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

SC APPEAL 133 /2013
SC/HCCA/LA/No.244/2012
SP/HCCA/RAT/No.380/2007(F)
D.C. Embilipitiya Case No.6167/Land

Weerasinghe Arachchige Ramenike *alias*
Weerakkody Arachchige Rammenike,
Bulutota,
Sooriyakanda.

PLAINTIFF

Vs.

Peter Fernandolage John,
Kada Muduna,
Sooriyakanda.

DEFENDANT

AND

Peter Fernandolage John,
Kada Muduna,
Sooriyakanda.

DEFENDANT-APPELLANT

Vs.

Weerasinghe Arachchige Ramenike *alias*
Weerakkody Arachchige Rammenike,
Bulutota,
Sooriyakanda.

PLAINTIFF-RESPONDENT

AND BETWEEN

Weerasinghe Arachchige Ramenike *alias*
Weerakkody Arachchige Ramenike,
Bulutota,
Sooriyakanda.

PLAINTIFF-RESPONDENT-APPELLANT

Vs.

Peter Fernandolage John,
Kada Muduna,
Sooriyakanda.

DEFENDANT-APPELLANT-RESPONDENT

Before : Jayantha Jayasuriya, PC, CJ.
E. A. G. R. Amarasekara, J.
Arjuna Obeyesekere, J.

Counsel : Harsha Soza, PC with Anuruddha Dharmaratne for the Plaintiff – Respondent-Appellant.

Z.A. Ammen Hussain instructed by Hussain Ahamed for the Defendant-Appellant-Respondent

Argued On : 28.10.2021

Decided On : 30.10.2024

E A G R Amarasekara, J

The Plaintiff-Respondent-Petitioner (Hereinafter sometimes referred to as the Plaintiff) instituted the action No.6167/Land on 26.03.1998 at the Embilipitiya District Court against the Defendant Appellant Respondent (Hereinafter sometimes referred to as the Defendant) stating inter-alia that;

(a) The original owner of the land described in the schedule to the Plaint was the State,

(b) The State by a permit marked as P1 with the plaint which was issued in terms of section 19(1) of the Land Development Ordinance, conveyed the land described in the schedule "A" to the plaint to the Plaintiff. The Plaintiff also acquired prescriptive title due to the long period of possession from 1987,

(c) The Defendant in the year 1993 illegally entered into a portion of the said land and has commenced illegal possession of the portion of land described in the schedule "B" to the Plaint,

d) The Plaintiff, accordingly, got the said land surveyed before the Grama Niladari and prepared a plan marked P2 with the plaint.

Accordingly, the Plaintiff in the said plaint prayed for a declaration of title to the land described in schedule "A" to the plaint, ejectment of the Defendant and all others under him from the land described in Schedule "B" to the plaint, for damages in a sum of Rs.500/- per month from the Defendant until the Plaintiff's possession is restored and, costs.

However, this Court observes that the document P1 dated 24.07.1986, found in the brief is not a permit as described in the plaint but a grant issued in terms of section 19(4) of the Land Development Ordinance. The document found in the brief marked P2 cannot be identified as a plan made before the Grama Niladari after the alleged encroachment that took place after the said land was conveyed to her by P1, but a line drawing of a village plan made in 08.10.1985. The aforesaid plan is also referred to in the said document marked P1in describing the land.

The Defendant filed his Answer dated 11.05.2000 and took up the position that the Defendant was in possession of the land described in the Answer from 1969 and he received written permission from the State in 1972 for his possession. The Defendant has further stated that after obtaining government aid, he put up a house in the said land. The Defendant has also stated that in terms of the entries in the land ledger in the Kollonne, Divisional Secretariat, he has been issued with the permit No.75/1441(sometimes referred to as permit No.1441 in evidence and in this judgment) for the said land and thus, he is entitled to the said land. The Defendant alleged in his answer that the Plaintiff has sold her land in Sooriyakanda to her brother and is disputing the Defendant's land. While estimating his house and plantation to a value of Rs.650,000/-, the Defendant had prayed, inter alia, for a dismissal of the Plaintiff's action and for a declaration in favour of the Defendant in respect of the land described in the schedule to the Answer. The land described in the schedule to the Answer, when consider with the contents in the body of the Answer, aforesaid P2 and the given boundaries, is the same land described in the schedule A to the plaint. The Plaintiff claimed the land based on a grant marked P1 with plaint and Defendant claimed it based on a permit issued to him.

