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

In the matter of an Appeal under Section 5C of the Provincial High Court (Special Provisions) Act No. 1990 as amended by Act No.55 of 2006 read with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Bamunusinghe Arachchige Lal Gunarathne Peiris, Walgama, Batapota, Bandaragama.

Plaintiff

S.C. Appeal No.166/2013
SC(HC) CALA Application No. 439/2012
WP/HCCA/KALU/LA /CASE No.42/2012
D.C. Horana Case No.52/2000/L

Vs.

Thuduwa Hewage Sumathipala, No.284/A. Walgama, Welmilla Junction.

Defendant

AND NOW

Thuduwa Hewage Sumathipala, No.284/A. Walgama, Welmilla Junction.

Defendant-Petitioner

Vs.

1. Bamunusinghe Arachchige Lal Gunarathne Peiris, Walgama, Batapota, Bandaragama.

Plaintiff-Respondent

2. The Divisional Secretary
Divisional Secretariat,
Bandaragama.

Added-Respondent

AND NOW BETWEEN

(Deceased) Thuduwa Hewage Sumathipala,
No.284/A. Walgama,
Welmilla Junction.

Defendant-Petitioner-Petitioner - Appellant

Madappuligedara Wasala
Mudiyanselage Podimanike
No. 284/A/2, Walgama Junction,
Bandaragama.

Substituted-Defendant-Petitioner - Petitioner-Appellant

Vs.

(Now Deceased) Bamunusinghe Arachchige Lal Gunarathne Peiris, Walgama,
Batapota, Bandaragama.

Plaintiff-Respondent-Respondent-Respondent

A. Palligoda Arachchige Ramani Jayawardena,
Walgama, Batapota,
Bandaragama.

B. Bamunusinghe Arachchige Sandeep Gunaratne Peiris,

No.25/2, Palligoda, Polgampola.

C. Bamunusinghe Arachchige Ruvini Gunaratne Peiris,
Walgama, Batapota,

Bandaragama.
Substituted-Plaintiff-Respondent Respondent-Respondents

The Divisional Secretary
Divisional Secretariat,
Bandaragama.
Added-Respondent-Respondent

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BEFORE : **P. PADMAN SURASENA, CJ.**
KUMUDINI WICKRAMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : L.M.K. Arulananthan P.C. with P.K.W. Wijeratne for the Substituted-Defendant-Petitioner-Petitioner- Appellant.
Haritha Adhikary with Ms. Dhanushika Dissanayake instructed by Ms. Chitra Jayasinghe for the Substituted-Plaintiff-Respondent-Respondent-Respondents.
Ms. Hasini Opatha, S.C. for the Added-Respondent-Respondent.

ARGUED ON : 11th July, 2023

DECIDED ON : 31st March, 2026

ACHALA WENGAPPULI, J.

The Substituted- Defendant -Petitioner – Petitioner - Appellant (hereinafter referred to as the Defendant) by his petition dated 18.10.2012, sought leave of this Court in order to appeal against an order pronounced by the Provincial High Court of Civil Appeal on 18.09.2012, in the case No.

WP/HCCA/Kalutara/42/012/L. His primary contention before the said appellate Court was that the judgment in the instant action had been procured by the Substituted-Plaintiff-Respondent-Respondent-Respondents (hereinafter referred to as the Plaintiff) through an act of fraud practice on the District Court and as such the said judgment is *void ab initio* for the reason that he had no proprietary interest or *locus standi* over the allotment of land in dispute, in order for him to maintain an action for declaration of title and ejectment.

On 25.11.2013, upon the petition of the Defendant being supported, this Court thought it fit to grant Leave to Appeal on questions of law that are set out in paragraph 22(a) to (g) of his petition. However, during the hearing of his appeal on 11.07.2023, and with the consent of all the parties, the questions of law on which this Court is called upon to pronounce its determination were re-formulated to following two questions.

Those questions of law are as follows;

1. *Whether the judgment of the District Court in this action is void ab initio as it had been obtained by fraud practice on the District Court by deliberately concealing a material fact, namely, the land relevant to this action had been surrendered by the Plaintiff to the State?*

2. *If the answer to the aforementioned question No. 1 is in the affirmative, then whether the Defendant is entitled to succeed in his application made under Section 839 of the Civil Procedure Code to the District Court after the execution of the writ of possession?*

It is evident from these two questions of law that the Defendant was granted Leave to Appeal by this Court not against a judgment pronounced by the Provincial High Court of Civil Appeal determining a final appeal preferred by the Defendant against the judgment of the District Court, but against an order pronounced by the Provincial High Court of Civil Appeal whereby that Court refused to grant Leave to Appeal against an order made by the District Court on an application filed by him under Section 839 of the Civil Procedure Code.

The said application appears to be the last-ditch attempt made by the Defendant to prevent himself from being evicted by the execution of Writ of Possession, issued by the District Court. In the circumstances, it is reasonable to assume that, in order to determine the instant appeal in its proper factual and legal context, a fuller consideration of all the factors that were presented and available before the Courts below for its consideration is an absolute pre-requisite.

In view of the long and complex litigation history between the parties, which has spanned over a period of over 25 years in order to reach this Court finally in the form of the instant appeal, I think it is necessary at this stage of this judgment to make a brief reference to all these different processes of litigation during the period, which commenced from the institution of the action and ending up with the point at which the instant appeal was presented to this Court. But it is equally important to make a detailed reference to the relevant factual events that are connected with each of these instances, in parallel to describing each of those acts of litigation. In my view, these factual events provide the backdrop against which the consideration and the determination of the two questions of law

should be undertaken. Perhaps, then only the expectation of the parties of reaching a finality to their dispute, which unfortunately had survived well beyond the life times of the original parties to the action, could be fulfilled.

On 30.10. 1987 one *Bamunusinghe Arachchige Methius Peiris* was given an allotment of State land which is in an extent of one Rood and twenty Perches and depicted as Lot No. 287 in Plan No. PPA 20074, prepared by the Surveyor General, by way of a Grant [P1], issued by the then President of the Republic, acting under the provisions of the Land Development Ordinance. This Grant was registered in the Folio No. 96 of the Register of Grants issued under the Land Development Ordinance and maintained by the Land Registry at *Panadura.* The said *Bamunusinghe Arachchige Methius Peiris* thereafter gifted the said land to his grandson *Bamunusinghe Arachchige Lal Gunaratne Peiris,* the Plaintiff in the instant action. This was the result of the execution of Deed of Gift No. 9997 [P2] made by the Grantee on 24.10.1989. This conferment of the rights to the Plaintiff, over the said allotment of State land, alienated under the said Grant was approved by the Divisional Secretary and, accordingly P2 too was registered in the said Folio after the Grant.

On 26.03.1993, the Plaintiff had handed over a formatted letter to the Divisional Secretariat after singing on it, by which he made a declaration to the latter that all his rights including that of his heirs over the land depicted as Lot No. 287 in the Plan No. PPA 20074 were renounced in favour of the Republic of Sri Lanka [at p.463 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L]. The purpose for which that renouncement was made by that letter is declared as 'for the purpose of subdivision' "කොටස් කිරීම සඳහා". This renouncement of his rights over the

land Grant made by the Plaintiff is further confirmed by the extract of the Folio 96 [at p.465 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L], which indicates that the Plaintiff had surrendered the land for subdivision ("… ඉඩම කොටස් කිරීම සඳහා පවරා දීම"). The said entry is inserted under the column "*Grantors*" where name of the Plaintiff appears while under the column "*Grantees*" the entry refers to "*[T]he Democratic Socialist Republic of Sri Lanka*".

The Defendant, who lived in around *Kesbewa* area, was searching for a suitable plot of land to build a residential house, located in the general area of *Horana*. This was because some of his siblings have already settled in that area. After being introduced to the Plaintiff, the Defendant purchased an allotment of land which is in extent of 12.5 perches and depicted as Lot No. B, in Plan No. 2322/B of 29.01.1996, drawn by licensed surveyor *Wickramage* [V4]. It was disclosed by the Plaintiff that he had already sold two more parcels of land to one *Sigera* and one *Karolinahamy*. The said Lot B is a subdivision of Lot No. 287 of Plan No. PPA 20074 in respect of which the Grant had been issued.

On 30.01.1996, the Defendant, after making a payment of Rs. 90,000.00 to the Plaintiff, placed his signature on an 'affidavit' [V4], sworn before a Justice of Peace, and also on another document which he referred to as a "receipt of payment" [V5]. In V4 and V5, the Plaintiff, his father and his grandfather *Bamunusinghe Arachchige Methius Peiris,* also have jointly affirmed to the fact that they have "*transferred*" the '*title*' of Lot No. B of V4, in favour of the Defendant and the transaction was confirmed by placing their signatures on those documents. After signing of the said 'affidavit' and the 'receipt', the Defendant moved into possession of the said

allotment of land on the same day. The Plaintiff promised the Defendant that he would, in the near future, take steps to prepare a transfer deed in his favour. Since the Plaintiff failed to deliver on his promise, the Defendant made enquiries from the Divisional Secretariat. The Defendant was told that the Grant and the Deed were handed over to that office by the Plaintiff for the purpose of subdividing the larger land, referred to in the schedule to the Grant.

It appears from the complaint made by the Plaintiff to the *Bandaragama* police on 31.07.2000, the relationship between him and the Defendant had deteriorated to the extent of issuing threats by the latter to the former, apparently on his failure to sign the deed of transfer as promised.

On 23.10.2000, the Plaintiff instituted the instant action against the Defendant, in the District Court of *Horana* (case No. 52/2000/L) seeking a declaration of title to the land described in the Schedule to the Plaint as Lot No. 287 of Plan No. PPA 20074 and the eviction of the Defendant. In that Plaint, the Plaintiff alleged that the Defendant came into possession of the said land on 30.01.1996 by occupying a room of an abandoned building. He further stated that despite the demand made on 25.07.2000, the Defendant failed to vacate the property. The schedule to the Plaint indicated that the disputed land in respect of which the action was instituted as Lot No. 287 of Plan No. PPA 20074 and not Lot No. B, in Plan No. 2322/B of 29.01.1996, as referred to the land possessed by the Defendant as per the 'affidavit' and the 'receipt'.

In his answer, the Defendant claimed that he came to possess the land in dispute after the Plaintiff had "*transferred*" his rights held over same by signing on V4 and V5. The Defendant also claimed that therefore the Plaintiff had no *locus standi* to institute action seeking a declaration of title as he had already surrendered his rights over the said land back to the State by his letter addressed to the Divisional Secretary of *Bandaragama* on 13.04.1996. The Defendant accordingly prayed for the dismissal of the Plaintiff's action.

After a trial held *inter partes,* the original Court delivered its judgment on 30.04.2004. The District Court held in favour of the Plaintiff and proceeded to grant relief as prayed. The Defendant filed the Notice of Appeal against the said judgment on 03.05.2004 and preferred his appeal to the Court of Appeal on 24.06.2004. With the establishment of Provincial High Court of Civil Appeal, the appeal of the Defendant that was pending before the Court of Appeal at that point in time, had been remitted to that Court to be dealt according to law.

Since the delivery of the judgment by the District Court in April 2004, the Land Commissioner, whilst replying to a letter dated 23.09.2004, by a letter dated 20.10.2004 [at p.469 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L], requested the Divisional Secretary of *Bandaragama* to forward his recommendation to have the Grant issued to Plaintiff's grandfather cancelled by the President. By a letter dated 20.10.2004 [at p.469 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L], the Land Commissioner also noted in that letter, that the Plaintiff had already requested the State to subdivide the land after having the registration of the Grant and the Deed of Gift at the Land Registry

cancelled, although the District Court has declared his ownership to the same land.

The Land Commissioner, by his letter dated 14.03.2005, [at p.473 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L] directed the Divisional Secretary of *Bandaragama* to either issue annual permits to the persons who are in possession of the land referred to in the Grant P1, or to issue one Grant and thereafter have notarial instruments issued in respect of the subdivisions already made of that State land, after conveying that the land Grant P1, issued to the grandfather of the Plaintiff, had been cancelled by the President of the Republic.

In compliance with the said directive issued by the Land Commissioner, the Divisional Secretary of *Bandaragama,* by his letter dated 22.03.2006, informed the Officer-in-Charge of *Bandaragama* police station that a survey is being conducted by the Surveyor General to demarcate the subdivisions enabling him to issue permits to the persons who are in occupation of the land in extent of one Rood and twenty Perches, referring to Lot No. 287 of Plan No. PPA 20074.

Plan No. 6176 of Surveyor *Cyril Wickramage*, depicting the four subdivisions of the Lot No. 287 of Plan No. PPA 20074 and referred to therein as Lot Nos 287/1 to 287/4 with the names of the Defendant, *Pulukkuttige Karlinahamy, Liyanage Jayapala Sigera* and *Renuka Damayanhi de Silva* was prepared. These two documents were submitted to this Court by the Defendant along with the Motion dated 07.05.2013.

Noting the delay in complying with his directions, the Land Commissioner had issued directions on the Divisional Secretary of

Bandaragama once more by letter dated 05.04.2007 [at p.366 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L].

By then, the Divisional Secretary of *Bandaragama* had issued annual permits in respect of the Defendant, *Pulukkuttige Karlinahamy, Liyanage Jayapala Sigera* and *Renuka Damayanhi de Silva* on 21.03.2007 [at pages 474 to 489 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L]. The Defendant and three others have purchased parcels of land carved out of the land referred to in the said Grant. The schedule to the annual permit issued to the Defendant indicates that he is entitled to Lot No. 03 of Plan No. 3855 drawn by the Surveyor General [at p.364 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L].

With the issuance of the permit under his name, the Defendant had withdrawn his appeal preferred against the judgment of the District Court declaring the ownership of the Plaintiff. In spite of the fact that the said judgment already ruled that the Defendant be evicted from the land in dispute, the appeal that was pending in the Provincial High Court of Civil Appeal (WP/HCCA/KAL No. 52/04(F) was withdrawn by the Defendant's Counsel (who also represented him at the trial), on 04.05.2010. The appellate Court, in allowing the application to withdraw the three appeals noted "… *that the Appellants have no desire to follow up these matters in appeal hereafter. No more details on the said application were adduced.*" Accordingly, the appeals were dismissed without costs and the case record was sent back to District Court "*for necessary action.*"

With the dismissal of the appeal, the appellate Court returned the case record back to the District Court. The District Court, after noticing the

parties, had read out the Judgment of the Provincial High Court of Civil Appeal on 03.09.2010. With the dismissal of the appeal preferred by the Defendant, the Plaintiff, by his application filed on 12.11.2010, had moved the District Court for the issuance of the Decree in terms of the Judgment it had already pronounced. The District Court, thereupon issued the Decree on 12.11.2010.

The Defendant apparently being alarmed by the issuance of the Decree, filed a Motion on 22.11.2010, and thereby moved Court to accept the fact of cancellation of the Grant to the Plaintiff, and accept the permit issued to the Defendant, along with the plan depicting the subdivision. However, the Journal Entry No. 36, indicates that the Registrar invited the attention of the District Judge that of the several documents referred to in the said Motion, the Defendant had actually tendered only a letter requesting the details from the Divisional Secretary. Importantly, the permit issued to the Defendant also had not been tendered. The Court thereupon made a ruling not to accept any further documents, as the matter had already been decided in favour of the Plaintiff and that conclusion reached by that Court on the rights of the Plaintiff had been affirmed by the appellate Court.

The District Court, following the issuance of the Decree, proceeded to issue a Writ of Possession against the Defendant on 14.12.2010. The Fiscal of Court, by his report dated 26.01.2011, informed Court of the presentation of a permit by the Defendant, who then pleaded for a period of two weeks to peacefully handover possession of the property [at p. 432 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L]. The Fiscal also reported to Court that the licensed surveyor, who assisted him

to execute the Writ of Possession, was of the opinion that the details pertaining to the property in the Writ and the information available at the Divisional Secretariat in respect of the same land do not match and therefore needs further instructions from the Court.

It is at this stage that the Defendant had taken steps to file an application under Section 839 of the Civil Procedure Code in the District Court. In his application filed on 31.01.2011, the Defendant named the Plaintiff and the Divisional Secretary as 'respondents' and moved Court to cancel the execution of the Writ of Possession issued against him. It is the position of the Defendant that he is in possession of the land, in respect of the Writ of Possession was issued, under a permit issued by the Divisional Secretary. The Defendant also alleged in that same application; that the Plaintiff, with the full knowledge that the ownership of the land is surrendered back to the State, obtained the said Writ of Possession by an "*abuse of process of Court*".

The Court, by its order dated 02.02.2011, suspended the execution of Writ of Possession and fixed the matter for inquiry. On 23.05.2011 the District Court having inquired into the said application filed by the Defendant, ruled that the Divisional Secretary must give evidence on the permit relied on by the Defendant and desisted from making an order at that stage. The Divisional Secretary informed the District Court that he sought advice of the Hon. Attorney General. Despite the ruling made by the Court on the previous day to call the Divisional Secretary to the inquiry over the issuance of a permit, the parties proceeded to conclude the inquiry on written submissions.

The District Court pronounced its order on the application filed by the Defendant under Section 839 on 25.07.2012 and dismissed the same after imposing costs fixed at Rs.10,000.00. Thereupon, the Court issued the Writ of Possession once more on 02.08.2012.

The Defendant thereupon filed an application in the Provincial High Court on 08.08.2012, seeking leave of that Court to appeal against the order made by the District Court on his application under Section 839 (Case No. HCCA/KAL/LA 4/2012).

With the issuance of the Writ of Possession by Court on 02.08.2012, the Fiscal proceeded to execute the same on 23.08.2012. The Fiscal, by his report dated 23.08.2012, informed Court that he could not execute the Writ as none of the occupants of the houses that stood on the land were present. He also reported to Court of a letter handed over by the *Grama Niladhari* of the area, issued by the Divisional Secretary. The said letter, signed by the Divisional Secretary of *Bandaragama,* conveyed confirmation to Court that the Grant issued to the Plaintiff had been revoked by the President of the Republic and that the land is now in possession of the permit holders who were subsequently issued with permits. He also invited the attention of Court, if the Writ of Possession is executed it is likely that certain problematic issues would arise and cautions against by stating those are " විසඳිය නොහැකි ගැටළු සහගත තත්වයක් උද්ගත වන බව ..."[at p.461 of the original Case Record of D.C. *Horana* in Case No. 52/2000/L].

The District Secretary also annexed several documents in the said letter for the information of Court, including the document by which the Grant was handed over back to the State by the Plaintiff, the relevant

Folios from the Land Registry, the letter dated 20.10.2004, the Grant issued on 31.10.1987, the letter dated 14.03.2005 and the four permits issued to the Defendant and three others by his office on 21.03.2007.

Since the Writ of Possession could not be executed due to the absence of the Defendant, the Plaintiff made application to the District Court on 28.08.2012, seeking permission of Court to execute the Writ of Possession by forcibly opening the building standing on the property in dispute and to evict the occupants by executing the Writ. The Court issued orders on the same day as moved by the Plaintiff.

The Fiscal, executed the Writ on 03.09.2012 and the Defendant moved his belongings from the property on his own, in compliance with the order of Court. In the report, the Fiscal reported to Court that there were four houses located within the land and the Plaintiff was advised by him not to cause damage to any of these buildings.

The Defendant supported his Leave to Appeal application in Case No. HCCA/KAL/LA 4/2012 on 04.09.2012 and 18.09.2012. The Provincial High Court of Civil Appeal pronounced its order on the application of the Defendant on 18.09.2012, dismissing the same but without costs. The appellate Court, having considered the submissions of the Defendant that he had been issued with a permit by the Divisional Secretary to occupy the land in dispute, noted that the appeal preferred by him against the judgment of the District Court was withdrawn by him without providing a reason and therefore the Court is of the view there is no reasonable ground on which leave to appeal could be granted.

The Defendant had thereupon filed his petition dated 18.10.2012 in the Registry of this Court, seeking Leave to Appeal against the said order of the Provincial High Court of Civil Appeal pronounced on 18.09.2012, dismissing his application seeking leave to appeal against the order made by the District Court in the application made under Section 839.

This Court, having considered the submissions of Counsel in support as well as in opposition decided to grant Leave to Appeal to the Defendant by its order made on 25.11.2013, identifying the questions of law as set out in sub-paragraph 22(a) to 22(g) of the petition dated 18.10.2012. This Court made further order directing the Plaintiff not to take any steps in furtherance to the Writ of Possession and permitted the Defendant to occupy the premises in terms of the permit that has been issued by the Divisional Secretary pending the determination of this appeal. What prompted this Court to make the said interim order was the photographs which had been tendered by the Defendant to Court by way of a Motion dated 25.10.2012, marked P17(1) and 17(2) showed that there was extensive damage caused to the dwelling house built by the Defendant on the disputed premises attributed to the acts of the Plaintiff.

It has been stated at the very outset of this judgment that the Defendant, in relation to the contention presented before this Court in support of his appeal, submitted that the Plaintiff had procured the judgment in the instant action through an act of fraud practice on the District Court and as such the said judgment is *void ab initio*. He then relied on several factors, in order to convince this Court of the validity of his said contention.

In the preceding section of this judgment, I have referred to the case presented by the Plaintiff before the District Court, upon which he sought a declaration of title to the disputed land and eviction of the Defendant therefrom, in a detailed account. Since the action instituted by the Plaintiff, being a *Rei Vindicatio* action, it was incumbent upon him to prove that he had valid title to the *corpus* and the Defendant in its possession. The Defendant, in his answer admitted that he is in possession of the 12.5 Perch allotment of land, which he had '*purchased*' from the Plaintiff on 30.01.1996, as evidenced by the '*receipt*' issued by the Plaintiff (marked "V5") and the '*affidavit*' affirmed to by him on the same day (marked "V6").

Thus, the only fact in issue that remained in the District Court for its determination is whether the Plaintiff established that he had valid title to the land in dispute. Consideration of the manner in which the Plaintiff proceeded to discharge that burden is an important factor that have a direct bearing on the first question of law this Court was called upon to determine.

With the commencement of the trial, the Plaintiff called a Land Officer from *Bandaragama* Divisional Secretariat as his first witness, even before he presented his own evidence under oath. The said official witness, whilst giving evidence before the trial Court, tendered the Grant [P1] and the Deed of Gift No. 9997 [P2]. The witness then testified of an inquiry conducted by the Divisional Secretary which was initiated over the complaint of the persons, who were in possession of different allotments of the land, referred to in the Grant P1, after its subdivision into several allotments. The inquiry by the Divisional Secretary was warranted as it appeared that the Plaintiff had acted in contravention of many of the

conditions that had been stipulated in the Grant. These conditions included the conditions which prohibited the Plaintiff from alienating, either a divided or an undivided share of the land, unless he obtained prior approval from the Divisional Secretary. Those persons who were in possession (including the Defendant) of the State land have made requests to the Divisional Secretary, requesting issuance of annual permits in their names and thereby regularising the possession of their respective parcels of land.

However, as the parties could not arrive at an amicably acceptable settlement, the Divisional Secretary had proceeded on with the established procedure, by accepting the land in dispute along with the Grant and the title deed of the Plaintiff, for the purpose of cancelling the Grant. After the cancellation of the Grant, it was expected that the Divisional Secretary would issue annual permits to the present occupiers of the said State land. The witness however stated in evidence that the land in dispute is still under the name of the Plaintiff in terms of Land Development Ordinance, at the time of his evidence.

He further offered certain clarifications on the procedure involved in the subdivision of a land that had been alienated under a Grant. The Grant itself prohibits any subdivisions of the land or of making transfers to any third parties other than the persons specified in the Ordinance. If the land is to be subdivided by the Plaintiff, as the Grantee, he is expected to make such a request to the Divisional Secretary, who would permit such subdivision only at his discretion. The other option was to take back the land in its entirety and to cancel the Grant. But this process would take place only after the surrender of the land, the relevant Grant and any title

deeds back to the Divisional Secretary, who would then take steps to register the fact of such surrender in the relevant Folio of the Register kept at the Land Registry.

During cross-examination by the Defendant, the official witness admitted that the originals of both the Grant as well as the Deed of Gift No. 9997 were retained in the file maintained by the Divisional Secretariat. On the Deed of Gift No. 9997, there is an endorsement made by the Divisional Secretary, which indicated that the Plaintiff has '*transferred*'(or surrendered) the ownership of the land back to the State ("දීමනා පතු ලාබියා විසින් රජයට පවරන ලදි"). This endorsement also reflected in the Folio L.D.O. 10/96 [V1], which thereafter brought over to Folio L.D.O. 10/204 [V3]. The witness also admitted that in the original Deed of Transfer No. 9997, the signature of the Plaintiff had been placed immediately after confirming the handing over of the land back to the State for the purpose of subdivision.

In contrast to the evidence of the official witness called on behalf of the Plaintiff, he strongly asserted in his evidence, that he neither handed over the Grant or the Deed No. 9997 to the Divisional Secretary for the purpose of any subdivision nor made any endorsement on any document to that effect. During cross-examination, when the Plaintiff was confronted with his signature that appeared on the Deed of Gift No. 9997, marked as V2(a), in relation to the denial made by him under oath that he never surrendered the land to State, the Plaintiff admitted the same to be his signature, but offered an explanation that he must have placed his signature on that deed, because it is his father who asked him to do so. The Plaintiff then stated that it could be well that the officers of the Divisional Secretariat may have committed a forgery on him.

When the Court questioned the Plaintiff as to when did he place his signature, the reply was that he may have placed the signature at the time of execution of the said Deed, but unable to confirm that fact. He then re-affirmed the position that he had never surrendered the land back to the State "*on any document*".

Interestingly, the Plaintiff had thereafter admitted in cross-examination that he subsequently learnt that the land in dispute was actually taken over by the State. He also admitted that he was informed of that taking over. He also admitted that the original of the Grant as well as of the Deed of Gift No. 9997 too were handed over to the Divisional Secretary.

When suggested by the Defendant that the Plaintiff did surrender the land back to the State and therefore had no title over same after April 1996, the Plaintiff specifically denied the suggestion. The position taken up by the Plaintiff before the trial Court is that he never ever surrendered the land in dispute to State, and it could well be the acts of forgery committed by someone in the Divisional Secretariat by making the endorsement "දීමනා පනත්‍ර රජයට පවරන ලදි" that resulted in the placement of the land under the State.

Returning to the consideration of the issue whether the Plaintiff in the instant action had deliberately concealed a material fact from the District Court, which qualifies to be an act of fraud that had been practiced on the District Court, I think it is important, as the first step, to distinguish between a party who merely utters a half truth or even utters a specific lie on some point and a party, who consciously distorts the truth by

concocting a particular narrative that runs totally contrary to the actual position that exists, and does that act with the expectation that he could mislead a Court of law, in arriving at a conclusion favourable to him, based on that false narrative.

The pertinent question this Court must consider in the circumstances is on what material it could be said that the narrative presented by the Plaintiff is a false one, which in turn would render the judgment of the trial Court condemned as a judgment obtained by fraud and therefore *void ab initio.*

The evidence elicited by the Defendant, during cross-examination of the Plaintiff and his witness, the Land Officer, it became clear that the Plaintiff had surrendered his rights over the land to the Divisional Secretary by letter addressed to the latter on 26.03.1996. When confronted with his signature confirming the endorsement of surrender, the Plaintiff claimed initially he did not sign, but later on changed his position by admitting the signature, but shifted the date of placing same to the date of execution adding another falsity. He repeatedly asserted that he did not surrender his only property back to the State at any time and attributed the endorsement made on the Deed of Gift by him, confirming the surrender of the property, to an act of forgery perpetrated on him by someone at the Secretariat.

Similarly, the Plaintiff in his evidence had strongly denied that he subdivided the land through a surveyor, accepted Rs. 90,000.00 as consideration from the Defendant and signed either on the 'affidavit' V2 or the 'receipt' V5.

The instant action was instituted on 23.10.2000, after a period of over seven years reckoned from the date on which he had surrendered the property to the State by his letter addressed to the Divisional Secretary on 26.03.1993. During this period, the Divisional Secretary had, acted on that letter and proceeded with the applicable administrative procedures with a view to have that Grant cancelled. This confirms the claim of the Defendant that the Plaintiff had surrendered land, along with the originals of the Grant as well as the Deed of Gift. This fact is also evident from the relevant Folio which contained an entry that the Plaintiff, as the Grantor, surrendered the land to the Divisional Secretary, the Grantee. This entry was made by the Divisional Secretary on 13.07.1993, obviously acting on the request of the Plaintiff made by him on 26.03.1993.

The Plaintiff also admitted in cross examination that he later became aware that the land was vested/transferred in the State ("පසුව දැනගත්ත රජයට පවරාගත් බව").

If the position presented by the Plaintiff, that he never surrendered the land to the State and the entries made on the Deed of Gift and in the relevant Folio are acts of forgery on the part of the officers at the Divisional Secretariat, in fact the case is, then it is reasonable to expect him to take some meaningful action to have that fraudulent activity exposed and to have the same declared *null* and *void* by a competent Court. Strangely, he seemed to be very complacent over the act by the Divisional Secretary, despite becoming aware of the fact that '*his*' land had been " රජයට පවරාගත්", even before he had instituted the instant action. This is more so, as the said "පවරා ගැනීම" was done on forged entries, as he did absolutely nothing to do with that. In the least, he could have retracted the letter dated 26.03.1993 at

that stage, but instead presented a false denial, when confronted by the Defendant over the same, during his cross-examination.

