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

In the matter of an appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 read with Article 118 of the Constitution.

SC / Appeal / 87/2002

SC/ Spl/LA/ 158/2002

C.A. Rev. No 769/2001

D.C. Pugoda 38/P

Singanipurage Kusuma Rajapakse
Muttetuwatta,
Dompe.

Plaintiff

Vs.

1. Rajapakse Hunuge Evsa,
   Giridara,
   Dompe.
2. Rajapakse Hunuge Alice,
   Pahala Dompe,
   Dompe.
3. Rajapakse Hunuge Punyasena Fernando,
4. Singanipurage Dharmasiri,
5. Singanipurage Karunathilake,
6. Rajapakse Hunuge Sarath Rajapakse,
7. Rajapakse Hunuge Wasantha Ramani
8. Rajapakse Hunuge Jayantha Ranjan Rajapakse,
9. Rajapaksage Mahattaya,
10. Hikkaduwage Winsena Rajapakse,
    All of Muttettuwatta,
    Dompe.

Defendants

AND

3. Rajapakse Hunuge Punyasena Fernando,

7. Rajapakse Hunuge Wasantha Ramani Rajapakse,

8. Rajapakse Hunuge Jayantha Ranjan Rajapakse,

3rd 7th & 8th Defendant Petitioners

Vs.

Rajapakse Huniuge Sarath Rajapakse,

Muttettuwatta, Dompe.

6th Defendant Respondent

Singanipurage Kusuma Rajapakse,

Muttettuwatta, Dompe.

Plaintiff Respondent

1. Rajapakse Hunuge Evsa,
   Giridara,
   Dompe.
2. Rajapakse Hunuge Alice,
   Pahala Dompe,
   Dompe.
4. Singanipurage Dharmasiri,
5. Singanipurage Karunathilake,
9. Rajapaksage Mahattaya,
10. Hikkaduwage Winsena Rajapakse,
    All of Muttettuwatta,
    Dompe.

Defendant Respondents

AND NOW BETWEEN

7. Rajapakse Hunuge Wasantha Ramani Rajapakse,
8. Rajapakse Hunuge Jayantha Ranjan Rajapakse,

7th & 8th Defendant Petitioner Petitioners

Vs.

Rajapakse Huniuge Sarath Rajapakse,

Muttettuwatta, Dompe.

6th Defendant Respondent-Respondent

Singanipurage Kusuma Rajapakse,

Muttettuwatta, Dompe.

Plaintiff Respondent-Respondent

3. Rajapakse Hunuge Evsa,
   Giridara,
   Dompe.
4. Rajapakse Hunuge Alice,
   Pahala Dompe,
   Dompe.
6. Singanipurage Dharmasiri,
7. Singanipurage Karunathilake,
11. Rajapaksage Mahattaya,
12. Hikkaduwage Winsena Rajapakse,
   All of Muttettuwatta,
   Dompe.

Defendant Respondent-Respondents

BEFORE	:	SISIRA J DE ABREW, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Ms. Mudithavo Premachandra for the 7th and 8th Defendant Petitioner Appellants Romesh Samarakkody for the 6th Defendant Respondent-Respondent and the Plaintiff Respondent-Respondent
WRITTEN SUBMISSION ON:		29.01.2003 & 30.03.2009 (7th & 8th Defendant Petitioner-Appellants) 31.12.2002 (Plaintiff Respondent--Respondent)
ARGUED ON	:	24.06.2016
DECIDED ON	:	21.10.2016

UPALY ABEYRATHNE, J.

The Defendant Petitioner Appellants (hereinafter referred to as the Appellants) sought special leave to appeal to this Court from the judgment of the Court of Appeal dated 11.06.2002 and this Court granted special leave to appeal on the questions of law set out in the paragraph 16 (h), (i) and (j) of the petition of appeal dated 14th July 2002. Said questions of law are as follows;

16(h) Did the Court of Appeal err in law holding that the Application in Revision is misconceived and ought to have been rejected as the remedy available to the Appellants was not revision but to appeal notwithstanding lapse of time under Chapter LX of the Civil Procedure Code?

16(i) Did the Court of Appeal err in law holding that since the 3rd, 6th, 7th and 8th Defendants have filed a joint statement of claim the 3rd, 7th and 8th Defendant Appellants are not entitled to contest or deprive the 6th Defendant of the share to which he is declared entitled to by the judgment of the District Court when, by issue No 15, the defendants have brought to the notice of court, the question whether an undivided 1½ acres was remaining to be gifted by deed No 8379 in 1989?

16(j) Has the Court of Appeal failed to consider the grounds on which the 3rd, 7th and 8th Defendants have invoked the revisionary jurisdiction of the Court of Appeal?

The following question of law has been raised at the time of granting the leave.

> "If leave is not granted by this court, whether it would result in grave miscarriage of justice in as much as the learned District Judge appears to have fallen in to error in presuming that the extent of the corpus sought be partitioned was 12 acres in extent, whereas, it was in fact 05 Acres 03 Roods 20.7 Perches in extent as depicted in preliminary plan P 2 (699/P)"

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) instituted the said action against 1st to 10th Defendants in the District Court of Gampaha seeking to partition the land described in the schedule to the amended plaint. According to the schedule to the said amended plaint dated 16th February 1993, the land sought to be partitioned was bounded on the North by the land of Dimunpura Hunuge Nonis Fernando and the land of Kodikarage Karanis Appu on the East byBandara Watta on the South and west by Muththes paddy field and containing in extent about 12 acres.

