IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal against the judgment delivered by the Civil Appellate High Court of Kegalle.

Kehelwattage Podi Singho Sunil
Premawardane,
Peramadulla,
Udumulla via Kadugannawa.

Plaintiff

Vs

SC Appeal 161/2016
SC/HCCA/LA 03/2016
SP/HCCA/KAG/81/2013 (F)
D.C. Kegalle 26203/P

1. Bibile Manage Chandrawathy,
   Peramadulla, Udumulla via
   Kadugannawa.

2. Kamal Gamini Premawardane,
   Peramadulla, Udumulla via
   Kadugannawa.

3. Agampodige Jinadasa,
   Waliwatura, Udumulla via
   Kadugannawa.

3(a) J. P Gnawathy,
   Pathahamula Hena,
   Udumulla via Kadugannawa.

4. Kehelwatte Gedara Gunadasa,
   Peramadulla, Udumulla.

5. Kehelwatta Gedara Wijepala,
   Peramadulla, Udumulla.

6. Kehelwattalage Jemis,
   Peramadulla, Udumulla.

6(a) Kehelwattalage Somasiri,
Peramadulla, Udumulla.

7. Suduhakuralage Podi Amma,
Peremadulla, Udumulla,

7(a) Kehelwatte Gedara Gunadasa,
Peremadulla, Udumulla.

8. Hondamuni Arachilage Podimenike,
Udumulla via Kadugannawa.

Defendants

AND BETWEEN

Kehelwattege Podi Singho Sunil
Premawardane,
Peramadulla,
Udumulla via Kadugannawa.

Plaintiff- Appellant

Vs

1. Bibile Manage Chandrawathy,
Peramadulla, Udumulla via
Kadugannawa.

2. Kamal Gamini Premawardane,
Premadulla, Udumulla via
Kadugannawa.

3. Agampodige Jinadasa,
Waliwatura, Udumulla via
Kadugannawa.

3(a) J. P Gnawathy,
Pathahamula Hena,
Udumulla via Kadugannawa.

4. Kehelwatte Gedara Gunadasa,
Peramadulla, Udumulla.

5. Kehelwatte Gedara Wijepala,
Peramadulla, Udumulla.

6. Kehelwattalage Jemis,
Peramadulla, Udumulla.

6(a) Kehelwattalage Somasiri,
Peramadulla, Udumulla.

7. Suduhakuralage Podi Amma,
Peramadulla, Udumulla,

7(a) Kehelwatte Gedara Gunadasa,
Peremadulla, Udumulla.

8. Hondamuni Arachilage Podimenike,
Udumulla via Kadugannawa.

Defendant- Respondents

AND NOW BETWEEN

4. Kehelwatte Gedara Gunadasa,
Peremadulla, Udumulla.

5. Kehelwatte Gedara Wijepala,
Peramadulla, Udumulla.

6. Kehelwattalage Jemis,
Peramadulla, Udumulla

6(a) Kehelwattalage Somasiri,
Peramadulla, Udumulla.

7. Suduhakurulage Podi Amma,
Peramadulla, Udumulla.

7(a) Kehelwatte Gedara Gunadasa,
Peramadulla, Udumulla.

4,5,6(a) and 7(a) Defendant-Respondent-Petitioners/Appellants

Vs

Kehelwattege Podi Singho Sunil Permawardane,
Peramadulla, Udumulla via Kadugannawa

Plaintiff- Appellant- Respondent

1. Bibile Manage Chandrawathy,
   Peramadulla, Udumulla via Kadugannawa.

2. Kamal Gamini Premawardane,
   Peramadulla, Udumulla via Kadugannawa.

3. Agampodige Jinadasa,
   Waliwatura, Udumulla via Kadugannawa.

3(a) J. P Gnawathy,
   Pathahamulla Hena,
   Udumulla via, Kadugannawa.

8. Hondamuni Arachilage Podimenike,
   Udumulla via Kadugannawa.

1, 2, 3(a), 8 Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, PC. J.,
L.T.B. Dehideniya, J and
Murdu N.B.Fernando, PC.J.

Counsel: D. Jayasinghe for the 4th to 7th Defendant- Respondent- Appellants.
P. Senanayake for the Plaintiff-Appellant-Respondent.

Argued on: 01.02.2021

Decided on: 12.01.2023

Murdu N.B. Fernando, PC. J.,

By this appeal, the 4th to 7th defendant-respondent-appellants ("the 4th to 7th defendants / appellants") impugned the judgement dated 01st December, 2015 pronounced by the Civil Appellate High Court of Kegalle. ("the High Court")

This Court on 29th August, 2016 granted leave to appeal to the 4th to 7th defendants, on the following two questions of law.

1. Did the High Court err in holding that the plaintiff has established the identity of the land shown to be partitioned?
2. Did the High Court err in failing to consider the prescriptive title of lots 2,3, and 4 claimed by the 4th to 7th defendants?

