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

S.C. Appeal 118/2014
SCHCCALA/ 124/2014
D.C. Avissawella 22089/P

In the matter of an Application for Leave to Appeal

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

PLAINTIFF

Vs.

1. Hettiarachchilage Piyaseeli
2. G. R. Piyaseeli
3. Hettiarachchilage Nandawathie
4. Hettiarachchilage Piyawathie
5. G.K. Jane **(DECEASED)**

5A. Hettiarachchilage Piyadasa
5B. Hettiarachchilage Piyaseeli
5C. Hettiarachchilage Nandawathie
5D. Hettiarachchilage Piyawathie

All of Dehiowita, Atalugama

1 – 4TH AND 5A – 5D SUBSTITUTED DEFENDANTS

AND

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

1ST AND 5B SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENT

Vs.

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

PLAINTIFF-RESPONDENT

2. G. R. Piyaseeli
3. Hettiarachchilage Nandawathie
4. Hettiarachchilage Piyawathie

5A. Hettiarachchilage Piyadasa
5B. Hettiarachchilage Nandawathie
5D. Hettiarachchilage Piyawathie

2ND – 4TH AND 5A, 5C AND 5D SUBSTITUTED DEFENDNATS-RESPONDENTS

AND NOW BETWEEN

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Hettiarachchilage Piyaseeli
Dehiowita, Atalugama.

1ST AND 5B SUBSTITUTED-APPELLANT-RESPONDENTS

5. G. R. Piyaseeli
6. Hettiarachchilage Nandawathie
7. Hettiarachchilage Piyawathie

5A. Hettiarachchilage Piyadasa
5B. Hettiarachchilage Nandawathie
5D. Hettiarachchilage Piyawathie

2ND – 4TH AND 5A, 5C AND 5D SUBSTITUTED-DEFENDANTS-RESPONDNETS-RESPONDNETS

BEFORE: S. E. Wanasundara P.C., J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Rohan Sahabandu P.C. with Ms. Hasitha Amarasinghe for Plaintiff-Respondents-Petitioner

Colin Amarasinghe for 1st & 5th Substituted Defendant-Appellant-Respondent

Respondents instructed by Mrs. K.A.D.T.C. Kahandawa Arachchci

ARGUED ON: 22.06.2016

DECIDED ON: 09.08.2016

GOONERATNE J.

This was an action to partition a land called 'Punchihena' alias 'Horagollehena' in extent of about 1 acre. At the trial one admission was recorded that the land described in the plaint is 'Punchihena and the original owner was Marthelis. Pedige accepted as in the plaint. Preliminary plan 682 marked 'X' gives an extent of about 2 Roods 35.06 Perches and consists of two lots (1 & 2). The 1st & 2nd Defendants also moved for a commission on the same Surveyor who prepared plan 'X' and the commission plan is marked 'Y'. The said plan 'Y' shows an extent of about 1 Acre, 1 Rood and 31.42 Perches. The main question is on the identity of the corpus and the position of the 1st Defendant

and Substituted 5B Defendants-Appellants-Respondents is that the corpus in plan 'X' is part of land in plan 'Y'. In any event it is their position that on insufficient evidence, corpus is not identified and no decree for partition could be entered.

The 1st Defendant-Appellant-Respondent also relies on Deed No. 1526 marked 1V1. Plan 'Y' was prepared at the instance of the 1st Defendant-Appellant-Respondent. The said Defendant takes up the position that the corpus in plan 'X' (lots 1 & 2) falls within the land in plan 'Y' and claim that lots 1 & 2 in plan 'X' falls within a part of land called Galamunagawahena alias 'Hena' which was purchased by Deed 1V1 of 27.01.1979.

On 14.07.2014 Supreme Court granted leave to appeal on the question of law set out in Paragraph 23(a) of the petition dated 06.03.2014. It reads thus:

23 (a) Did the High Court err in holding that there had not been a proper identification of the corpus?

This court observes that as regards plantations and improvements the 1st Defendant-Appellant-Respondent marked and produced documents 1V3 (subsidy) and documents to show receipts of subsidy by document marked 1V4, 1V5 and 1V6. All the said documents were marked subject to proof. The learned trial Judge in his Judgment states that the Defendant party failed to tender these documents to court to enable the trial Judge to consider same in his Judgment.

As such the learned District Judge in his Judgment states he is unable to consider same and takes the view that plantation should be held in common with all concerned.

There is no doubt that documents once marked in evidence become part of the record and should remain in the custody of court. (Section 114(2) of the Civil Procedure Code). As such it is the duty of the trial Judge to take to its custody, and not for convenience sake return same to the Attorneys of the respective parties. The learned District Judge has failed to do so. The record does not clearly indicate as to whether the trial Judge had called for the documents, at the end of the case. Defendant party on the other hand cannot be heard to complain about any aspect of the Judgment of the learned District Judge, having deliberately or negligently failed to make available to court the documents referred to above. I have also considered the Judgments of the Court of Appeal, re *Podiralahamy Vs. Ranbanda 1993 (3) SLR 20* a persuasive Judgment on this aspect, of *H.W. Senanayake J*. In fact learned President's Counsel R. Sahabandu who appeared for the Plaintiff-Respondent-Petitioner also appeared in the above decided case for the Appellant.

I find that matters relevant to the case in hand had been made to take a different turn by the learned High Court Judge, which is certainly not in the best interest of Justice. The learned High Court Judge erred in considering

documents relied upon by the Defendant party, the above documents 1V3, 1V4, 1V5 & 1V6. The said documents were not part of the record in the District Court, though marked subject to proof. The learned District Judge refused to consider the evidentiary value of 1V3 to 1V6 as it was not available to court. Learned District Judge failed to apply his judicial mind and do what he ought to have done, legally. High Court made matters difficult or worse and was misdirected in law. The High Court relied on the '*cursus curiae*' of the original court on the premise that there was no objection by the Plaintiff recorded at the closure of the case as regards documents marked subject to proof in the course of the trial. The situation in the case in hand is entirely different as some documents were not part of the record from the stage of the end of the trial, and the learned District Judge and the learned High Court Judge could not have considered such a case in the absence of marked documents in the record.

This is a total misdirection on the part of the learned High Court Judge as the High Court concludes that the 1st Defendant was responsible for the plantation, having considered the above documents as proved, when it is not part of the record and cannot be admitted in law. The High Court on this matter having considered the said documents, if it was legally admissible may have endeavoured to explain possession of the 1st Defendant based on the said documents. If documents were legally admitted one could also infer possession

of 1st Defendant, based on proof of said documents. The only question of law need to be answered as follows. In view of the above matters discussed in this judgment identity could not have been considered by either Court. Such a Judgment could not have been pronounced due to the above lapse. It is not necessary for the Supreme Court to consider the pivotal question of identity of the corpus due to the above lapse. Both the District Court and the High Court have erred and failed to give its judicial mind based on the above documents. For these reasons and in the interest of justice, I set aside both Judgments of the District Court and the High Court and send the case back for Trial De Novo. Judgments set aside. Case sent back for Trial De Novo. This court directs the learned District Judge to conclude the trial as expeditiously as possible.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C., J.

JUDGE OF THE SUPREME COURT