The Plaintiff filed her Replication dated 03.08.2000 and, inter alia, prayed for a dismissal of the Claim in Reconvention of the Defendant.

Originally the trial was commenced on 09.11.2000. However, it appears that owing to certain facts revealed during the evidence of the official witness called on behalf of the Defendant, the then learned District Judge had directed the said witness to hold an inquiry with regard to the issuance of the grant in relation to the disputed land and submit a report – vide page 101 of the brief. After the receipt of said report along with a plan made in that regard, considering the submissions made by the parties, the learned District Judge who succeeded the previous District Judge had decided to commence the trial afresh – vide page 105 of the brief.

The trial de novo was commenced on 04.11.2003. The Plaintiff raised issues 1 to 17, the Defendant raised issues 18 to 35, and the Plaintiff raised consequential issues 36 to 47. Further issues were raised during the recording of evidence. (The said issues are found at pages 106 to 116, 126, 153 and 154 of the appeal brief)

On behalf of the Plaintiff, the Plaintiff herself, a land development officer named Siriwardena Weerasinghe and one W.A. Wimalasena, a brother of the Plaintiff had given evidence. While giving evidence, the Plaintiff had marked documents "P1" to "P5" subject to proof. At the close of the Plaintiff's case, the Plaintiff has only read in evidence the documents marked P1, P2, P3 and P4 and the Defendant has reiterated the objections he raised earlier as to the proof of documents – vide page 175 of the brief. It appears that the Plaintiff's Counsel through inadvertence has forgotten to read P5 at the close of the Plaintiff's case.

P1 is the Swarna Boomi Deed in favour of one Weerakkodi Arachchige Ramenike of Buluthota, Sooriyakanda. In the caption of the Plaint, the Plaintiff has used her name as Weerasinghe Arachchige Ramenike *alias* Weerakkodi Arachchige Ramenike. However, the evidence led at the trial shows that she has not used or identified as Weerakkodi Arachchige Ramenike. The Plaintiff has admitted that no one call her by the name Weerakkodi Arachchige Ramenike[1]. Her position is that when the deed was issued, name has been wrongly mentioned- vide pages 132 and 133 of the brief. Thus, inclusion of the additional name Weerakkodi Arachchige Ramenike in the caption of the Plaint seems to be an attempt to name herself to suit the name in the deed marked P1. Further it can be seen that the deed marked P1 has been issued under the signature of the then President of the Country and the said signature appears to have been scored off by a crooked line. Even though the land development officer from the Kollonna Divisional Secretariat has stated in evidence that P1 was a lawful permit and it has not been cancelled (as said before P1 is not a permit but a Grant), this witness has admitted that he was not involved in preparing the deed and it was drafted by the Government Agent's office- vide page 167 of the brief. In the context of this case, he might have been referring to the Provincial Secretariat of Ratnapura. If so to prove P1, when it was marked subject to proof, one must have been called from the said office which was involved in preparing and issuing P1.