The matter in issue in this appeal pertains to a partitioning of a land called 'Getagoyawe Hena' situated at Weliwathura in the Kegalle District.

The plaintiff-appellant-respondent ("the plaintiff / respondent") initiated an action in the District Court of Kegalle in May 1994 citing five defendants, the 1st and 2nd defendants being his wife and son and praying, that the land more fully described in the plaint be partitioned among the plaintiff and the 1st and 2nd defendants in accordance with the Partition Law.

The plaintiff pleaded that the 3rd to 5th defendants were trespassers of the land to be partitioned. The plaintiff further moved for an enjoining order and an interim injunction against the 3rd defendant, restraining him from building on the land in issue and interfering with the plaintiff's proprietary rights. The District Court upon hearing all parties, granted the interim relief as prayed for by the plaintiff against the 3rd defendant.

Thereafter, commissions were issued and the 6th, 7th and 8th defendants (being the parents of the 4th and 5th defendants) intervened to this action and the matter proceeded to trial, based upon 34 points of contention.

The corpus in issue was described in the schedule to the plaint as *'2 palas of paddy sowing extent'* and the commission issued by court referred to the land as 'Getagoyawe Hena' in extent 1A 1R and 16.4P comprising of 4 lots bearing numbers **1, 2, 3** and **4**.

The plaintiff and the 1st and 2nd defendants claimed all 4 lots of 'Getagoyawe Hena' and moved that it be partitioned upon the share allotment of 14/16, 1/16 and 1/16.

The 3rd defendant claimed proprietory rights exclusively to lot **1** and the 4th to 7th defendants claimed lots **2,3,4** and specifically the buildings and plantations standing thereon. The claims of the 3rd and the 4th to 7th defendants were based upon title deeds, which referred to a land called and named as 'Deekiriyawatte Kumbukke Hena'. It is observed that the land depicted in the plaint is not 'Deekiriyawatte Kumbukke Hena' but 'Getagoyawe Hena'.

On 29th January, 2013 the District Court dismissed the plaintiff's action primarily upon the ground that the corpus sought to be partitioned had not been properly identified.

Being aggrieved by the said judgement, the plaintiff appealed to the High Court and the High Court set aside the District Court judgement and entered decree in favour of the plaintiff and permitted the partitioning of the corpus as prayed for by the plaintiff.

The 3rd defendant (i.e., the principal defendant) did not appeal against the judgement of the High Court to this Court. Thus, the 3rd defendant did not challenge the aforesaid High Court judgement which permitted the partitioning of the corpus among the plaintiff and the 1st and 2nd defendants.

Only the 4th to 7th defendants came before this Court and obtained leave of court and that is the instant appeal that this Court is now called upon to adjudicate. The appellants are challenging the judgement of the High Court on two grounds, namely the identity of the corpus and the appellants right and title to lots **2, 3** and **4** of the corpus based upon deeds and prescription.

Regarding the identity of the corpus, the submissions of the appellants were twofold. *Firstly*, the extent and boundaries of the corpus are not accurate and the surveyed land is called Deekiriyawatte Kumbukke Hena (based on the title deeds 6V1 and 6V2 produced by the appellants) and not Getagoyawe Hena as claimed by the plaintiff. *Secondly*, that the burden of proving the identity of the corpus lies with the plaintiff.

Whilst there is no doubt that the burden of proving the identity of the corpus is with the plaintiff, as succinctly observed by Sansoni, J. in **Jayasuriya v. Ubaid (1957) 61 NLR 352**, there is a duty cast on the trial judge to satisfy himself as to the identity of the land sought to be partitioned in a partition action.

In the instant matter, the finding of the District Judge was that the plaintiff has failed to prove to the satisfaction of court the identity of the corpus.

However, in appeal the High Court reversed the said finding. Whilst the High Court categorically remarked that an appellate court generally does not interfere with the findings of the trial court and does so only on very rare occasions and for reasons stated, that in the instant case, the appellate court had to examine the factual matrix, since the trial judge had failed to investigate the title of the plaintiff and moreover the identity of the corpus.

It is observed that the learned judges of the High Court have been mindful of the statutory duty of a trial judge with regard to evaluating and assessing evidence, when it embarked on a journey to investigate the title and identity of the corpus.

Thus, this Court cannot falter the conduct of the learned judges of the High Court with regard to evaluation of evidence led at the trial and be satisfied of the title and identity of the corpus.

This Court further observes that the appellants did not challenge the judgement of the High Court *per se* before us. The appellants did not attack or found fault with the findings of the learned judges of the High Court in evaluating the evidence led at the trial, specifically regarding the identity, the name, the metes and bounds i.e., the four corners of the corpus. In the submissions before this Court, the appellants merely re-iterated the position taken up at the trial and did not even refer to the findings of the District Court, which too the appellants now move to set aside.

