IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

N. H. J. C. Rangajith Dassanayake
Galliyedde,
Ellawala

18th Defendant-Appellant- Appellant

S.C.Appeal No.183/2014
SC/HC/CALA No.303/2013
GCCA Avissawella
WP/HCCA/AV/522/2008[F]
D.C.Avissawella Case No.599/P

Vs

A. Amaratunga Fernando
64/5, Cross Street
Colombo 8

Plaintiff-Respondent-Respondent

1. A. Rosalin Fernando
2. A.E.Akman (deceased)
3. A. Swarnalatha
4. K.M.John Fernando (deceased)
5. A.R.Yasapala
6. A.R.Punyawathi
7. A.R.Gnanawathi
8. A.R.Siripala
9. A.R.Piyaseeli
   of Ellawela, Eheliyagoda
10. A.R.Luciya Fernando (deceased)

10A.V. H. Gunasoma
37, Sri Sumana Mawatha,
Mudduwa, Ratnapura

11.A.R.Lewis
C/o Ethoya Stores, Ratnapura

12. A.Alensu
    317/F, Naiwala Road, Udugampola

13. A.Pedrik
300,Naiwala Road.Udugampola
14. A.Saimon
300,Naiwala Road.Udugampola
15.A.R.Ensa
Niripola, Hanwella
16.A.Sunil
Ellawela, Eheliyagoda
17.A.Abeywardane
Ellawela, Eheliyagoda
19.Weragodage Kamini Chandralatha
20.A.S. Samanthika Abeywardane
21. Nisansala Lakmali Abeywardane
Ellawela, Eheliyagoda

Defendant-Respondent-Respondents

BEFORE : **S.E.WANASUNDERA, PC, J.**
B.P. ALUWIHARE, PC, J.
K.T.CHITRASIRI, J.

COUNSEL : Thishya Weragoda with Iresh Seneviratne and Chinthaka Sugathapala for the 18th Defendant-Appellant-Appellant

B.O.P.Jayawardane with W.Oshada Rodrigo for the Plaintiff-Respondent-Respondent

ARGUED ON : **03.03.2016**

WRITTEN SUBMISSIONS ON : 24.03.2016 by the 18th Defendant-Appellant-Petitioner
24..05.2016 by the Plaintiff-Respondent-Respondent

DECIDED ON : **30.05.2016**

CHITRASIRI, J.

When this matter was supported on 3rd October 2014, this Court granted leave to proceed on the questions of law referred to in paragraph 21 (b), (c), (d) and (e) of the petition of appeal filed by the 18th defendant-Appellant-Appellant. (hereinafter referred to as the 18th Defendant-Appellant) Those questions of law read thus:

(b) has the learned Provincial High Court Judge erred in law by coming to the conclusion that the plaintiff and other co-owners have prescribed a defined portion of land "Galliyadde Godella alias Radage Godella" marked as Lot 1 in the Plan No.323A marked as "X" at the trial?

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(c) has the learned Provincial High Court Judge erred in law holding that several co-owners of "Radage Kumbura" have prescribed to a portion of land called "Radage Godella".

(d) has the learned Provincial High Court Judge erred in law in holding that –

(i) it is common ground that Lot No.1 of the Plan No.323A marked as "X" at trial is "Radage Godella"?
(ii) that several co-owners of "Radage Kumbura" have prescribed to a portion of land called "Radage Godella"?.
(iii) the owners of "Radage Kumbura" had possessed "Radage Godella" and "Radage Kumbura" as one land?

(e) has the learned Provincial High Court Judge has erred in law by holding that upon coming to a conclusion that that Lot No.1 of the Plan No.323A marked as "X" at the trial is "Radage Godella" a distinct land from "Radage Kumbura" in relation to which *lis pendens* has been registered and the action relates to, can be partitioned in the present action?

By looking at the above questions of law, it is seen that the 18th defendant-appellant is challenging basically, the decision of the learned Civil Appellate High Court Judges. Hence, it seems that the judgment of the learned District judge has not been challenged though all the issues raised in the Trial Court had been answered against the 18th defendant-appellant. Hence, the questions of law raised in this Court may lead to think that the appellant is not keen in canvassing the judgment of the learned District Judge.

Be that as it may, even though the learned High Court Judges in the Civil Appellate high Court have looked at the longstanding possession of the 17th Defendant-Respondent-Respondent to the land subjected to in this appeal upon which the leave was granted by this Court; basically the issue here is to determine whether or not Lot 1 in Preliminary Plan marked as "X" which is the Plan bearing No.323A, forms part of the corpus.

This action was instituted by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) by the plaint dated 11th May 1990 having made the 1st to 17th respondents as parties to the action. Subsequently, the 18th defendant-Appellant was added as a party to the action consequent upon his application made by the petition dated 29th January 2002. He is the party who sought to exclude the aforesaid Lot No.1 in Plan 323A, from the corpus. Significantly, neither he nor any other person on his behalf has made any claim before the Surveyor, at the time the

preliminary survey was conducted. Not having made such a claim before the surveyor, the 18th defendant-appellant has thought it fit to claim rights to lot 1 in the preliminary plan X, almost after a period 10 years from the date on which he or his representatives had every opportunity to do so.

In the aforesaid application dated 29.01.2002, 18th defendant-appellant has stated that he became entitled to a land called Galliyadde Godella by deed No.410 dated 17th October 1989 and has claimed that the aforesaid Lot No.1 in Plan 323A forms part of that land called Galliyadde Godella. It is so stated in the Statement of Claim filed by the 18th defendant-appellant as well. Accordingly, he has prayed that lot No. 1 in Plan 323A be excluded from the corpus.

Accordingly, the issue here is to determine whether or not the Lot No.1 in Plan 323A forms part of the land referred to in the Final Village Plan bearing No.252. At the outset it must be noted that this particular issue has been carefully considered by the learned District Judge who heard the witnesses. In that judgment learned District Judge has stated as follows:

"ලොට් අංක 1 ඉල්ලා සිටින 18 වෙනි විත්තිකරු, තම අයිතිය තහවුරු කිරීම සඳහා කේ. විජේරත්න බලයලත් මිනින්දෝරුවරයාගේ අංක 761 දරණ අධිස්ථාපිත පිඹුර 18වී.3 ලෙස ඉදිරිපත් කරමින්, එම පිඹුරේ කැබලි අංක 5 සහ 1 ගල්ලියැද්ද ගොඩැල්ලට අයත් වන බව කියා සිටි. එසේම 18වී.1 දරණ, රත්නපුර මැනුම් අධිකාරි,

අවසාන ගම් පිඹුරු අංක 252 පිළිබඳව සඳහන් කර ඇති ලිපියක් 18 වන්නිය සාක්ෂි මඟින් ඉදිරිපත් කර ඇත.

මෙහි ඉඩම ගල්ලියැද්ද ගොඩැල්ල හෙවත් රදාගේගොඩැල්ල යන නම් දෙකෙන්ම හඳුන්වා ඇති බව පෙනී යන නමුත්, ඉඩම නිරවුල් කල බවට රජයෙන් ලබා දුන් සහතිකයක් ඉදිරිපත් කර නැත.

තවද, රත්නපුර මැනුම් අධිකාරී අංක 345 දරණ බිම් කොටස මැන පෙන්වන ලේඛනයක් 18වි.2 ලෙස ඉදිරිපත් කරන අතර, 18වි.2 කේ. විජේරත්න බලයලත් මිනින්දෝරුවරයා 18වි.3 දරණ ලේඛනයෙහි අධිස්ථාපිත කොට පෙන්වා ඇත.

18 වන වන්නිය විශ්වාසය තබන 18වි.5 වශයෙන් ලකුණු කර ඉදිරිපත් කරන ලද අංක 725 සහ 1946.02.05 දිනැති ඔප්පුවෙහි 18වි.2 වශයෙන් ඉදිරිපත් කල ලේඛනයෙහි ඇති මායිම් කිසිවක් සඳහන් නොවේ.

18වි.5 දරණ ඔප්පුවේ මායිම් මෙලෙස සඳහන් වේ.

උතුරට - මඩවලේ කනත්තෙ අගලද, නැගෙනහිරට- ගල්ලියැද්ද, දකුණට- රදාගොඩැල්ලද, බස්නාහිරට- මත්තාගේලියැද්දද යන මායිම් තුල පිහිටි අක්කර භාගයක පමණ විශාලකම ඇති ඉඩමය.

18වි.5 ඔප්පුවේ එම උපලේඛනයේ සඳහන් ගල්ලියැද්ද ගොඩැල්ල නැමැති ඉඩම පිය උරුමයෙන් අයිති වූ යහපත් හාමි යන අය හේවාගේ ආබ්‍රහම් දාබරේ යන අයට පවරා දී ඇති බව පෙනී යන අතර, 18වි.5 ඔප්පුවෙහි කලින් සඳහන් කල 18වි.1 වශයෙන් ලකුණු කරන්නට යෙදුන ලේඛනයේ ඇති ගල්ලියැද්ද ගොඩැල්ල හෙවත් රදාගේගොඩැල්ල යන ඉඩමක් පිළිබඳව සඳහන් නොවේ.

18වි.5 ලේඛනයේ විෂය වස්තුවේ කොටසක් රදාගේගොඩැල්ල නොවන අතර, එය දකුණට අති මායිමක් වශයෙන් සඳහන් කර ඇති බව නිරීක්ෂණය වේ.

18V.5 ඔප්පුවෙන් අයිතිය ලද ආබ්‍රහම් දාබරේ යන අය 1989.10.17 දිනැති අංක 4110 ඔප්පුවෙන් තම අයිතිවාසිකම් 18 වෙනි විත්තිකරුට පවරා දී ඇති අතර, එම ඔප්පුවේ උපලේඛනයේද ඉඩම හඳුන්වන්නේ ගල්ලියැද්දෙගොඩැල්ල වශයෙන් පමණි.

ඉහත කරුණු අනුව, 18 විත්තිය ඉල්ලා සිටින පරිදි විෂය වස්තුවේ ඇති ලොට් අංක 1 විෂය වස්තුවෙන් පිට කිරීමට හැකියාවක් නැති අතර, එම කොටසින්ද විෂය වස්තුව සමන්විත වන බව නිගමනය කරමි."

The above analysis of the evidence by the learned District Judge shows that he has addressed his mind to the identity of the land referred to in the Final Village Plan with that of the lands referred to in the schedules to the deeds marked by the 18th defendant, having looked at the boundaries of lot 1 in preliminary plan marked X. Moreover, he has stated that there was no settlement of the land in favour of the appellant by the authorities of the Government in respect of the land referred to in the Final Village Plan. Finally, he has concluded that the 18th defendant-Appellant has no right or title to the aforesaid lot 1 in the preliminary plan 323A which he claims to have it excluded from the corpus. This decision as to the title in respect of the land sought to be excluded has not been challenged.

However, as mentioned hereinbefore, the task of this Court is to ascertain whether or not the aforesaid lot 1 forms part of the final village plan marked 18V2 and not on the question of title to the land. Only evidence available to establish this fact is the plan and the oral evidence of the surveyor

Wijerathne who made the plan marked 18V3. He, in his evidence has stated lot 1 in the preliminary plan marked X falls within the boundaries of the Final Village Plan.

However, I do not see any evidence to show the exact basis on which he identified the boundaries of the final village plan when he superimposed that plan with that of the plan marked X. No questions had been asked from the Surveyor Wijeratne as to how he identified Lot 345 in the Final Village Plan for him to perform the superimposition. Even in the Report of the plan marked 18V3, prepared by the Surveyor Wijeratne, he has not stated the manner in which he identified Lot 345 in the Final Village Plan. Answers given by the surveyor as to the way he traced the boundaries of the final villege plan 18V2 show that he was not certain as to those boundaries when he drew the superimposition of the relevant plans. It is evident by his evidence quoted below.

ප්‍ර : මහත්මයා කියන විදිහට 252 ගම් පිඹුරේ කැබලි අංක. 345 දරණ කැබැල්ලේ කොටසක් ?

උ : ඔව්.

ප්‍ර : 345 දරණ සැලැස්ම ඔය ඉඩම තුල තිබෙන පැල ඉනි වැට පෙන්වල නැහැ ?

උ : ඔව්.

(Page 162 in the appeal brief)

Physical boundaries in Lot 345 of the final village plan that existed were not given in his Report marked 18V2 either.

Therefore, it is clear that the surveyor Wijerathne has failed to explain the manner in which he identified the Lots 345 in the Final Village Plan marked 18V2 when he superimposed the final village plan on to the preliminary plan X. Therefore, merely because the Surveyor Wijeratne has stated that Lot No.1 in Plan "X" is a part of the land referred to in the Plan 18V2, it is impossible to decide so for the reasons setout above particularly when no evidence is forthcoming as to the manner in which he determined the boundaries of the final village plan at the time he surveyed the land.

Such a position becomes more relevant when the Surveyor has failed to mention the date on which the Final Village Plan was prepared. His evidence to this effect is found at page 165 in the appeal brief. It reads thus:

ප්‍ර : කොයි කාලයේද අවසාන ගම් සැලැස්ම?

උ : ඒ ගැන මගේ සටහනක් නැහැ.

(Page 165 in the appeal brief)

Hence, it may have been prepared even before a century. The age of the Final Village Plan also matters when identifying the boundaries of such a plan. Hence, I am unable to agree with the surveyor's findings as to the identity of

the Final Village plan upon which the case of the 18th defendant-appellant rests.

I will now advert to the names of the respective lands in order to determine whether those names do have any relevance in determining the issue at hand. In the schedule to the plaint, land sought to be partitioned is identified as Radage Watta. No other name is found in that schedule to identify the corpus. In the plan marked as "X" which is the plan prepared by the Commissioner of the Court, land called Radage Kumbura is shown and it comprises 4 lots. Report of the Surveyor is marked as "X1" at the trial. However, the 18th defendant-appellant's claim is on the basis that it is a land called Galliyadde Godella. Such a name is not referred to in the schedule to the plaint. In that schedule to the plaint it is named as Radage Watta and not even Radage Godella.

Lot 345 in the Final Village Plan bearing No.252 is shown in the plan marked 18V2. In the document marked 18V1, the said Lot 345 is identified as part of the land called Galliyadde Godella alias Radage Godella Garden. However, the deeds marked 18V4 and 18V5 by which the 18th defendant has claimed title, shows that he is entitled to a land called Galliyadde Godella and not to a land called Radage Godella.

Accordingly, it is seen that the land referred to in the Final village plan upon which the 18th defendant has sought to have lot 1 in plan X excluded does not bear the exact name of the land referred to in the schedule to the plaint or the name referred to in the preliminary plan X which is the subject

matter of this action. Therefore, the difference in the names of the lands as described above also creates a doubt as to the identity of the land to be excluded.

Learned Counsel for the appellant contended that it is wrong to have considered the longstanding possession of the 17th defendant as it was done by the learned High Court Judges. It must be noted that such longstanding possession by the 17th defendant-appellant having lived thereon may also become material since the accuracy of the plan marked 18V3 that was made use of, to support the claim of the 18th defendant-appellant was in doubt.

In this instance, clear evidence is found to establish that the 17th defendant having built a dwelling house on that land had been in possession thereon for a long period of time. 18th defendant-Appellant had neither title no possession to that block of land. Learned Counsel for the plaintiff submitted that the aforesaid Lot No.1 had been the Kamatha of the remaining land of the corpus which was a paddy field even at that point of time. Therefore, it is not incorrect to determine that Lot 1 in that plan, it being a block of land of a higher elevation forms part of the land sought to be partitioned.

Therefore, I do not see any error on the part of the learned High Court Judges when they considered the longstanding possession of the 17th defendant to the aforesaid lot 1.

I also must state that the questions of law upon which the leave was granted by this court, entirely depend on the facts of the case. No other clear and specific question of law has been raised in this instance. It is well established that our appellate courts are always slow to interfere with the findings arrived upon considering the facts of the case. In the case of **Alwis vs Piyasena Fernando [1993 (1) S.L.R.at page 119] G.P.S. De Silva C J** held thus:

> *"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.The findings in this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."*

Long line of authorities could be seen to support this position of the law. A few of those are;

Frad vs. Brown & Co [28 N.L.R. 282]

Mahavithana vs. Commissioner of Inland Revenue [64 N.L.R. 217]

De Silva vs. Seneviratne [1981 (2) S.L.R. 8]

The authorities referred to above too, guides me not to interfere with the findings of the trial judge in this instance. The identity of the lands involved in this case particularly the ascertaining of the boundaries of the old Final Village plan depended on the evidence of surveyor Wijerathne. Learned District Judge having considered his evidence has decided that the lot 1 in the preliminary

plan marked X should not be excluded from the corpus. Therefore, I am reluctant to interfere with his decision considering the authorities referred to above.

For the aforesaid reasons, I am not inclined to interfere with the decision of the learned District Judge as well as the decision of the Judges in the Civil Appellate High Court, Avisswella. Accordingly, all the questions of law raised in this case are answered in favour of the plaintiff-respondent-respondent. This Appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C, J .

I agree

JUDGE OF THE SUPREME COURT

ALUWIHARE, P.C. J.

I agree

JUDGE OF THE SUPREME COURT