත. ඒ අනුව 1-17 දක්වාවු ඔහුගේ දරුවන් විත්තිකරුවන් ලෙස ඇතුළත් කර ඇත. එසේ කර ඇත්තේ සිවිල් විධාන සංග්‍රහයේ 398(1) වගන්තිය ප්‍රකාරව එකී ආදේශ කිරීම සම්බන්ධයෙන් දැනට නඩුවට මැදිහත්වීමට ඉල්වා සිටින 17ඊ ලෙස ආදේශ කරඇති චන්ද්‍රාවතී අධිකරණයට පැමිණ සිට ඇති අතර, ආදේශ කිරීම සම්බන්ධයෙන් විරුද්ධ වී නැත. 86.1.17 වන දින කාර්ය සටහන අනුව අශෝකා චන්ද්‍රාවතී අධිකරණයේ පෙනිසිට ඇත. ඇය 7ඊ විත්තිකාරිය ලෙස ආදේශකර ඇත. දැනට ඇය වෙනමම විත්තිකරුවෙකු ලෙස ඇතුලත් වීමට ඉල්වා සිටින්නේ 1964 අංක 10861 හා 1967 අංක 12644 යන ඔප්පු මත මෙම දේපල ඇයට හිමි බවට යන පදනම මතය. ඇය 7ඊ විත්තිකාරිය ලෙස අධිකරණයේ ආදේශ කිරීම සඳහා පෙනී සිටි 86.1.17 වන දින වන විට මෙම හිමිකම් ලබාගත් ඔප්පු තිබූ බව ඇය දැන සිටිය යුතුය. එසේ නම් 86.1.17 වන දින ඇය 7ඊ විත්තිය ලෙස ආදේශ කිරීමට විරුද්ධව කරුණු කියා වෙනමම විත්තිකරුවෙකු ලෙස ඇතුල් වීමට ඉල්වා සිටීමට හොඳටම ඉඩ තිබිනි. එසේ නොකර වසර 6ක් ගතවී එම ඉල්ලීම කිරීම මෙම නඩුව ප්‍රමාද කිරීමේ අරමුණින් කරන ඉල්ලීමක් ලෙස පළිගැනීමට සිදුවේ. වෙනමම විත්තිකාරියක් ලෙස ඇතුල්වීමට ඉල්වා සිටින 7ඊ ලෙස දැනටම ආදේශ කරඇති විත්තිකාරිය වෙනුවෙන් ලිඛිත දේශනයේ සඳහන් කරඇති කරුනු සලකා බැලුමුත් සිවිල් විධාන සංග්‍රයේ 18 වගන්තියෙන් පාර්ෂවකරුවන් එකතු කිරීම සම්බන්ධයෙන් සලකා බැලීමේදී මෙම නඩුවේ සිදුවී ඇති කරුණු මුල් නඩුව පවරා ඇති පදනම මත මෙම 7ඊ විත්තිකාරියගේ ඉල්ලීමට ඉඩදිය නොහැකි බව කිව යුතුය....."*
>
> *[Podisingho, the first Defendant in this case, passed away in May 1985. Accordingly, his children 1-17 have been included as Defendants. This has been done as per the provisions of Section 398(1) of the Civil Procedure Code. Chandrawathie, now been substituted as the 7E Defendant, and currently seeking*

to intervene in the case, appeared in the courts and did not object to the substitution. Ashoka Chandrawathie appeared before the court as per the journal entry dated 17.01.86. She has been substituted as the 7E Defendant. Presently, she is seeking independent entry as a Defendant, claiming ownership of the property based on Deeds No. 10861 of 1964 and No. 12644 of 1967. By the date of her appearance in court on 17.01.1986, she must have been aware of the fact that the relevant deeds were available to assert these claims. At that juncture, on 17.01.1986, she had the opportunity to contest her substitution as the 7E Defendant and plead to be entered as a separate independent Defendant by presenting pertinent facts. Without doing so, the current application is being submitted after a lapse of six years and this can be construed as an application made to delay this case. Even though the facts presented in the written submission on behalf of the 7E Defendant are considered, it is evident that her application to be entered as a separate Defendant cannot be allowed based on the institution of the initial case when considering the procedure prescribed in law for the addition of parties under Section 18 of the Civil Procedure Code.]

Further, I'd like to once again underscore the provisions of the Civil Procedure Code (Amendment) Act, No. 17 of 2022, specifically the constraints upon the application of section 2 that allows for parties to prove documents without formal proof, which reads:

(2)(1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, it shall not be necessary to adduce formal proof of the execution or genuineness of any deed, or document which is required by law to be attested, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless–

(a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

(b) the court requires such proof:

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

[Emphasis added.]

Upon the passing of the original Defendant, his daughter, the 1(F) Substituted Defendant, was substituted in the room, place and shoes of the original Defendant, Podisingho.

In ***Careem vs. Sivasubramaniam and Another (2003) 2 SLR 197*** Udalagama J states that:

"In the event of the death of a party substitution would be for the purpose of representing the deceased solely for the purpose of prosecuting the action and nothing more."

As the original Defendant did not claim for a declaration of title to the corpus and instead claimed for his rights as a lessee under the agreement executed between himself and Halideen, the 1(F) Substituted Defendant cannot take up a position different to the original Defendant.

Further, in application of section 2 of the Civil Procedure Code (Amendment) Act, No. 17 of 2022, the provisions of this section are not applicable to any deed and/or

document not included in the pleadings of that party, and therefore I find that the 1(F) Substituted Defendant's deeds are not proved.

In light of these aforementioned facts, I answer the fourth question of law affirmatively. As the third and fourth questions of law have been answered in the affirmative, it follows that the fifth question of law is also answered in the affirmative.

In consideration of the totality of the above facts and submissions, the appeal is allowed with costs.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT