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

In the matter of an application for Leave to Appeal under and in terms of Article 128 (1) of the Constitution read with Section 5C (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

S.C. Appeal No. 22/2018

SC/HCCA/LA Application No. 571/2016

HCCA Gampaha Case No. HCCA/Gam 24/2012 (F)

D.C. Gampaha Case No. 41609/L

Don Sunil Shantha Kuruppu,
No. 19B, Kirindivita,
Gampaha.

PLAINTIFF

Vs.

1. Sujatha Kuruppu,
   19A, Kirindivita, Gampaha.
2. Gamini Wanshanatha Kuruppu,
   Kirindivita, Gampaha.
3. Seetha Perera,
   19D, Kirindivita, Gampaha.
4. S. Dissanayake,
   19A, Kirindivita, Gampaha.

DEFENDANTS

AND

1. Sujatha Kuruppu,
   19A, Kirindivita, Gampaha.
2. Gamini Wanshanatha Kuruppu,
   Kirindivita, Gampaha.
3. Seetha Perera,
   19D, Kirindivita, Gampaha.

DEFENDANT – APPELLANTS

Vs.

Don Sunil Shantha Kuruppu,
No. 19B, Kirindivita,
Gampaha.

PLAINTIFF – RESPONDENT

4. A. Dissanayake,
   19A, Kirindivita,
   Gampaha.

DEFENDANT – RESPONDENT

AND NOW BETWEEN

1. Sujatha Kuruppu,
   19A, Kirindivita, Gampaha.
2. Gamini Wanshanatha Kuruppu,
   Kirindivita, Gampaha.

3. Seetha Perera,
   19D, Kirindivita, Gampaha.

DEFENDANT – APPELLANT - APPELLANTS

Vs.

Don Sunil Shantha Kuruppu,
No. 19B, Kirindivita,
Gampaha.

PLAINTIFF – RESPONDENT – RESPONDENT

4. A. Dissanayake,
   19A, Kirindivita,
   Gampaha.

DEFENDANT – RESPONDENT - RESPONDENT

Before: **Hon. S. Thurairaja, P.C., J.**

Hon. Kumudini Wickremasinghe, J.

Hon. Janak De Silva, J.

Counsel: Erusha Kalidasa with Wishmi Praveena and Lakshika Lenawala for the 1st, 2nd and 3rd Defendant-Appellant-Appellants

H. Withanacchhi with Shantha Karunadhara for the Plaintiff-Respondent-Respondent

Written Submissions:

1st, 2nd and 3rd Defendant-Appellant-Appellants on 21.08.2018 and 19.10.2018

Plaintiff-Respondent-Respondent on 16.10.2018

Argued On: 26.08.2024

Decided On: 16.01.2026

Janak De Silva, J.

The Plaintiff-Respondent-Respondent (Plaintiff) instituted this *rei vindicatio* action against the 1st, 2nd and 3rd Defendant–Appellant–Appellants (1st to 3rd Defendants) and 4th Defendant-Respondent-Respondent (4th Defendant).

The District Court entered judgment as prayed for by the Plaintiff. The 1st to 3rd Defendants appealed to the Provincial High Court of the Western Province exercising Civil Appellate jurisdiction holden in Gampaha (High Court) which affirmed the judgment of the District Court subject to varying answers given to a few issues.

Aggrieved, the 1st to 3rd Defendants sought leave to appeal which was granted on the following questions of law:

(1) Have their Lordships failed to consider the fact that the 1st to 3rd Defendants have prescribed to the property claimed by them?
(2) Have their Lordships failed to consider the other two commissions marked "P8" and "P9" in evidence?
(3) Have their Lordships failed to consider the provisions of law contained in Section 428 of the Civil Procedure Code in evaluating evidence?

(4) Have their Lordships failed to consider the evidence to the effect that the property claimed by the Plaintiff is not on the ground physically?

Before proceeding to examine these questions of law, let me set out the factual matrix.

Plaintiff's Position

The land more fully described in the schedule to the plaint (corpus) was allocated to one Don Juwanis Appuhamy by the final decree entered in D.C. Negombo Case No. 163/P. The corpus is identified as Lot C of Kongahawatta. Juwanis Appuhamy transferred the corpus to Edmond Kuruppu by Deed No. 9182 dated 26.07.1952.

Edmund Kuruppu transferred his rights to the Plaintiff by Deed No. 141 dated 10.03.1995. The Plaintiff and his predecessors in title have been in continuous and uninterrupted possession of the corpus for more than ten years, thereby acquiring prescriptive title to it.

The 1st to 4th Defendants have been obstructing the Plaintiff's peaceful possession of the corpus since January 1997**.**

The Plaintiff sought a declaration of title, an order for ejectment of the 1st to 4th Defendants from the corpus and damages for losses incurred due to the dispossession.

1st to 3rd Defendants' Position

The 1st to 3rd Defendants admit that the corpus formed part of the land partitioned in D.C. Negombo Case No. 163/P when the final decree was entered in 1926.

The final decree identified three lots as Lots A, B, and C as depicted in Plan No. 950P made by P.P. Fernando, Licensed Surveyor. Lot C is the land claimed by the Plaintiff. Lot B is claimed by the 1st to 3rd Defendants. Lot C is situated to East of Lot B. Lot A belonged to the father of the Plaintiff.

The 1st to 3rd Defendants, having set out their paper title to Lot B, also claim prescriptive title by virtue of continuous and uninterrupted possession for over 50 years.

They deny any intrusion into Lot C as claimed by the Plaintiff.

District Court Judgment

Lot C formed part of the final decree in D.C. Negombo Case No. 163/P. According to the final decree, Lot C was 30.75 perches in extent and was allocated to Juwanis Appuhamy who is the grandfather of the Plaintiff. Juwanis Appuhamy transferred the corpus to Don Edmund Kuruppu, father of the Plaintiff, by Deed of Transfer No. 9182 dated 26.07.1952. Don Edmund Kuruppu gifted the corpus to the Plaintiff by Deed of Gift No. 141 dated 10.03.1995. These deeds were marked in evidence as P3 and P4.

Furthermore, the Plaintiff marked in evidence Plan No. 950P, prepared by P.P. Fernando, Licensed Surveyor. Evidence was also led by R. Lakshman De Silva, Licensed Surveyor who prepared Plan No. 1490 dated 09.05.2004 and superimposed it on Plan No. 950P. His plan and survey report was marked in evidence as P5 and P6 respectively. According to the Surveyor, there were encroachments onto Lot C in Plan No. 950P. The Defendants have failed to establish any title to Lot C.

Question of Law Nos. 2 and 3

P8 is Plan No. 6702/land prepared by K. Hubert Perera, Licensed Surveyor on a commission taken out in this action by the Plaintiff. This was prepared in 2000. The Surveyor had superimposed the plan he prepared on Plan No. 950P. According to his report, the Plaintiff was in possession of 21 perches of Lot C. Around 4.65 perches of Lot C has been encroached upon by the 1st to 3rd Defendants while the 4th Defendant had encroached upon 4.40 perches. Around 0.7 perches have been used for the new road.

P9 is Plan No. 333 prepared by G.G. Wathugala, Licensed Surveyor also on a commission taken out in this action. It appears that this commission was taken out by the 4th Defendant. It was prepared in 2001. The survey report states that there is no dispute on the boundaries. There is only a misconception. Plaintiff is aware that he is the owner of Lot C. However, he is in possession of part of Lot B. The owners of Lot B are in possession of the balance portion of Lot B and Lot C. The Surveyor has observed that someone had written "C" on Lot B of Plan No. 950P.

However, unlike P5 and P6, neither of these Surveyors testified. Neither was any one of the above plans marked in evidence.

It is not clear as to the reason for the failure on the part of the Plaintiff to mark in evidence Plan No. 6702/land prepared by K. Hubert Perera, Licensed Surveyor on a commission taken out by the Plaintiff himself. I can only infer that this may be due to the claim made by the 4th Defendant in her answer that the superimposition was not properly done.

Section 154(1) of the Civil Procedure Code (CPC) states that every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.

Section 154(3) of the CPC states that the document or writing being admitted in evidence, the court, after marking it with a distinguishing mark or letter by which it should be, when necessary, be ever after referred to throughout the trial.

Admittedly, P8 and P9 were not marked with a distinguishing mark or letter as they were not formally tendered during the trial.

However, the 1st to 3rd Defendants contend that both the District Court and the High Court erred in failing to consider the evidence contained in these two plans identified as P8 and P9. According to the 1st to 3rd Defendants, these plans establish that Lot C in Plan No. 950P

is not physically seen on the ground and that they have acquired prescriptive title to Lot C.

They rely on Sections 428 and 432 of the Civil Procedure Code which reads as follows:

> "*428. In any action or proceeding in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, and the same cannot be conveniently conducted by the Judge in person, the court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report to the court."*
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> *"432. (1) The commission in every case within this Chapter shall be entitled as in the action, whether of regular or summary procedure, in which it issued, and on its return shall, with all the proceedings, evidence, and documents, if any, taken therein, be filed and recorded as of that action.*
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> *(2) The report of the commissioner or commissioners in each case within (B) and (C), and the evidence taken by a commissioner (but not the evidence without the report) shall be evidence in the action; but the court, or, with the permission of the court, any of the parties to the action, may examine the commissioner personally in open court touching any of the referred to him, or mentioned in his report, or as to the manner in which he has made the investigation or conducted his proceedings."*

The 1st to 3rd Defendants rely on the decision of the Karnataka High Court in ***Parappa and Others v. Bhimappa and Another*** **[ILR 2008 KAR 1840]** where it was held (para. 16) as follows:

> *"In a civil proceedings (sic) when an expert is appointed as a Commissioner by the Court at the instance of one of the parties to the proceedings, the Court may issue commission to such experts for the purpose of elucidating any matter in dispute directing him to make such investigation and to report thereon to the Court. It is thereafter when the commissioner/expert submits his report to the Court which appointed him, the report of the Commissioner shall become evidence in the suit and shall form part of the record. Therefore, the report of the commissioner/expert prepared and submitted on the orders of the Courts stands on a totally different footing in the matter of admissibility than the report of an expert prepared at the instance of either of the parties of the suit or at the instance of the prosecution in a criminal case."*

The Court was examining Order 26 Rule 10(2) of the Civil Procedure Code which is substantially similar to Section 432(2) to our Civil Procedure Code. Court went on to hold (at para. 13) that the Commissioners report can be taken as evidence without marking it as an exhibit and without the Commissioner being examined.

However, I am not inclined to adopt the approach taken in ***Parappa*** **[supra]**. In my view, Sections 154(1) and 154(3) of the CPC have overarching application in any civil trial. Any document which is relied on by the parties must be formally tendered in evidence by following the procedure set out therein. It is only then that the opposing party as well as Court is put on notice that such documents are relied on by the party tendering it. This is an important constituent of the rules of natural justice that forms part of our procedural law.

Although the above reasoning is not reflected in the reasoning, in ***G. A. P. De S. Jayasuriya v. A. M. Ubaid*** **[61 N.L.R. 352]**, Court held that, any plans which the parties may seek to put in evidence must be market necessary for their case, and duly proved, if objected to. Court further held that Sections 428, 429 and 432 of the Civil Procedure Code do not justify a preliminary plan made by Commissioner after the plaint is filed and before summons is served on defendant being treated as evidence when it has not been marked and proved by the plaintiff.

There is another compelling reason preventing Court from considering P8 and P9 as part of the evidence led at the trial. These documents suggest that part of Lot C claimed by the Plaintiff is possessed by the 1st to 4th Defendants.

However, according to the answer filed by the 1st to 3rd Defendants, they claim title, paper as well as prescriptive, only to the land more fully described in the schedule to their answer. That schedule specifically refers only to Lot B depicted in Plan No. 950P. It was never their case of having prescribed to Lot C therein or any part thereof. Issues Nos. 8 to 12 raised by the 1st to 3rd Defendants align with the case they have enunciated in their answer.

Explanation 2 to Section 150 of the CPC states that the case enunciated must reasonably accord with the party's pleading, i.e. plaint or answer as the case may be. No party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. This again is a reflection that our procedural laws are aligned with different components of the rules of natural justice.

Accepting and acting on the evidence presented by P8 and P9 will be a clear violation of these provisions.

Questions of Law Nos. 2 and 3 are therefore answered in the negative.

Question of Law No. 4

The 1st to 3rd Defendants contend that Lot C claimed by the Plaintiff is not on the ground physically.

However, this is devoid of merit. They have in the schedule to their answer identified Lot C, claimed by the Plaintiff, as forming the Eastern boundary to Lot B claimed by them. That cannot happen if Lot C is non-existent on the ground.

Moreover, this contention violates the principle set out in Explanation 2 to Section 150 of the CPC.

In any event, the evidence of R. Lakshman De Silva, Licensed Surveyor negates this contention. He prepared Plan No. 1490 dated 09.05.2004 and superimposed it on Plan No. 950P. Both his plan and survey report were marked in evidence as P5 and P6 respectively. They show the existence of Lot C on the ground. In fact, in his report P6, it is clearly stated that he went to the corpus on 28.11.2003 with notice to the parties and marked the common boundary of Lot C on the ground.

I therefore answer Question of Law No. 4 in the negative.

Question of Law No. 1

The corpus to which the Plaintiff is claiming title is Lot C of Plan No. 950P. The 1st to 3rd Defendants claim Lot B therein. Hence, the question of whether they have prescribed to the property claimed by them does not arise for determination.

I accordingly hold that Question of Law No. 1 does not arise.

For all the foregoing reasons, I affirm the judgment of the High Court dated 11.10.2016 and dismiss this appeal with costs fixed at Rs. 75,000/=.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.

I agree.

JUDGE OF THE SUPREME COURT