

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

S.C. Appeal 149/2013
SC/HC/CALA No. 571/2012
WP/HCCA/Mt. 66/09/F
D.C. Mt. Lavinia Case No. 1959/04/L

In the matter of an application for Leave to Appeal in terms of Section 5(C) (1) of the High Court of the Province (Special Provisions) Amendment Act No. 54 of 2006

1. Sanvara De Ruberu
Samaraweera Gunasekera
2. Suranga Madhawa De Ruberu
Samaraweera Gunasekera
3. Gerald Mervin De Ruberu
Samaraweera Gunasekera

All of No. 25/12, De Alwis Road,
Mt. Lavinia.

Manna Marakkalage Lakshmi Malkanthi
Cooray

No. 25/12, De Alwis Road,
Mt. Lavinia.

(By Attorney of the 1st and 2nd Plaintiff)

PLAINTIFF

Vs.

Fathima Thasneem Yusuff nee Nizar
No. 174/2 – 12A, Kesbewa Road,
Boralesgamuwa

DEFENDANT

AND BETWEEN

1. Sanvara De Ruberu
Samaraweera Gunasekera
2. Suranga Madhawa De Ruberu
Samaraweera Gunasekera
3. Gerald Mervin De Ruberu
Samaraweera Gunasekera

All of No. 25/12, De Alwis Road,
Mt. Lavinia.

Manna Marakkalage Lakshmi Malkanthi
Cooray

No. 25/12, De Alwis Road,
Mt. Lavinia.

(By Attorney of the 1st and 2nd Plaintiff)

PLAINTIFF-APPELLANTS

Vs.

Fathima Thasneem Yusuff nee Nizar
No. 174/2 – 12A, Kesbewa Road,
Boralesgamuwa

DEFENDANT-RESPONDENT**AND**

1. Sanvara De Ruberu
Samaraweera Gunasekera
2. Suranga Madhawa De Ruberu
Samaraweera Gunasekera
3. Gerald Mervin De Ruberu
Samaraweera Gunasekera

All of No. 25/12, De Alwis Road,
Mt. Lavinia.

Manna Marakkalage Lakshmi Malkanthi
Cooray

No. 25/12, De Alwis Road,
Mt. Lavinia.

(By Attorney of the 1st and 2nd Plaintiff)

PLAINTIFF-APPELLANT-PETITIONERS

Vs.

Fathima Thasneem Yusuff nee Nizar
No. 174/2 – 12A, Kesbewa Road,
Boralesgamuwa

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Sisira J. de Abrew J. &
Anil Gooneratne J.

COUNSEL: C. Sooriarachchi with E.A Liyanagama for
Plaintiff-Appellant-Petitioners

Manohara de Silva P.C. with Hirosha Munasinghe for
Defendant-Respondent-Respondent

ARGUED ON: 02.10.2015

DECIDED ON: 28.01.2016

GOONERATNE J.

This was an action filed for a declaration of title to the land described in the first schedule to the plaint and eviction of Defendant-Respondent from a portion encroached from the eastern boundary of Plaintiff-Appellant-Petitioner's land and also for demolition of the building/wall standing thereon. Plaintiff-Appellant-Petitioners by this appeal seeks to set aside the Judgment dated 21.11.2012 of the Western Provincial High Court of Civil Appeals

The only short point involved in this appeal, which in fact was urged and issues raised in the District Court, was whether a transfer of title of the lands described in the 2nd schedule to the plaint by Plaintiff party and when title to the property in question was transferred to the Defendant-Respondent-Respondent, a portion or strip of land had been encroached by the Defendant-Respondent-Respondent. Issue Nos. (1) to (4) raised on behalf of Plaintiff in the District Court attempts to demonstrate such a position, but the learned District Judge answered those issues in the negative which Judgment was affirmed by the Civil Appellate High Court. However this court on 24.10.2013 granted leave in terms of paragraph 24 of the petition.