P3a to P3d are payment receipts issued to the Plaintiff for the permit No.78/1444 (sometimes referred to as permit No.1444 in evidence and in this judgment) and P3e is a payment receipt for fees for the issuance of the grant for the land 22/78 in Buluthota Division given to one W. A Rameneike. Lot 157 has been written on the top of the receipt by a pen. W.A. Ramenike had signed at the bottom of the receipt accepting the grant. The land development officer called on behalf of the Plaintiff has admitted these receipts are for the money paid by the Plaintiff in relation to a permit. As there does not appear any cross examination as to the inability of the said witness to state the said fact in evidence, it can be considered that P3a to P3e receipts have been proved by the Plaintiff. P4 is a letter written to the Divisional Secretary, Kollonne by the Provincial Commissioner of Land of the Sabaragamuwa Province. The aforesaid Land Development Officer from the Divisional Secretariat in his evidence has admitted this document. As such it is proved that it is a letter received by the Divisional Secretariat. As said before, P5 appears to be a plan surveyed and drawn by a government surveyor and approved by the Superintendent of Surveys of Ratnapura. Even though this plan was marked subject to

[1] Page 134 of the brief

proof, as said before the Counsel for the Plaintiff at the close of Plaintiff's case has not read this in evidence apparently due to inadvertence. The Defendant has reiterated his objections made to the documents. The Plaintiff has not called any witness, namely the surveyor who surveyed and drew it or any officer involved in approving it from the Government Survey Department, Ratnapura to prove the said plan.

However, this Court observes that there was no real dispute as to the identity of the corpus involved in this action. As per the description in the schedule to the Answer, it is very much the same land described in the schedule A to the Plaint. As per the body of the Answer, in answering the averments in the plaint, the Defendant has not denied the land described in the plaint but has claimed it on a permit and has also averred how he has improved it by putting up a house worth Rs.300,000/- and plantation worth Rs.350,000/- to claim damages, in case the Plaintiff succeeds. Thus, there seems to have no contest to say that the Defendant is occupying a different land as per the pleadings itself. The case between the parties as per the pleadings is that the Plaintiff claims the Lot 157 of the Springwood estate on a permit marked P1 (which is in fact a Grant) and the Defendant claims the same based on a permit No.75/1441. This Court observes that there is a discrepancy between the schedule A of the plaint which describes the main land and schedule B of the plaint which describes the alleged encroached portion with regard to the extent as the encroached portion is given a bigger extent. However, when looking at the description of boundaries of both schedules it is apparent that it has to be a mistake and schedule B should be lesser in extent.

Thus, if the Plaintiff could prove that the grant he has is lawful and the Defendant was a trespasser, he could have maintained a successful *rei vindicatio* action. The plan marked P5 and its report mentioned above, which was marked subject to proof, only show the ground situation on the land namely, the exact portion the Defendant was occupying, details relating to plantations and buildings etc. at the time of the said survey. Not proving P5 and its report may not have caused much harm if the Plaintiff was able to prove his cause of action for which he needs to prove that he is the lawful title holder and the Defendant is in possession without a lawful ground. It is true that in a *rei vindicatio* action, the Plaintiff must prove his case and if it is not proved, the Defendant is not bound to prove anything. Even though P5 was marked subject to proof, as per the case record it has to be considered that the Defendant waived such objection prior to the Judgment since while giving his evidence, the Defendant has admitted it in his evidence-in-chief itself- vide page 185 and 186 of the brief. What is admitted by parties need not be proved. This admission shows that his original objection to mark P5 subject to proof is either an unscrupulous act or the relevant lawyer has acted contrary to his instructions.

As said before, the Plaintiff has not called any witness from the Authority which prepared and took steps to issue P1 when it had been marked in evidence subject to proof. Subject to that, even though there is a difference between the Plaintiff's true name which is Weerasinghe Arachchige Ramenika and the name in P1 which is Weerakkodi Arachchige Ramenika the Court could have assumed that the name difference was a mistake, if it was a genuine grant, as it was produced from the custody of the Plaintiff. In the same manner, if it was a genuine grant, the Court could have assumed that, even though the signature of the President on P1 appears to have been scored off, it is the placement of the correct signature as a true sample of the signature of the President has not been tendered in evidence to show that what is on P1 is not the signature of the President or what is on P1 has not been scored off even though it appears as scored off. The land development officer of the Divisional Secretariat of Kollonne who gave

evidence on behalf of the Plaintiff has stated that P1 is a lawful document in his evidence-in-chief [2] but, as he has stated that it was a one prepared by the Government Agent's office[3] (May be referring to the Provincial Secretariat), it is questionable whether he is a suitable witness to affirm the genuineness of P1. It must be noted that this witness has also admitted that the signature of the President has been stricken off.[4] If a witness from the relevant office which prepared and took steps to issue P1 was called to give evidence, he could have revealed and clarified whether P1 was a genuine document and the matters relating to the aforesaid signature of the President. Even if it is considered for the sake of argument that officer from Divisional Secretariat, Kollonne is sufficient to prove P1 and/or that it can be presumed that all official acts have been duly performed and P1 need not be further proved, following facts revealed in evidence stand against the proof of plaintiff's cause of action.

As per the evidence of the said land development officer, prior to issuing the grant, Weerakkodi Arachchige Ramenike had been issued with a permit No.78/1448 and the Defendant had been issued with a permit No.1441 marked V3. In fact, V3 is the ledger entry relating to the permit issued to the Defendant. Said witness admits that the land relevant to the matter at hand is the land given on permit to the Defendant- vide page 150 and 151 of the brief. However, in the aforesaid Grant P1, which was produced in evidence by the Plaintiff, Lot 157, which is the land relevant to this matter, has been given to Weerakkodi Arachchige Ramenike. The said land officer while giving evidence has stated that it may be an error and it can be cured by the Land Commissioner and there has been an attempt to settle the dispute at that level but, since an action has been filed that process has been stayed and not concluded yet- vide pages 152 and 153 of the brief.

V2 and V2a have been marked subject to proof through Plaintiff during her cross examination by the Defendant[5]. Out of them V2a, is a statement made by the Plaintiff herself and she is the Author of that statement and V2, is a report made by the Divisional Secretary, Kollonne. It appears that at the close of the Defendant's case, the objection has been reiterated- vide J.E dated 14.08.2006 at page 34 of the brief. However, V2a has been marked through the Plaintiff herself and the Plaintiff's witness, aforesaid land development officer also has admitted it as the statement made by the Plaintiff – vide page 155 of the brief. The Defendant's witness, Sirisena Manawadu, retired Divisional Secretary has given evidence regarding the making of the said report marked V2 and the making of the statement marked V2a by the Plaintiff- vide pages 177 and 178 of the brief. Thus, two documents marked V2 and V2a have been proved. In V2a, the Plaintiff has admitted that the Defendant, Peter Fernandolage John has built a house in the portion of land the Defendant seized and occupied, which was given to the Defendant by the State and, the Defendant had planted tea in that land. What she has asked in her statement is to give the Defendant the part of the land where he has built his house and to give her the balance portion of the land. What is important is that the Plaintiff in the aforesaid statement has admitted that the Defendant has built the house in the land which was given to the Defendant by the State. Even the Plaintiff while giving evidence has admitted that the Defendant resides in the land given to him by the State and she has no objection to it. However, she attempts to state that she resides in her land- vide pages 139 and 140 of the brief. If the

[2] Page 153 of the brief
[3] Page 167 of the brief
[4] Page 159 of the brief
[5] Page 138 of the brief.

Defendant is in a land given to him by the State and she has no objection to it, the Defendant cannot be a trespasser. Even though, as explained before, the land development officer called by the Plaintiff has given evidence that there apparently had occurred a mistake in issuing the grant. However, while admitting that a permit has been issued to the Defendant as per the ledger entry marked V3 for the land in issue[6], on certain occasions in his re-examination has stated that he cannot say that V3 is relevant to Lot 157 and the Defendant has not been given a permit to it- vide pages 160 to 164 and 166 of the brief. However, the said witness in his cross examination has clearly said that the permit No.1441 was given to the Defendant and it relates to the land in issue, namely Lot 157- vide pages 151,156, and that permit No 1448 was issued to Weerakkody Arachchige Ramenike and lot allotted to her is Lot No.138- vide pages 150,156,157, and 158. Lot 138 is not the lot in issue in the matter at hand. However, the Grant marked P1 shows that lot No. 157 has been given to the said Weerakkodi Arachchige Ramenike when the grant was issued.

