

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

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 53/2013

SC/HCCA/LA/472/2012

SP/HC/CALA/899/2011

DC/Kegalle/3930/L

Nuwarapaksa Pedige Gunawathie,
Polwattewedagedara,
Meepitiya.

Plaintiff

Vs.

1. Nuwarapaksa Pedige Malani,
Atabomulahena,
Dampelgoda,
Bossala.
2. Meragal Pedige Wimaladasa,
Atabomulahena,
Dampelgoda,
Bossala.

Defendants

AND BETWEEN

1. Nuwarapaksa Pedige Malani,
Atabomulahena,

Dampelgoda,

Bossala.

2. Meragal Pedige Wimaladasa,

Atabomulahena,

Dampelgoda,

Bossala.

Defendant Appellants

Vs.

Nuwarapaksa Pedige Gunawathie,

Polwattewedagedara,

Meepitiya.

Plaintiff Respondent

AND NOW BETWEEN

Nuwarapaksa Pedige Gunawathie,

Polwattewedagedara,

Meepitiya.

Plaintiff Respondent Appellant

Vs.

1. Nuwarapaksa Pedige Malani,

Atabomulahena,

Dampelgoda,

Bossala.

2. Meragal Pedige Wimaladasa,

Atabomulahena,

Dampelgoda,

Bossala.

Defendant Appellant Respondents

BEFORE : PRIYASATH DEP, PC, J. (as he was then)
UPALY ABEYRATHNE, J.
ANIL GOONARATNE, J.

COUNSEL : M. S. A. Saheed with A. M. Hussain for the
Plaintiff Respondent Appellant
Dr. Sunil Cooray for the 1st & 2nd Defendant
Appellant Respondents

WRITTEN SUBMISSION ON: 03.05.2013 Plaintiff Respondent
Appellant
25.06.2013 Defendant Appellant
Respondents

ARGUED ON : 03.02.2016

DECIDED ON : 01.08.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) has preferred this appeal from the judgment of the High Court of Civil Appeal of the Sabaragamuwa Province, holden at Kegalle dated 04.10.2012. By the said judgment, the High Court has set aside the judgment of the learned

Additional District Judge of Kegalle dated 29.08.2011, which was delivered in favour of the Plaintiff Appellant.

When the matter was supported for leave to appeal, this court has granted leave on the following questions of law raised by the Appellant and the Respondents respectively:

1. Whether the Civil Appellate High Court erred in law in holding that the 1st Defendant was a co-owner of the subject matter of the Action?
2. Whether the Plaintiff can maintain this action for the ejectment of the Defendant from an undivided 01 (one) acre out of a land of 07 (seven) acres in extent?

The Appellant has instituted the said action against the 1st and 2nd Defendant Appellant Respondents (hereinafter referred to as the Respondents) in the said District Court seeking declaration of title to the land described in the schedule to the plaint and ejectment of the Respondents therefrom. The Appellant has averred that her father Bandiya, the predecessor in title to the said land, by deed of gift bearing No 45595 dated 11.06.1984, gifted 01 acre of undivided land and the house standing thereon out of a land in extent of 07 acres subject to the life interest of said Bandiya and his wife. After the death of said Bandiya and his wife the Appellant became the sole owner of said 01 acre and lived there. She separated the land by a fence. On or about 12.05.1987, the Respondent having no title to the said land had forcibly entered in to possession of the said land.

The Respondents have filed their answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. They have averred that they were living in the house on the said land permanently and

the Appellant's said title deed bearing No 45595 was a forged deed. They have further averred that the Appellant, after her marriage, did not live in the house on the said property. However, in their answer, the Respondents have not claimed title on deeds or by inheritance to the said land in dispute.

Prior to the trial of the case an inquiry had been held in to the application for interim injunction sought by the Appellant restraining the Respondents from interfering with the Appellant entering in to the said land in dispute and taking the produce of the said land. Accordingly, an interim injunction had been issued in favour of the Appellant.

The case has proceeded to trial on 19 issues. The Respondents have raised issues No 9 to 17. However, issues they have not challenged the said deed of gift bearing No 45595 in the said issues, which was referred to in their answer as a forged deed. The Appellant and her husband had given evidence at the trial. They had produced documents marked P 1 to P 8 inclusive of the said title deed No 45595 of the Appellant and also their marriage certificate to establish that the Appellant had gone on a binna marriage. The Respondents have not challenged the said binna marriage certificate too. In her evidence, the Appellant has stated that after the said marriage, she was living in her father's house put up on the said land in dispute with her husband. Later, her father gifted the said land to her by the said deed of gift bearing No 45595. Upon the death of her father, said Bandiya, the Respondents came to the said house in order to attend the funeral. After the funeral, she became unconscious very often due to a ghostly influence and therefore she moved to her husband's house situated at Meepitiya on 07.05. 1987 for medical treatment. Hence, she had requested the Respondents to stay in the said house to look after the house during her absence. On 12.05.1987, when she

returned to her said house subsequent to treatments she was chased out by the Respondents from the said house. Appellant's husband, Gunasinghe too has given evidence.

The Respondents have closed their case leading the evidence of the 1st Respondent Malani. They have not produced any documentary proof of the facts alleged by them. In her evidence, the Respondent has admitted that she had gone on a diga marriage whilst the Appellant had gone on a binna marriage. The 1st Respondent has further stated that after her marriage, in 1979, she came in to the occupation of the said house and the Appellant was residing at Meepitiya. Whilst taking the said position, the Respondent has admitted the extract of the electoral register produced marked P 8. According to P 8 her residence was at Dampella. She has further admitted that consequent to the death of her father said Bandiya the Appellant fell ill and went to Meepitiya for treatment and returned to the premises in dispute. Although the issue No 17 has been raised on prescriptive title, the 1st Respondent has not given evidence on that basis. The 1st Respondent whilst admitting her diga marriage has claimed the title of the said property on the basis of her binna marriage. She said that she is living in the said house in dispute with her father and she is entitled to the said property on inheritance.

In this regard, the Respondents should have adduced evidence to prove that the 1st Respondent had gone on a binna marriage and thereby she became entitled to her father's property on inheritance according to Kandiyani Law and therefore, she is a co-owner of the said property. However, the 1st Respondent has not produced her marriage certificate in her evidence to establish whether her marriage was binna or diga.

It is interesting to note that the 1st Respondent, in her evidence has admitted that she went on a diga marriage with Wimalaratne and moved in to occupation of said Wimalaratna's house. However, P 8, the extract of the electoral register indicated that she was residing at Dampella.

On the other hand, the Respondents having led evidence on the said basis have failed to raise issues on the said matters. Whether the 1st Respondent has regained binna rights has to be decided on evidence. It is not a pure question of law. Hence such matters should be raised at the trial stage. The Respondents have failed to do so. Therefore, the Respondents are not entitled to raise such matters for the first time in appeal.

In the case of *Punchi Menike vs. Appuhamy* (1917) 19 N.L.R. 358, De Sampayo J. said: " The point to be kept in view in all cases, I think, is that the essence of a diga marriage is the severance of the daughter from the father's family and her entry into that of the husband, and her consequent forfeiture of any share of the family property ; and the principle underlying the acquisition of binna rights, as I understand it, is that the daughter is re-admitted into the father's family and restored to her natural rights of inheritance. This of course is not a one-sided process; the father's family must intend or at least recognize the result."

Therefore, when there are no issues raised at the trial on the point urged for determination, this court cannot go in to such matters at the appeal stage. In the circumstances, the respondents' possession of the land in dispute has become unlawful. The Appellant, therefore, is entitled to a decree for declaration of title against the Respondents since the Respondents are remaining in the

possession of the land in dispute in the capacity of trespassers. Hence, I answer the said questions of law in favour of the Appellants.

Therefore, I set aside the said judgment of the learned High Court Judges dated 04.10.2012 and uphold the judgment of the learned Additional District Judge dated 29.08.2011. I allow the appeal of the Appellant with costs.

Appeal allowed.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

I agree.

Chief Justice

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court