The aforesaid conduct on the part of the Plaintiff, considered in this perspective, clearly supports the position presented before the trial Court by the Defendant that the land was 'sold' by the Plaintiff and he was placed in possession of the same, consequent to that 'sale'. The Plaintiff clearly lied under oath that the Defendant is in illegal occupation of the land, when in fact he had already 'sold' his rights over the land to the latter.

With these factors in mind, I shall now proceed to consider the effect of the said concocted narrative presented by the Plaintiff before the trial Court had on its judgment holding in his favour.

The trial Court accepted the evidence of the Plaintiff that he did not sign on the receipt relied on by the Defendant and that the land had been surrendered only for the purpose of subdivision, and not after renouncing his rights over the same. The trial Court strengthened its conclusion that the Plaintiff had title over the land, which made him entitled to the relief prayed, from the evidence of the Land Officer, who stated the Grant remained valid even at the time of his evidence. The letter dated 26.03.1993, was not produced at the trial By the Defendant, despite the fact that he referred to that letter in paragraph 10(iii) of his answer.

Thus, it is clear that the denial of his signature on the endorsement making the surrender on Deed of Gift, marked V2(a), was disregarded by the trial Court based on the oral evidence of the Plaintiff, where he strongly asserted the position that those entries are forgeries.

Despite the fact that the Plaintiff was having a clear understanding of the position that the land in dispute had been 'surrendered' by him back to the State, and that too after he was found to have acted in contravention of the conditions stipulated in the Grant, he nonetheless deliberately presented totally a different factual position contrary to the one that actually existed at that point in time, and expected the trial Court to make a ruling in his favour. In order to ward off the adverse effects of the evidence relating to the 'sale' of a 12.5 Perch land to the Defendant by signing on an 'affidavit' and a 'receipt', and also of the fact that he surrendered the land back to the Divisional Secretariat at an inquiry, that enabled the Secretariat to subdivide same, after following proper procedure and to confer rights on the illegal occupies of their respective allotments, the Plaintiff offered a series of false denials.

These illegal occupiers, including the Defendant, are the persons from whom the Plaintiff had accepted monies in return of the right to possess those allotments. The Plaintiff, in order to misuse the process of Court with a view to achieve an ulterior objective entertained in his mind, profited from a legally flawed transactions he made with the Defendant, in violation of the provisions contained in Section 2 of the Prevention of Frauds Ordinance. He then maintained and presented a totally distorted claim before the trial Court and thereby mislead that Court to the extent that his evidence made that Court to accept a position that is totally different to the actual situation that prevailed at that particular point in time.

In my mind this undoubtedly satisfies a conduct, what is known as 'fraudulent conduct'; as the Plaintiff, in adopting the course of action he

did adopt, was acting with the intention to deceiving or making a gross misrepresentation to Court, for the purpose of obtaining an unlawful financial and/or personal gain from that Court.

In view of the above, I am of the opinion that the first question of law; whether the judgment of the District Court in this action is *void ab initio* as it had been obtained by clear act of fraud practice on the District Court by deliberately concealing a material fact, namely, the land relevant to this action had been surrendered by the Plaintiff to the State, should be answered in the affirmative.

With that finding, it is opportune to consider the second question of law now as, if the answer to the aforementioned question No. 1 is in the affirmative, then this Court is required to consider whether the Defendant is entitled to succeed in his application made under Section 839 of the Civil Procedure Code to the District Court, after execution of the writ of possession.

But, before proceeding to consider the said question of law, I think it is helpful, if the purpose and scope of Section 839 is examined first at least briefly.

In spite of the fact that there is a significant body of jurisprudence available on the application of Section 839, I would consciously restrict myself to consider the applicability of Section 839, only in relation to execution of Writs, as the question of law demands.

Section 839 is the penultimate Section of the Civil Procedure Code, which consists of a total of 840 Sections, and reads thus;

> *" [N]othing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court."*

Dr. *K.D.P. Wickremesinghe,* in his commentary on the *Civil Procedure Code* published in 1971, in relation to the scope and the purpose of Section 839 states as follows (at p.442):

> *"[T]he procedure laid down in the Civil Procedure Code is binding on all Courts so far as it goes. But the Code is not exhaustive as to the powers of a Court in matters of procedure. The powers of a Court are not rigidly circumscribed by the provisions of the Code, and the Court has inherent power to make a particular order which is essential in the interests of justice, even where no section of the Code can be pointed out as a direct authority for it, where its decision is based on sound general principles and is not in conflict with them or the intention of the Legislature".*

Thereafter, the learned author inserted a quotation from the judgment of the Full Bench case of ***Hurro Chunder Chowdhry et al. vs. Schoorodhonee Debia***, into his text, where, the then Chief Justice of India, made the following observations regarding the inherent power of a Court:

> *"Since laws are general rules, they cannot regulate for all time to come so as to make express provisions against all the cases that may possibly happen. It is the duty of a law-giver to foresee only the most natural and ordinary events, and to form his disposition in*

such a manner as that without entering into the detail of singular cases, he may establish rules common to them all; …".

What is relevant to the present context in my view is the role attributed by *Peacock* CJ, to the Judges, in the administration of justice, which I wish to highlight by reproducing from the same quotation. According to the learned Chief Justice; " … *it is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it."*

With that brief reference made to an illuminating authority, pronounced by the apex Court of India, with the intention to highlight the purpose and scope of Section 893, I shall revert back to the facts of the instant appeal that are relevant to the second question of law.

It was noted earlier on of the several events that had taken place between the period 1993 to 2000, commencing from the 'receipt' issued to the Defendant, followed up by the letter addressed to the Divisional Secretary by the Plaintiff by which he 'surrendered' the land back to the State for the purpose of subdivision and the eventual institution of the instant action.

The administrative process that commenced at the Divisional Secretariat with the inquiry into the complaint of the Defendant and others over their 'possession' of the land in dispute, that led to the 'surrender' of the land in March 1996 by the Plaintiff continued unabated as evidenced by the fact that the Divisional Secretary had taken action to register the

said surrender in the relevant Folio of the Land Registry. Moreover, the Grant that was issued to the Plaintiff's grandfather was cancelled by the President of the Republic upon the recommendations of the Divisional Secretary and the Land Commissioner to that effect as reflected in the letter 14.03.2005 [page 473 of the original case record of D.C. *Horana* Case No. 52/2000/L].