To state very briefly, the Plaintiff-Appellant-Petitioners by deed No. 818 dated 03.11.2000 sold and transferred to Defendant-Respondent-Respondent the land and premises shown as lot 2 in plan 1535 dated 25.08.2000 by Surveyor Alahakoone. The extent of the said lot was 6.60 perches. In the said lot 2, premises No. 174/2 is situated and occupied by the Defendant. Issue Nos 1 and 2 raised by the Plaintiffs in the original court indicates that at the time the land in dispute was transferred and possession handed over to Defendant, there was an agreement on part of the Defendant to demolish the alleged encroached portion of land. However the Defendant failed and neglected to do so or hand over possession of the strip of land on which a common wall stood. It is the position of the Defendant-Respondent that there was no such agreement to demolish any wall at any stage and if it was to happen in the manner suggested by the Plaintiff, that would be a reduction of the extent of land purchased by the Defendant (Lot 2 in plan 1535 which is 6.60 perches).

Both courts have dealt with the question of an alleged agreement as described above. Defendant-Respondent-Respondent denies any kind of agreement to demolish. Both courts have considered this position in relation to the provisions of Section 2 of the Prevention Frauds Ordinance. Defendant-Respondent has raised issue Nos 05-10 and issue No 06 refer to the position contemplated under Section 2 of the Preventions of Frauds Ordinance. It is on

this footing that parties proceeded to trial. Any agreement pertaining to land should be a written agreement. There is no legal or any other valid basis to interfere with the Judgement of the learned District Judge and that of the Provincial High Court.

The learned trial Judge has considered the evidence led at the trial and dismissed Plaintiff's case. This court being the Apex Court does not wish to interfere with several factual positions dealt with by the Original Court. Unless perverse orders are made by the lower courts it would not be in order for a Superior Court to interfere with factual matters. Plaintiff party sold the entirety of lot 2 in pan No. 1535, as evidenced by deed No. 818. Plaintiff party has not placed reliable evidence to prove their case, especially the question of encroachment and that Defendant agreed to demolish a wall. In fact the trial Judge disbelieves the version of the Plaintiff that there was any kind of arrangement to the effect that Defendant had agreed to demolish the wall, at the time of execution of title deed in favour of the Defendant-Respondent. Original Court has the advantage of hearing testimony of a witness and observe the demeanour of a witness. Unless substantive material is placed before court, to hold otherwise, I do not wish to interfere with the views expressed by the

trial Judge. An Appellate Court will not interfere with findings of a trial Judge on question of fact. *Fradd V. Brown & Co. Ltd.*, 20 NLR 282.

Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the Judge of first instance, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact purely is overruled by a Court of Appeal.

The High Court in its Judgment has considered the un-contradictory evidence of the Defendant. It is stated in the said Judgment that Plaintiff is seeking to demolish the western wall of the Defendant within premises bearing assessment No. 174/02 which is also Plaintiff's eastern wall. If the western boundary is demolished the structure of the entire building would collapse as the roof and the entire building rests with western boundary.

The questions of law referred to in paragraph 24 of the petition cannot be answered in favour of the Plaintiff-Appellants. In fact the question referred to in the said paragraph seems to assume certain facts in the absence of suggested admissions recorded at the trial. I answer the question as follows;

24:-

- (i) No. It is misleading to state that paragraph 12 of plaint was admitted. Only paragraphs 1 – 4 of plaint and paragraph 7 (correspondence) had been admitted.

- (ii) No. As stated above, the land described in the 2nd schedule to the plaint, by deed 818 of 03.11.2000 had been transferred to Defendant-Respondent.
- (iii) No. Land purchased in the extent referred to in the above deed. Evidence reveal that there was no arrangement to demolish a wall. As such based on evidence no encroachment proved.
- (iv) No
- (v) No, no issue suggested on prescription
- (vi) No. Defendant-Respondent purchased the extent of land as per above deed.
- (vii) There is no 3rd schedule to the plaint but the Judgment of the High Court explains that land was purchased by Defendant-Respondent, along with the right of way.
- (viii) No. Does not arise.

In all the above circumstances we affirm both judgments of the District Court and the High Court. This appeal stands dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

P. B. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT.