The 3rd 5th 6th 7th 8th and 10th Defendants have filed a joint statement of claim. In paragraph 02 of the said statement of claim dated 5th December, 1994, they have averred that the land sought to be partitioned had not been accurately depicted in preliminary plan bearing No 699/P marked X 1. They have challenged the said preliminary plan on the basis that the land depicted in the preliminary plan was not as large as described in the schedule to the amended plaint but a smaller land in extent Acres 05 Roods 03 Perches 20.07. The said Defendants have not disputed the boundaries of the land in suit which were depicted in the said preliminary plan as well as of the land described in the schedule to the plaint. Furthermore the said Defendants admitted the original owners of the said land as shown in the Appellant's pedigree excluding the person who had been described in the Appellant's pedigree as 'unknown'.

It is noteworthy that although the said Defendants had disputed the extent of the land in suit, no attempt had been made to show a larger land as claimed in the statement of claim, so far as possible by reference to physical meets and bounds, or by reference to a plan.

Also on the other hand, the said Defendants in prayer 'b' of their statement of claim have prayed for that "in the event, the Court decides to partition the land depicted in the said preliminary plan to grant rights as pleaded in their statement of claim". In the light of the said pleadings I have no hesitation in concluding that the said prayer 'b' demonstrates the said Defendants' willingness to admit the corpus as depicted in the said preliminary plan bearing No 699/P marked X 1.

The case proceeded to trial on 18 issues. The Plaintiff Respondent has closed her case leading her evidence and reading the documents marked P 1 to P 6. The 3rd 5th 6th 7th 8th and 10th Defendants have closed their case leading the evidence of the 3rd and 8th Defendants and reading the documents marked 3 D 1 to 3 D 11. The learned Additional District Judge has delivered the judgment in favour of the Plaintiff Respondent. Being aggrieved by the said judgment dated 28.01.2001, the 3rd 7th and 8th Defendants have preferred an application in revision dated 14th July 2002 to the Court of Appeal and the Court of Appeal has rejected the said application in revision.

The Court of Appeal has reached the said conclusion mainly on the grounds;

- the 6th Defendant, who had filed a joint statement of claim with the 3rd 7th and 8th Defendants, is now contesting the application in revision filed by the 3rd , 7th and 8th Defendants, and,
- Since the 3rd, 7th and 8th Defendants had not taken steps within 14 days to appeal against the judgment of the District Court the remedy available to the said Defendants has been specifically provided in Chapter LX Civil Procedure Code.

It is pertinent to note that the 6th Defendant, who had filed a joint statement of claim along with the 3rd 7th and 8th Defendants, has filed a statement objecting to the said Application in Revision filed by the 3rd 7th and 8th Defendants. In paragraph 03 of the said statement of objections the 6th Defendant has averred that the judgment of the learned Additional District Judge dated 28.02.2001 is correct and is based on the facts and evidence of the case.

It is also important to note that, in answering to the paragraph 23 of the plaint, the 3rd 5th 6th 7th 8th and 10th Defendants, in paragraph 22 of their joint statement of claim dated 05th December 1994, had averred that Diamon, who became entitled to undivided 17/1920, 1/8 and 67/480 shares had transferred 1/8th share of his rights to the 6th Defendant by deed of transfer bearing No 8379 dated 10.04.1989. Also, in answering to the paragraph 24 of the plaint, the 3rd 5th 6th 7th 8th and 10th Defendants, in paragraph 23 of their joint statement of claim, had averred that 1½ acres had been transferred to the 6th and 7th Defendants by a deed of transfer bearing No 104.

But, in contrary to the said statement of claim the 3rd 7th and 8th Defendants, in paragraph 16(c) and (d) of their petition to the Court of Appeal dated 28th May 2001, has averred that the learned Additional District Judge had erred in concluding that Diamon had conveyed 1½ acres each to Punyasena by Deed No 3997 and to his son, the 6th Defendant, by said Deed No 8379 dated 10.04.1989.

According to the findings of the learned Additional District Judge which appears at page 11 of the judgment dated 28.02.2001 the said averment of the 3rd 7th and 8th Defendants is erroneous. The learned trial judge has clearly stated at the said page 11 of the judgment that, although both the Plaintiff and the Defendants had stated that Diamon had transferred 1½ acres to his son, the 6th Defendant, by Deed of Transfer bearing No 8379, the said Deed had not been produced for the examination of the Court. Therefore the Court has to decide that said Diamon, having believed that his 727/2560 share amount to 3 acres, had transferred ½ share of his said rights to Punyasena and balance ½ share to his son, the 6th Defendant. Accordingly 6th Defendant became entitled to ½ share of 727/2560; i.e. 727/5120 share, and Punyasena, the 3rd Defendant became entitled to balance ½ share of 727/2560; i.e. 727/5120 share of the corpus.

Needless to say that it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. *(Alwis vs. Piyasena Fernando (1993) 1 SLR 119)*

In the above context I am not inclined to agree with the submission of the Appellants that the conclusion of the learned Additional District Judge was erroneous. Also, I hold that the facts and circumstances of the case clearly reveal that the land to be partitioned was clearly depicted in the preliminary plan bearing No 699/P marked X 1. Since the Appellants have preferred a belated application in revision based on the devolution of title, disputing the rights of the 6th Defendant of which had been admitted by the Appellants in their joint statement of claim, I hold that the Court of Appeal was correct in rejecting the Appellants' application in

revision for the reasons stated in the judgment of the Court of Appeal dated 11.06.2002.

For the forgoing reasons I dismissed the Appeal of the Appellants with costs.

Appeal dismissed

Judge of the Supreme Court

SISIRA J DE ABREW, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court