By that letter, the Land Commissioner authorised the Divisional Secretary to issue annual permits to the occupiers of the different subdivided allotments of land referred to in the cancelled Grant. Moreover, the Divisional Secretary had prepared a Plan No. මු.පී.ක. 3835, drawn by the Surveyor General on 04.08.2006, depicting three subdivisions made to lot No. 287 of Plan No. PPA 20074. The Tenement List attached to the said Plan, also indicates that Lot No. 3 of the said Plan, being a part of the said Lot No. 287 of Plan No. PPA 20074, being occupied by the Defendant, who had built two buildings on that land.

The Divisional Secretary had thereupon issued annual permits, conferring a legally recognisable entitlement to the Defendant and three others who were already in possession of these subdivided allotments of land, permitting them to possess the allotments of State land, subject to the conditions stipulated therein.

Quite independent of these developments that had taken place within the Divisional Secretariat over the alleged 'title' of the Plaintiff over Lot No. 287 of Plan No. PPA 20074 upon a Grant, the *Rei Vindicatio* action also proceeded after its institution in the year 2000. The Defendant raised several issues before that Court. Issue Nos. 9 and 10 were raised by the

Defendant, based on the letter dated 13.04.1996 issued by the Plaintiff to the Divisional Secretary surrendering the land. Issue No. 9 was whether the land had been surrendered to the State while issue No. 10 was to the effect, if it is so, whether the Plaintiff has *locus standi* to have and maintain the action. The judgment of the District Court was pronounced on 12.02.2004. The trial Court answered issue Nos. 9 and 10 against the Defendant by stating the land had been surrendered only for the purpose of subdivision and the Plaintiff has *locus standi.*

Thus, it could be seen that there were two parallel proceedings which continued in respect of the land in dispute, but in totally different directions. The administrative procedure initiated by the Divisional Secretariat continued with a view to take away his interest over the land by cancelling the Grant, but strangely without any form of objection raised on the part of the Plaintiff for its continuation. On the other hand, the action instituted by the Plaintiff against the Defendant to vindicate his title over the same land also progressed in spite of the said administrative procedure, which was deliberately suppressed to Court by him, and therefore concluded in his favour. The fact that the Plaintiff deliberately uttered falsehood is a part of his fraudulent acts practiced on the District Court.

The appeal preferred by the Defendant against the said judgment was pending before the appellate Court until, it was withdrawn by the Defendant and others on 04.05.2010. By this time, the Defendant had been issued with an annual permit and had a legal entitlement to be in possession of the land referred to in the said permit. In all probability, this must be the factor that led the Defendant to make an application to

withdraw his appeal against the judgment of the District Court, which held that the Plaintiff is entitled to the declaration of title and to evict the Defendant.

The Defendant merely indicated to the appellate Court that he no longer desires to follow up his appeal and, accordingly withdrawn the said appeal. The Defendant did not indicate any reason for the withdrawal of his appeal. The Provincial High Court of Civil Appeal, in allowing the application of the Defendant noted that "*[N]o more details on the said application were adduced*". The Court thereupon proceeded to dismiss the appeal of the Defendant. Clearly, the Defendant had not acted with prudence in withdrawing his appeal. Ideally, it would have been better if that fact was highlighted before the appellate Court. With the issuance of an annual permit, the determination of the appeal might have been an academic exercise and if the Plaintiff conceded that position, the appeal could have been withdrawn on that basis. The obvious lack of foresight on the part of the Defendant, in withdrawing his appeal, became the strongest factor against him, when the Plaintiff, seizing the opportunity unwittingly provided by the Defendant, moved the District Court for the issuance of the decree; in terms of the judgment, since the appeal against that judgment had been dismissed. The Plaintiff, thereupon moved Court for the issuance of Writ of Possession, as per the decree.

There were two unsuccessful attempts made by the Defendant to prevent the District Court from the issuance of the decree and the Writ of Possession, which led him to seek intervention of Court, against the imminent eviction by the execution of Writ of Possession, with an application under Section 839 of the Civil Procedure Code.

In the said application the Defendant stated to Court that; while the appeal against the judgment preferred by him was pending before the appellate Court, he was granted an annual permit by the State in respect of the parcel of land on which he is in occupation. That permit was granted only after the Surveyor General had prepared a plan subdividing the land described in the Plaint of the Plaintiff. The Defendant also stated that the action of the Plaintiff is "*abuse of process of Court*" when the latter attempted to execute the Writ in spite of all these developments and therefore moved that Court to recall the Writ of Possession already issued, as if it is executed, an irreparable and irremediable loss would be caused.

The District Court, after an initial inquiry decided on 23.05.2011, to have the evidence of the Divisional Secretary recorded with relevant supporting documentation and desisted to issue an order either way. The Defendant, however, did not present any evidence before the original Court in support of his application under Section 839, and was content to conclude the inquiry into his application with a set of written submissions.

On 25.07.2012, the District Court dismissed the Defendant's application with fixed costs primarily on the basis that it should not permit a Judgment Debtor to challenge the validity of the execution proceedings initiated by a Judgement Creditor. The Court rejected the Defendant's contention that the Plaintiff had no right over the land. It did not accept that the principle of "*eviction by title paramount*" has any application either. The Court also rejected the plan and the annual permit that were attached to the application, as it had entertained "doubts" over the authenticity of those documents and concluded to dismiss the application by stating that the rights of the parties should be decided as at the date of the action.

When the Defendant sought leave from the Provincial High Court to appeal against the said order made by the District Court, the appellate Court rejected the same on the basis that, in withdrawing the appeal against the judgment of the District Court, he had not adduced any reasons and therefore it should not interfere with the order of the original Court pronounced on 25.07.2012.

