

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 103/2009

SC/ HCCA/LA/ 20/2009

CP/HCCA/Kan/367/03

DC Kandy No.19682/L

R. M. Punchi Manike,
No. 130, Thennekumbura,
Kandy.

Plaintiff

Vs.

G. G. Jayarthne,
No. 130, Thennekumbura,
Kandy.

Defendant

AND BETWEEN

G. G. Jayarthne,
No. 130, Thennekumbura,
Kandy.

Defendant Appellant

Vs.

R. M. Punchi Manike (deceased)

1. G. G. Kiribanda,
Pandiwatta, Sirimalwatta,
Gunnepana.
2. G. G. Muthubanda,
No. 213/7, Thalwatta, Kandy.
3. G. G. Senevirathna Banda,
NO. 46/21, Thennekumbura, Kandy.
4. G. G. Tikiri Banda,
No. 96/112, Rajapihilla Mawatha,
Kandy.
5. G. G. Nawarathna Banda,
No. 37/26A, Pitiyegedara, Medawatta,
Wattegama.
6. G. G. Thilakarathna Banda,
No. 213/7, Pattiyakelewatta,
Thalwatta, Kandy.
7. G. G. Anula Kumarihamy,
No. 130/1, Thennekumbura, Kandy.
8. G. G. Seetha Kumarihamy.
NO. 213, Thalwatta, Kandy.
9. G. G. Wijerathna Banda,
No. 130/1, Thennekumbura, Kandy.

Substituted Plaintiff Respondents

AND NOW BETWEEN

G. G. Jayarthne,

No. 130, Thennekumbura,

Kandy.

Defendant Appellant Petitioner

Vs.

R. M. Punchi Manike (deceased)

1. G. G. Kiribanda,

Pandiwatta, Sirimalwatta,

Gunnepana.

2. G. G. Muthubanda,

No. 213/7, Thalwatta, Kandy.

3. G. G. Senevirathna Banda,

N0. 46/21, Thennekumbura, Kandy.

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No. 96/112, Rajapihilla Mawatha,
Kandy.

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Wattegama.

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No. 213/7, Pattiyakelewatta,
Thalwatta, Kandy.

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No. 130/1, Thennekumbura, Kandy.

8. G. G. Seetha Kumarihamy.

NO. 213, Thalwatta, Kandy.

9. G. G. Wijerathna Banda,

No. 130/1, Thennekumbura, Kandy.

Substituted Plaintiff Respondent
-Respondents

BEFORE : PRIYASATH DEP, PC, J. (as he was then)
UPALY ABEYRATHNE, J.
K. T. CHITRASIRI, J.

COUNSEL : Harsha Soza PC with Athula Perera for the
Defendant Appellant-Appellant
Dr. Sunil Cooray for the 1st to 7th Substituted
Plaintiff Respondent Respondents

WRITTEN SUBMISSION ON: 23.11.2009 (Defendant Appellant Appellant)
08.12.2009 (1st to 7th Substituted Plaintiff
Respondent Respondents)

ARGUED ON : 18.01.2016

DECIDED ON : 29.06.2017

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Central Province holden at Kandy dated 19.12.2008. By the said judgment

the Civil Appellate High Court has dismissed the appeal of the Defendant Appellant-Appellant (hereinafter referred to as the Appellant) subject to the variations of the judgment of the learned District Judge of Kandy dated 24.06.2003 which was delivered in favour of the plaintiff. The High Court has held the view that the relief prayed for in prayer 2 to the plaint should be restricted to rooms bearing Nos. 130C, 130D and 130E, other than the rooms bearing Nos. 130A and 130B of the building in question.

Leave to Appeal has been granted on the following questions of law set out in paragraph 20 (a) and (b) of the petition of appeal dated 29th January 2009;

20(a) Is the Defendant Petitioner in possession of boutiques 130C, 130D and 130E?

(b) Did the original Plaintiff terminate the said leave and license granted to the Defendant Petitioner in respect of the boutiques 130C, 130D and 130E?

The Plaintiff instituted the instant action against the Appellant in the District Court of Kandy seeking a declaration to the land described in the schedule to the plaint. The Appellant took up the position that he constructed the said building in question with his money and he was in possession of five rooms bearing Nos. 130A, 130B, 130C, 130D, and 130E. He further averred that the plaintiff has failed to terminate the alleged leave and license given to him.

The Appellant has not disputed the title of the plaintiff to the land in suit. It is apparent from the facts of the case that the plaintiff and the appellant are mother and son. The Appellant went on to say that he spent over Rs. 2.2 Million for the construction of the said building and out of the said five rooms two were

boutiques and three were store rooms. He has further stated that he spent on the administration of the said building, paid the rates and taxes, electricity bills and water bills.

The Appellant has given evidence. With regard to the claim of the Appellant the burden is on him to prove that he was in lawful possession as the plaintiff's title to the land in suit has not been disputed by the Appellant. In this regard, the Appellant has stated that shortly prior to the filing of present action in June, 1999, whilst the Appellant had gone to the Munneswaram temple, the plaintiff and two of her daughters who have instigated the plaintiff to file this action have on or about 17.02.1999 trespassed in to the rooms bearing Nos. 130A, 130B, 130C, 130D and 130E of the downstairs portion of the said premises in suit which were wholly occupied and possessed by the Appellant. The Appellant further averred that the Primary Court of Kandy in case No 46488 had made order that the Appellant be restored to possession.

The Appellant has set out a question of law with regard to the termination of leave and license, at the trial. But the Appellant has failed to raise an issue on the matter of termination of leave and license. He has raised issues No 06 to 15 on the basis that he constructed the building in issue and he was in occupation of the said three rooms in downstairs.

The learned counsel for the plaintiff contended that the case has been heard and concluded on the issues raised by the parties and therefore the Appellant, for the first time in appeal, cannot raised the matter of terminating the leave and license given to the Appellant by the plaintiff since it was a matter arising out of the facts of the case.

It is well settled law that once issues are framed and a trial is held and concluded on those issues, the court should decide the case on the issues already framed and thereby the pleadings recede to background.

In the case of *Setha vs. Weerakoon* 49 NLR 225 Howard C.J. stated that “A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more.”

In the case of *Candappa nee Bastian Vs. Ponambalampillai* (1993) 1 SLR 184 Supreme Court held that “A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.”

The Appellant is burdened to prove his possession as regard the possession of the said rooms bearing Nos. 130A, 130B, 130C, 130D and 130E as the title of the plaintiff to the premises in question is not in dispute. The Appellant has given evidence at the trial to prove his possession. But there had been no any other witness called to testify the possession of the premises in question of the Appellant. An official witness has been called merely to produce the case record of the Primary Court. The Appellant has closed his case leading in evidence the documents marked V 1 to V 15. Said documents do not in any way establish the possession of the Appellant. The Appellant has not adduced any evidence in order to support his evidence. The documents produced by the plaintiff marked P 1 to P 59 clearly establish that she was in occupation of the premises in suit paying rates

and taxes. When I consider the said evidence I cannot find any reason to interfere with the findings of the learned District Judge.

In the case of *Alwis vs. Piyasena Fernando* (1993) 1 SLR 119 G. P. S. de Silva, C.J. held that “It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal.”

In the said circumstances I see no reason to interfere with the said judgment of the High Court of Civil Appeal dated 19.12.2008. The said questions of law cannot be answered in favour of the Appellant. Hence, I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

I agree.

Chief Justice

K. T. CHITRASIRI, J.

I agree.

Judge of the Supreme Court