The High Court considered the identity of the corpus, specifically regarding its metes and bounds, extent and given name, in much detail and in comparison with title deeds and all other plans and documents produced and marked at the trial by all the parties, including the 4th to 7th defendants. I do not wish to refer to or appraise and or evaluate the said details, especially the findings with regard to the corpus and its four boundaries in this appeal, except to state that the High Court has considered and analysed the title deeds of the appellants, *viz* 6V1 and 6V2 and held that out of the 4 boundaries, 3 boundaries namely, the east, the south and the west referred to in the said title deeds do not correspond with the corpus.

It is further significant that the High Court upheld the findings of the trial court regarding lot **3** of the court commissioner's plan and held that it is not Deekiriyawe Watta as contended by the 4th to 7th defendants *i.e.,* the present appellants. The said finding was based upon the evidence given, deeds, plans and other documents marked and produced at the instant trial.

In coming to its finding, it is observed that the learned Judges of the High Court heavily relied upon a plan produced at the trial, which relates to another partition case where final decree had already been entered. In the said case, where the plaintiff and the 3rd to 7th defendants were also parties, the 3rd to 7th defendants have categorically asserted that Deekiriyawe Watta, lies to the '*east of the present corpus*', which the plaintiff pleaded as Getagoyawe Hena. Based on the contention of the said defendants, Deekiriyawe Watta lies to the east of Getagoyawe Hena and the High Court had come to a finding for reasons elicited, that the 3rd to 7th defendants cannot take a different position and or challenge or contend in the appeal before it, that Deekiriyawe Watta comprise of Getagoyawe Hena or a part of Getagoyawe Hena, the named corpus.

The instant corpus Getagoyawe Hena, consists of four lots, bearing numbers **1, 2, 3** and **4** based on the court commissioner's plan. Lots **1** and **3** are larger in extent of land compared to

lots **2** and **4**. There is no dispute between the appellants and the respondent regarding lot **1**. In fact, lot **1** comprising in extent 29.6P is not claimed by the appellants. It was only claimed by the 3rd defendant who did not come before this Court. The trial court and the High Court as discussed above, have categorically held that lot **3** [comprising in extent 15.7P] is not Deekiriyawe Watta, the land claimed by the appellants based upon its title deeds 6V1 and 6V2.This finding of the High Court is also not challenged by the appellants.

Thus, the dispute narrows down to lots **2** and **4**, the smaller portions of lands which are not contiguous lots but depicted in the two corners of the corpus, comprising of 3.3P and 7.8P of land. The High Court has categorically held that the boundaries in lots **2** and **4** do not fall within the metes and bounds referred to in the appellant's title deeds 6V1 and 6V2 and therefore had come to the finding, based upon the said title deeds the 4th to 7th defendants cannot claim title to lots **2** and **4** of the corpus. This finding too, was not challenged by the appellants before this Court.

In the aforesaid circumstances, this Court sees no merit in the contention of the appellants regarding the failure of the High Court to identify the corpus, based upon the given name and the specified boundaries. We observe that the identification of the property to be partitioned had been properly done by the High Court adhering to principles laid down in judicial precedent. We therefore see no reason to interfere with the judgement of the High Court on the said ground.

The appellants also challenged the identity of the land based upon the varying extent depicted in the plaint and the court commissioner's plan. Regarding the difference of the extent, the High Court held that the extent of land could vary between the schedule to the plaint and the court commissioner's plan, since the plaint gives the extent as *"2 palas of paddy sowing extent"* and the court commissioner's plan gives the extent as 1A 1R 16.4P. i.e., two different modes of measurement.

In coming to the said finding the learned judges of the High Court, relied upon the case of **Ratnayake and others v. Kumarihamy and others** reported in **2002 (1) Sri LR 65.**

In the said case, Weerasuriya, J. (President, Court of Appeal as he was then), referred to the ancient traditional method of measurement of land and exhaustively quoted from **Ceylon Law Recorder, Vol XXII page** xlvi and observed;

> *"The system of land measure computed according to the extent of land required to sow with paddy or kurakkan varies due to the interaction of several factors. The amount of seed required could vary according to the varying degrees of the soil, the size and quality of the grain and the peculiar qualities of the sower. In the circumstances it is difficult to correlate sowing extent accurately by reference to surface areas."* (page 68)

The aforesaid judgement of the Court of Appeal was upheld by the Supreme Court. **See: Ratnayake and others v. Kumarihamy and others** reported at **2005 (1) Sri LR 303.**

In the Supreme Court judgement Udalagama J., whilst reiterating the above observations of the President of the Court of Appeal went onto hold,

> *"that land measures computed on the basis of land required to be sown with kurakkan vary from district to district depending on the fertility of soil and quality of grain and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus, there cannot be a definite basis for the contention that 1 laha sowing extent, be it kurakkan or paddy would be equivalent to 1 acre."* (page 307)

Thus, based upon the above dicta, this Court sees no merit in the submission of the appellants regarding the variation of extent given in the schedule to the plaint and the extent depicted in the court commissioner's plan. We are of the view, that the ancient and traditional sowing extent of grain and the modern measurement of actual extent of land cannot be compared *per se* since numerous other factors (*i.e.*, the terrain, the fertility of the soil, size and quality of the grain and various modes and methods of cultivation) have a bearing on the sowing extent. Thus, ancient sowing extent cannot be considered in its strict form and a leverage ought to be given for variation when corelated to present-day measurements. Further, we are of the view, that even if the trial court came to a finding that extents vary, that factor alone will not vitiate rejection of the plaint and judgement be given in favour of the appellants, as there are many other items of evidence that should be considered in deciding on the identity of a land to be partitioned.

This Court also observers, that the learned judges of the High Court have in detail investigated the title of the plaintiff based on deeds running back to the year 1901,.*i.e.*, more than a century.The High Court has evaluated the corpus, its identity, its metes and bounds and the extent (given in accordance with ancient measurements) and had come to the finding that the plaintiff has established the identity of the land to be partitioned and the title to lots 1, **2, 3** and **4** of Getagoyawe Hena. This finding of the High Court, regarding the plaintiffs right and title was not challenged by the appellants before us. Hence, this Court sees no basis or reason to interfere with the said finding and or the judgement of the High Court.

In the aforesaid circumstances, the **1st question of law** raised before this Court is answered in the negative. The High Court we hold, was not in error when it held that the plaintiff has established the identity of the land sought to be partitioned.

Let me now move onto consider the **2nd question of law** raised before this Court. It is in respect of the prescriptive title of the appellants to the corpus or the land to be partitioned.

It is observed, except for a bald statement in the submissions of the appellants, *'that the appellants have possessed the plantations and the buildings for a long duration, uninterruptedly and without accepting the plaintiff and the 1st and 2nd defendants as co-owners and thus acquiring prescriptive title to the land called Deekiriyawe Watta,* there is not an iota of acceptable evidence led before the trial court with regard to prescription and or to appellants prescriptive title to the corpus in issue and or to the *plantations and buildings* standing thereon as emphatically pleaded by the appellants. The appellants have also failed to establish adverse possession against the respondent and or an overt act said to have been committed by the appellants against the respondent. Moreover, the submission of the appellants is regarding acquiring a prescriptive title or a prescriptive claim to a land called Deekiriyawe Watta. As categorically held by the High Court, Deekiriyawe Watta lies to the east of the corpus and hence does not form or comprise the land sought to be partitioned by the plaintiff nor a part thereof. Hence, I see no merit in the contention put forward by the appellants that they have established prescriptive title to the land in dispute.

In a long line of judicial decisions, this Court has categorically held that an overt act and or an ouster i.e., a starting point of possession has to be established to prove prescription and the burden of proof clearly lies with the party who asserts prescriptive title. [**Ref. Chelliah v. Wijenathan 54 NLR 337; Corea v. Iseris Appuhamy 15 NLR 65; Thilakeratne v. Bastian. 21 NLR 12; Sirajudeen v. Abbas 1994 (2) Sri LR 365]**

In the instant appeal, the appellants have failed to establish before us, an overt act and or that they have prescriptive title to the land to be partitioned, namely Getagoyawe Hena and or specifically to the plantations and the buildings standing on lots **2** and **4** of the corpus. The High Court has emphatically held that the 3rd to 7th defendants cannot claim any right to the corpus, based upon prescriptive title. The appellants have failed to challenge such position before this Court and we see no reason to interfere with the findings of the High Court regarding its finding on prescription.

In the aforesaid circumstances, the **2nd question of law** raised before this Court is answered in the negative. The High Court has not erred in failing to consider the prescriptive title claimed by the appellants to lots **2,3** and **4** of the land to be partitioned.

In summarizing, the two questions of law raised before this Court are answered in favour of the respondent. The appellants have failed to establish that the learned judges of the High Court have erred whatsoever in coming to its conclusion.

Thus, for reasons adumbrated in this judgement, the appeal of the **4**,**5,6a and 7a defendant- respondent-appellants is dismissed**.

The judgement of the Civil Appellate High Court of Sabaragamuwa, holden in Kegalle dated 01st December, 2015 is upheld.

The plaintiff-appellant-respondent is entitled to a sum of Rs 25,000/= payable by the 4, 5, 6a and 7a defendant- respondent- appellants as costs of this appeal.

The appeal is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J

I agree

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree

Judge of the Supreme Court