The documents V3 to V7 were marked during the cross examination of the said land development officer, the witness called by the Plaintiff. V3 is the entry in the land ledger mentioned above. These documents were not marked subject to proof. V4, V5 and V6 referred to at pages 155 and 156 of the brief are some receipts for payments including acreage tax. V5 dated 13.06.74 clearly shows that the payment was made by the Defendant for the permit No.75/1441. In contrast to this, P3A to P3D receipts show that prior to the issuance of Grant marked P1, the Plaintiff was paying on account of the permit No.78/1444. V7 contains a plan and its overleaf shows that the lot allocated to the Plaintiff was Lot 138.

The Plaintiff's brother, W.A. Wimalasena, while giving evidence attempts to indicate that the Defendant resides in a different land which is adjoining to the land in issue- vide pages 170 and 172 of the brief. However, plan marked P5 at page 220 of the brief, which was admitted by the Defendant as aforesaid, clearly shows that Defendant's buildings are situated within Lot 157. In a very small portion identified as 'C', there appears to be cinamon plantation done by the Plaintiff's father, W.A.Sirisena. However, separated by a roadway identified as 'B', bigger part of Lot 157 has been identified as 'A' in the said plan marked P5. The Defendant's plantation and buildings have been found within the said portion marked 'A'. Thus, he is not in possession of an adjoining land as stated by the witness Wimalasena, but in the bigger portion of Lot 157 which is the subject matter of the matter at hand. However, it must be noted that even though the report of the said plan described said plantations by the Plaintiff's father and the Defendant as unauthorized plantation, even the land development officer called by the Plaintiff to give evidence has stated that the Defendant had been issued a permit No 1441 for the land in issue. Later on, a grant has been issued to the Plaintiff for the same lot. No evidence is there to say that the permit issued to the Defendant was duly cancelled.

In the case of **Kassim Hameedu Lebbe Vs Samoon** 71 NLR 452, the Plaintiff armed with a permit, sought to evict the Defendant who possessed and had improved the land on implied undertaking by the crown to issue a permit. The former Supreme Court held inter alia that where a person is given an implied undertaking by the Crown that he would be issued a permit within a reasonable time in respect of an allotment of Crown land under the Land Development Ordinance, if he has made improvements on the land in consequence of the implied

[6] Pages 151,161 of the brief

undertaking, his prospective permit is not liable to be cancelled in favour of another person. Furthermore, Alles J held;

"Indeed, in my view, the permit that the Plaintiff has successfully obtained in this case is nothing less than a worthless piece of paper"-at page 454 of the said judgment

Hence, Alles J concluded in that case that the permit obtained in contrary to the accepted procedure of Land Development Ordinance, tainted with irregularity does not give valid title.

It appears to be the policy of Land Development Ordinance to issue a new permit or grant, earlier permit to be necessarily cancelled – vide S.C. Appeal No.119/2010 **Wimala Herath Vs M.D.G. Kamalawathi** reported in (2013) 2 Sri L R 60.

In the matter at hand, it appears that the grant was issued when in fact a permit was issued to the Defendant as per the entries in V3, and without canceling it.

The Defendant giving evidence has stated that he has been residing in the Lot 157 from 1968, built a temporary house in 1968, and thereafter put up a permanent house in 1975. He further has stated that as per the entries in the Divisional Secretariat and the ledger entry marked V3 he is the one who is entitled to the permit No. is 75/1441. He has also stated that he was given aid by the Government Agent's office to build his house on this land. A document which is also marked as V5 found at page 313 of the brief has been submitted in evidence in this regard. The said V5 is a document relating to paying of financial aid to permit holders and said document contains the name of the Defendant and the permit number which is 75/1441. This document supports the Defendant's position that he is a permit holder and he put up a house with the aid given by the government agent's office. The Defendant has referred to the aforesaid documents marked V3 to V6 to show that he has made various payments such as acreage tax. The Defendant, while giving evidence, has admitted that the Divisional Secretary Manawadu held an inquiry on a commission issued by the District Court and tendered the report marked V2. As mentioned before, the Defendant has further admitted the plan marked P5 sent along with the said report. Even though he is the permit holder as per the ledger entry marked V3, the answers given in cross examination show that the Defendant has not been physically given a permit using the prescribed form. The Defendant wonders why the grant was given to the Plaintiff without giving him a permit in its physical form.

Sirisena Manawadu, retired Divisional Secretary has given evidence and confirmed that he prepared the report marked V2 in terms of the direction given by the District Court, which was marked through the Plaintiff when she was giving evidence. In that regard, he has also stated that he took steps to make the plan marked P5 and its report through a government surveyor. He has further confirmed that the statements marked V2a were made by the Plaintiff and the Defendant. The V2 report made by the said witness indicates that the said witness on the direction of the Court perused what was available in the office and also did a field observation. The report says originally the Lot 157 was given to one Dinoris Hamy. After cancelling the said permit it has been given to the Defendant on 13.10.1972 on the permit No.1441. As per the said report, the Plaintiff had been given a land under the permit No.1444 and now her brother resides in the land relevant to the said permit given to her. The report says that during the field visit the Plaintiff was not able to show the boundaries but the boundaries shown by the Defendant corresponded with the boundaries of the plan. This report was originally marked subject to proof when the Plaintiff gave evidence. When the author of the report, Sirisena

Manawadu, while giving evidence, confirmed that he made it, and authenticated its genuineness, no challenge has been made to the contents of it through the cross examination of the said witness. In my view, the direction made by the District Court to investigate and report[7] which resulted in making V2 falls within the scope of section 428 of the Civil procedure Code. In **Ariyaratne Vs Laksiri Fernando** (2004) 1 Sri L R 184, Wimalachandra J held that in his view, "local investigation" mentioned in section 428 is not confined to an investigation with regard to a place or premises. On the other hand, a Court has inherent powers to make an order to call such report if it was necessary for the ends of justice or to prevent abuse of the process of the Court. When the order was issued in the matter at hand, there was an ambiguity whether the Court's power was going to be issued to evict a permit holder in the guise of evicting a trespasser and whether there was an error in the issuance of the grant. Thus, there were matters to be elucidated and a need to prevent any injustice being caused.

In terms of the section 2 of the Land Development Ordinance as amended, a 'permit' means a permit for the occupation of State Lands issued under chapter IV of the Land Development Ordinance and a "permit holder' means any person to whom a permit is issued and includes a person who is in occupation of any land alienated to him on a permit although no permit has actually been issued to him. Thus, it is clear that a document termed as a permit need not be physically handed over to a person for him to be a permit holder. If a valid decision is taken and it is entered in the relevant ledgers, it is sufficient for that person to be recognized as the permit holder. The official witnesses called by the Plaintiff and the Defendant has placed sufficient evidence to establish on balance of probability that the Defendant became a permit holder to Lot 157 many years prior to the issuance of the grant to the Plaintiff. Even the Plaintiff's witness, land development officer has admitted that the Defendant was the holder of permit No.1441 and the relevant land is Lot 157. V3 ledger entry confirms that it is the Defendant who is the permit holder of the permit No.1441. Generally, a permit is given under the Land Development Ordinance anticipating a grant to be given in the future. As stated in **B.R.Chandrasena Vs A.M.Lokubanda SC Appeal No. 20/2010** S.C. minuets 18.12.2020, a permit holder gets his right to possess through a statutorily proclaimed process and he is not a mere licensee whose right to possess can be terminated by giving notice. There is a statutorily proclaimed procedure to cancel the permit where the authorities have to act in terms of chapter VIII of the Land Development Ordinance. Until such process is taken place, the permit holder has the right to possess. It is questionable how the grant marked P1 was issued without cancelling the permit No.1441 which was in the name of the Defendant for the same Lot No.157. It makes it more suspicious due to the difference in the Plaintiff's actual name and the name in the grant as well as the apparent scoring off of the President's signature. Even if it is considered that P1 is valid till it is invalidated through a legal action or administrative process, the cause of action stated in the plaint cannot be established as the Defendant cannot be considered as a trespasser or one who encroached the Plaintiff's land in 1993 after the Plaintiff was given the grant. The Defendant is in possession on the strength of the permit in his name given by the predecessor in title of the Plaintiff's grant, namely the State, prior to the issuance of the grant from about 1968. It must be noted that in terms of the section 2 of the Land Development Ordinance as amended by Act No 27 of 1981, a permit holder can be considered as the owner if he has paid all the sums which he is required to pay under section 19(2) of the said Ordinance. Though it was not revealed whether the Defendant has paid all the said sums,

[7] Page 101 of the brief

it is the duty of the Plaintiff to prove his title and the cause of action. As explained before, the Plaintiff has clearly failed in proving his cause of action on balance of probability.

What has been discussed above, on preponderance of evidence establishes that;

- Originally the Plaintiff held the permit No. 1444 and Lot 138 was the land allocated to her.
- The Defendant is the holder of permit No.1441 which was confirmed by ledger entry marked V3.
- As per the evidence led, the Lot 157 which is the subject matter of the matter at hand is the land given to the Defendant on the aforesaid permit No.1441.
- The Defendant was also given aid by the Authorities to build on the land given on said permit.
- As there is no evidence to show that the said permit given to the Defendant is cancelled, it is still valid.
- The Plaintiff has been given a grant to the same Lot 157 without cancelling the permit given to the Plaintiff.
- As the Defendant is entitled to possess until the permit given in his name is cancelled, he is not a trespasser and as such the cause of action of the Plaintiff is not proved. Thus, the Plaintiff's case should have been failed and dismissed by the learned District Judge.

However, the learned District Judge of Embilipitiya delivered his judgment on 07.11.2006 and entered Judgment in favour of the Plaintiff and granted the reliefs of declaration of title and eviction of the Defendant. The learned District Judge appears to have rejected what was revealed from the report tendered to court by the retired Divisional Secretary Manawadu stating that it would amount to decision making being given to an external institution when it was the task of the Court. It is true that the decision making had to be done by the Court but it does not hinder the Court considering the facts revealed by such a report. It is pertinent to note that this report was commissioned by the Court itself and the Plaintiff had not objected to calling of such report. Though it was marked subject to proof, the author was summoned and he affirmed that it was made by him but no challenge was made to the truthfulness of the contents through cross examination by the Plaintiff. Even if the report is not considered, V3 ledger entry has been marked and the Plaintiff's witness, the land development officer, has admitted the permit referred to in V3 in favour of the Defendant is for the Lot 157 which is the land in issue in the matter at hand but the land which was allotted for the Plaintiff on a permit was Lot 138. The learned District Judge has stressed that the Defendant failed to submit any permit or written authority to establish his entitlement. As explained above, entry in the ledger marked V3 proves that the Defendant had a permit and there were other documents that referred to his permit as mentioned above. As mentioned above, a permit holder need not actually issued with a permit in terms of the interpretation given to the term 'permit holder'.

Thus, the learned District Judge of Embilipitiya clearly erred in evaluating evidence and deciding in favour of the Plaintiff to grant relief as mentioned above.

Being aggrieved by the said Judgment of the learned District Judge, the Defendant preferred an appeal to the Provincial High Court Holden in Ratnapura which hears Civil Appeals.

The learned High Court Judges delivered their judgment on 22.05.2012 and allowed the appeal, and set aside the Judgment of the District Court. In the said Judgment the learned High Court

Judges have, inter alia, held that the **Plaintiff has failed to identify the subject matter of the action through a commission issued in that regard and** the Plaintiff has also **failed to prove Plan** marked "P5". On those grounds, the said Judgment of the District Court has been set aside. However, as mentioned above, except for the discrepancy with regard to the extent of the land described in schedule A to the plaint and schedule B to the plaint which has to be a part of the land described in schedule A, there was no true contest with regard to the land claimed by the Plaintiff and the land claimed by the Defendant. The Plaintiff claimed it on a grant and the Defendant claimed it on a permit. On the other hand, grant marked P1 had an attachment of a Plan No.2226 which depicted the Lot 157 which was the land in issue in the matter at hand. Plan marked P5 showed the situation on the ground and any objection made to it has to be considered as waived before the judgment by the conduct of the Plaintiff as aforesaid, since the Plaintiff himself has admitted it in his evidence.

Being aggrieved by the said Judgment of the High Court dated 22.05.2012, the Plaintiff sought to invoke the jurisdiction of this Court by way of leave to appeal and this Court has granted leave on four questions of law which are mentioned and answered below.

Question:

(a) Have the learned Judges of the High Court erred in law by failing to appreciate and consider that the Plaintiff was seeking a declaration of title to a specific portion of land depicted as Lot 157 in Village Plan 930 prepared by the Surveyor General, in terms of a Grant issued under Section 19(4) of the Land Development Ordinance?

Answer:

No, it does not appear that the learned High Court Judges failed to appreciate and consider that the Plaintiff was seeking a declaration of title to a specific portion of land depicted as Lot 157 as aforesaid but were of the view it has to be physically identified on the ground. However, as said above there was no real contest as to the identity of the land and P5 proved the situation on the ground.

Question:

(b) Have the learned Judges of the High Court erred in law by failing to appreciate and consider that the said Grant "**P1**" read together with the attached Plan No. 2226 "**P2**" clearly shows that the Plaintiff's land is bounded on all four sides by surveyed and identified allotments of land, and the said land has a specifically measurable extent, and that therefore there is no difficulty in identifying the said land?

Answer:

Yes, as said before there was no real contest as to the identity of the corpus.

Question:

(c) Have the learned Judges of the High Court erred in law by failing to appreciate and consider that when the Defendant has specifically admitted the Plan marked "P5" no further proof of it is necessary?

Answer:

Yes.

Question:

(d) Have the learned Judges of the High Court erred in law by arriving at the finding that the Plaintiff has failed to identify the land in dispute, and by setting aside the said Judgment of the District Court?

Answer:

Yes, they erred in law arriving at a finding that the Plaintiff has failed to identify the land in dispute and setting aside the District Court judgment on that ground but the District Court Judgment should have been set aside on the grounds explained above in this judgment, especially not proving the cause of action of the Plaintiff. Thus, the conclusion of the learned High Court judges to set aside the District Court's judgment has to be affirmed as it should be the correct decision for the reasons given above in this judgment. The High Court Judges have failed to see that the cause of action of the Plaintiff has not been proved due to other grounds as explained above.

Among other things in the prayer to the petition, the Plaintiff has prayed to set aside the High Court judgment and affirm the District Court judgment or to enter judgment in favour of the Plaintiff. As for the reasons given in this judgment, District Court Judgment cannot be affirmed and a judgment in favour of the Plaintiff cannot be entered. For the same reasons, the judgment of the High Court cannot be totally set aside as the decision to set aside the judgment of the District Court has to be affirmed but, reasons given in the said High Court judgment for such setting aside of the District Court judgment have to stand amended in accordance with reasons given in this judgment.

Hence, this appeal for the setting aside of the High Court Judgment and affirming of the District Court Judgment or entering a judgment in favour of the Plaintiff is dismissed but, as for the reasons given above the grounds for setting aside the District Court Judgment as given in the High Court Judgment should stand amended on par with the reasons given in this judgment.

Hence, the Appeal of the Plaintiff is dismissed. No Costs.

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Judge of the Supreme Court

Hon. Jayantha Jayasuriya PC, CJ

I agree.

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The Chief Justice

Arjuna Obeyesekere J

I agree.

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Judge of the Supreme Court