It must be noted that the Defendant, during the long legal proceedings against the Plaintiff had committed not only one but a series of legal blunders. It could be seen from the above, that neither the Defendant nor his Attorney had any notion of "proof" in terms of Section 3 of the Evidence Ordinance, and failed to present sufficient evidence in support of his case, on which a Court could act. The Defendant did not place sufficient evidence before the trial Court to contradict the false claim of the Plaintiff either. In addition, there was no affirmative evidence placed before the trial Court to establish that not only the land that had been surrendered to the State by the Plaintiff but his rights claimed over the Grant too were surrendered. This was the position before the trial Court.

Then, the appeal was withdrawn leaving room for the Plaintiff to proceed with the judgment that had been entered against him. Once more, the Defendant neglected to place evidence before the District Court when he limited his case to a set of written submissions. It is unfortunate by that time, there were sufficient material already available in the original case record to support the application under Section 839. The report presented to the Fiscal through the *Grama Niladhari* by the Divisional Secretary, when the former made an attempt to execute the writ, on 06.08.2012 had been presented with the return filed by the Court officer (at p.461 of the original

case record). In that report, the Divisional Secretary clearly stated that the Grant on which the Plaintiff relied on for his title had been cancelled and the Defendant and others who were in occupation of the State land were issued with annual permits. The Divisional Secretary also made an observation therein by stating that if the Writ of Possession is executed, the resultant position would be an issue unresolvable by any means.

The Defendant, when invoked the inherent power of the District Court by his application, there were overwhelming material contained in the Court record itself as to the falsity of the Plaintiff's claim and confirming his act of fraud in presenting same.

In ***Jeyaraj Fernandopulle v Premachandra De Silva and Others*** (1996) 1 Sri L.R. 70, this Court, after underscoring the principle that a judgment which has been obtained by fraud could be impeached by one or more of the parties with an action, quoted Halsbury (Vol 26, paragraph 560, page 285) which states that;

> *" … it is not sufficient merely to allege fraud without giving any particulars, and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof, and not to matters which are merely collateral. The Court requires a strong case to be established before it will set aside a judgment on this ground, and the action will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment …"*

In my opinion, the material available before the District Court, which it could have utilised in the determination of the application made

by the Defendant under Section 839 of the Civil Procedure Code, was more than sufficient to establish the "*strong case*" that is needed to determine that the prevention of the execution of the Writ of Possession is necessitated " … *for the ends of justice*" and "… *to prevent abuse of the process of Court*", as alleged by the Defendant.

In addition, it must also be noted that the instant action being a *Rei Vindicatio* action, it is imperative that the Plaintiff must have title not only at the time of institution of action but throughout the proceedings before the trial Court. The District Court, in rejecting the application under Section 839 was of the view that it should strictly apply the rule that the rights of the parties must be determined as at the date of the institution of the action. In ***Thilakaratne v Nandasiri Kumara*** (SC Appeal No. 138/2009 – decided on 07.08.2005) *Gooneratne* J, after considering a series of authorities, has held (at paragraph 44) that the "*[L]egal principles dictate that when a party who has lost title during pendency of proceedings cannot maintain an action in Rei Vindicatio. Since ownership is the foundation of such an action, the loss of title, whenever it occurs, must result in the failure to pursue the claim. To hold otherwise would serve no practical purpose, as the Plaintiff no longer hold title and cannot be placed in possession of what he does not own.*"

Even if one considers that the Plaintiff is entitled to the declaration he sought, in terms of the Grant, which the President of the Republic had revoked on 15.02.2005, by a letter bearing the same date issued by his secretary under the reference No. MHD/L/19-2003 II, the said administrative process, which commenced on 26.03.1993, had proceeded on uninterrupted until the said revocation of the Grant. When the Plaintiff instituted the action on 23.10.2000, over the rights conferred on him in

terms of the Grant, which had already been surrendered back to the State by him without having any intention to receive same once more, made the Plaintiff bereft of an enforceable title over the land in dispute. The Plaintiff's title, though technically may have survived until the revocation process of the Grant is complete, but remained in state of suspended animation, at the time he instituted the instant action as he concedes to the position that it had been "රජයට පවරාගත්"

In the circumstances, I proceed to answer the second question of law also in the affirmative. Therefore, I hold that the appeal of the Defendant to this Court is entitled to succeed.

The most disturbing feature in the execution process is the destruction caused by the Plaintiff to the house built by the Defendant on the land in dispute. The Defendant, by way of a Motion dated 25.10.2012, brought it to the notice of this Court, by way of photographs, to the extent to which the house was destroyed. It is relevant to note that the Fiscal, in executing the Writ of Possession, instructed the Plaintiff to desist from doing any damage to the buildings, as by then the Defendant had a valid permit issued by the Divisional Secretariat, recognising his right to possess the land in dispute.

Not only the Plaintiff had fraudulently obtained a decree by suppressing a very material fact, he also acted with a vicious mind whilst being fully aware that he has no title to the land at the time of the execution of the Writ, but instead chose to proceed with the execution and have caused extensive damage to the dwelling house built by the

Defendant, that stood on the land to which he has acquired a legally enforceable right to possess.

The said conduct on the part of the Plaintiff warrants a suitable remedial action taken by this Court.

Accordingly, I make the following orders;

a. Declare that the judgment of the District Court had been obtained by fraud and therefore the said judgment is *null and void,*
b. The Plaint of the Plaintiff stands dismissed,
c. The dismissal of the Defendant's appeal preferred against the said judgment has no avail in law,
d. The dismissal of the application made under Section 839 is accordingly set aside,
e. The order of the District Court made to issue the Writ of Possession is also set aside,
f. The Defendant is entitled to be placed in possession of the land described in the schedule to the annual permit issued in his favour, but subject to the terms and conditions stipulated therein,
g. The Defendant is also entitled to exemplary costs from the Plaintiff, in view of the wanton destruction caused to his house,
h. The Plaintiff is imposed a sum of Rs. [tentatively I have fixed at 2,000,000.00 pending concurrence] as exemplary costs payable to the Defendant within three months from

the date of pronouncement of this judgment in the District Court of *Horana.*

The appeal of the Defendant is accordingly allowed.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, CJ.

I agree.

CHIEF JUSTICE

KUMUDINI WICKRAMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT