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

In the matter of a Petition of Appeal convassing the judgment entered in D.C. Colombo Case No. 1995/L dated 13.07.1999.

C.A. No. DCF - 0642/99

DC Kegalle No. 1995/L

1. Koswatte Ralalage Punchirala
2. Koswatte Ralalage Punchi Banda
3. Koswatte Ralalage Podi Ralahamy

   All of Millangoda,

   Galathara.

3(a) K.A. Millangoda

3(b) Nimal Jagath Bandara

3(c) Dharma Pradeepika Koswatte

3(f) Sajith Saman Kumara Koswatte

3(g) Geethani Manel Koswatte

3(h) Amaratunga Arachchilage Dona Rosalin Amaratunge

Molagoda,

Kegalle.

4. Koswatte Ralalage Podi Menike
5. Koswatte Ralalage Biso Menike
6. Koswatte Ralalage Kumari Manel Koswatte
7. Koswatte Ralalage Herath Banda

All of Millangoda,

Galathara.

PLAINTIFFS

-Vs-

K.R.A Millangoda,

Molagoda,

Kegalle.

DEFENDANT

AND BETWEEN

K.R.A. Millangoda,

Molagoda,

Kegalle.

DEFENDANT - APPELLANT

-Vs-

1. Koswatte Ralalage Punchirala

1(a) Koswatte Ralalage Indrawathi Menike

2. Koswatte Ralalage Punchi Banda

3. Koswatte Ralalage Podi Ralahamy

All of Millangoda,

Galathara.

3(a) K.A. Millangoda

3(b) Nimal Jagath Bandara

3(c) Dharma Pradeepika Koswatte

3(f) Sajith Saman Kumara Koswatte

3(g) Geethani Manel Koswatte

3(h) Amaratunga Arachchilage Dona

Rosalin Amaratunge
Molagoda,
Kegalle.

4. Koswatte Ralalage Podi Menike
5. Koswatte Ralalage Biso Menike
6. Koswatte Ralalage Kumari Manel
   Koswatte
7. Koswatte Ralalage Herath Banda
   All of Millangoda,
   Galathara.

PLAINTIFFS - RESPONDENTS

BEFORE	:	Shiran Gooneratne J. &
		Dr. Ruwan Fernando J.
COUNSEL	:	L.M.C.D. Bandara with M.N.L. Perera for the Defendant-Appellant.
		Ruwan de Silva with Prasad Sirimanne for the Plaintiffs-Respondents.
ARGUED ON	:	10.03.2020
WRITTEN SUBMISSIONS TENDERED ON	:	Defendant-Appellant (25.01.2016, 25.02.2020 & 10.06.2020)
		Plaintiffs-Respondents (28.02.2020 & 30.06.2020)
DECIDED ON	:	31.07.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal from the judgment of the learned Additional District Judge of Kegalle dated 13.07.1999. By that judgment, the learned Additional District Judge entered judgment in favour of the Plaintiffs-Respondents against the Defendant-Appellant for a declaration of title, ejectment of the Defendant-Appellant from the land which was the subject matter of the action and damages.

[2] The Plaintiffs-Respondents (hereinafter referred to as the Plaintiffs) instituted this action by Plaint dated 09.10.1979 and subsequently, by Amended Plaint dated 23.11.1987 against the Defendant-Appellant (hereinafter referred to as Defendant) praying *inter alia* for:

(a) a declaration of title to the land morefully described in the schedule to the Amended Plaint;

(b) an order for the ejectment of the Defendant and for the peaceful vacant possession thereof;

(c) damages in a sum of Rs. 5000/- per month and legal interest thereof from the date of the Amended Plaint and further sum of Rs. 1200/- per month and legal interest thereof until the vacant possession is delivered to the Plaintiffs; and

(d) cost of the action.

The Plaintiffs' case

[3] The Plaintiffs averred in their Amended Plaint dated 23.11.1987 *inter alia,* that:

a. The original owner of the land called "Kudumeeriya" *alias* "Goluwellukapuhena" now watta in extent of 2 Amunam of paddy was Esmadalle Koswatte Ralalage Mudiyanse;

b. By Deed No. 1411 dated 19.02.1953 attested by Thilaka Kalugalle, Notary Public, the said Mudiyanse transferred his half share of the said land to the 1st Plaintiff Koswatte Ralalage Punchirala who possessed the said share without any disturbance or interruption;

c. Upon the demise of the said Mudiyanse, his balance half share devolved on his seven children who are the Plaintiffs in the present action and the Plaintiffs and his predecessors in title had undisturbed and uninterrupted possession of the said land for well over 10 years pior to the dispute in the present case and acquired prescriptive title to the same; and

d. On or about 16.02.1974, the Defendants unlawfully entered into the land and commenced to possess the same causing the Plaintiffs damages in a sum of Rs. 1200/- per mensum.

The Defendant's case

[4] The Defendant filed Answer and denied the existence of the land described in the schedule to the Amended Plaint. The Defendant pleaded *inter alia,* that he was declared entitled to lot 2 of the land called "Delgahamulahena" in extent of 1 acre and 22 perches morefully described in the schedule to the Answer and depicted in the Final Partition Plan No. 3589 by virtue of the Final Partition Decree entered in the District Court of Kegalle Case bearing No. 18036/P. The Defendant further pleaded that he along with his predecessors in title had undisturbed and uninterrupted possession to the said lot for over 10 years and acquired prescriptive title to the same. Accordingly, the Defendant sought a dismissal of the Plaintiffs' action.

Survey of the subject matter of the action

[5] The Plaintiffs took out a commission and the subject matter of the action has been surveyed and depicted as Lot 1 in Plan No. 1346 dated 11.09.1986 made by Mr. T.N.Cader, Licensed Surveyor (P1) containing in extent of 4 acres 2 roods and 16 perches.

[6] The subject matter of the action was also surveyed by Mr. T.N.Cader, Licensed Surveyor on a commission issued by Court on an application made by the Defendant and Mr. T.N. Cader superimposed his Plan No. 1346 (P1) on the Final Partition Plan No. 3589 dated 15.03.1968 (V1) made by Mr. J. Aluvihare, Licensed Surveyor for the District Court of Kegalle Partition Case bearing No. 18036/P. The superimposed Plan No. 1346/A dated 05.03.1991 prepared by Mr. T.N. Cader (V2) depicts a land in extent of 4 acres 2 roods and 26 perches.

The Issues & Trial

[7] At the trial, 10 issues were raised on behalf of the Plaintiffs while 6 issues were raised on behalf of the Defendant and the case proceeded to trial on 16 issues. On behalf of the Plaintiffs, Mr. T.N.Cader, Licensed Surveyor, L.S.Koswaththe Ralalage Indrawathie Menike, Grama Niladhari Rajapakshage Wimalasena, Revenue Controller Udagama Galayalage Piyasena gave evidence. The Plaintiffs closed the case reading in evidence documents marked P1 to P13. On behalf of the Defendant, only the Defendant gave evidence and the Defendant closed the case reading in evidence documents marked V1 to V5.

Judgment

[8] At the conclusion of the trial, on 13.07.1999, the learned Additional District Judge of Kegalle entered judgment in favour of the Plaintiffs as prayed for, answering issues 1 to 4, 6 to 10 in the affirmative and issue 5 as

"not proved". The learned Additional District Judge of Kegalle further answered the Defendant's issues 11 and 15 in the negative, issues 12 to 14 as "not proved" and issue 16 in favour of the Plaintiffs.

The Appeal

[9] Being aggrieved by the said judgment of the learned Additional District Judge of Kegalle, the Defendant has preferred this appeal to this Court.

The Issues on Appeal

[10] When the appeal was taken up for hearing on 10.03.2020, both Counsel made oral submissions and thereafter, with the permission of Court, filed further written submissions. This Court is now called upon to decide the following issues in this Appeal:

1. Whether the land described in the schedule to the Amended Plaint called "Kudumeeriya" *alias* "Goluwellukapuhena" now watta is depicted in the Survey Plan No. 1346 dated 11.09.1986 (P1) made by T.N. Cader, Licensed Surveyor as claimed by the Plaintiffs; or

2. If so, whether the Plaintiffs had established title to the land depicted in Plan No. 1346 dated 11.09.1986 made by T.N. Cader, Licensed Surveyor by title deeds and/or inheritance if so, whether the Defendant is in unlawful possession of the said land having dispossessed the Plaintiffs from the said land on or about 16.02.1974;

3. Whether the Plaintiffs and their predecessors in title had undisturbed and uninterrupted possession of the said land for over 10 years and acquired prescriptive title to the same.

4. Whether the land described in the schedule to the Amended Plaint and depicted in the Survey Plan No. 1346 dated 11.09.1986 made by T.N. Cader, Licensed Surveyor is identical to the land called

"Delgahamulahena" which was partitioned in D.C. Kegalle Case No. 18036 and is depicted in the Final Partition Plan No. 3589 dated 15.03.1968 made by Mr. J. Aluvihare, Licensed Surveyor;

5. Whether the Defendant was declared entitled to lot 2 in extent of 1 acre and 22 perches depicted in the Final Plan No. 3589 made by Mr. J. Aluvihare, Licensed Surveyor by virtue of the Final Partition Decree entered in D.C. Kegalle Case No. 18036;

6. Whether the said lot 2 of Plan No. 3589 made by Mr. J. Alivihare, Licensed Surveyor is depicted in the superimposed Plan No. 1346A made by Mr. T.N.Cader dated 05.03.1991 (V2);

7. If so, whether the Defendant is in possession of lot 2 depicted in the Final Plan No. 3589 by virtue of the Final Partition Decree entered in D.C. Kegalle Case No. 18036/P said land by virtue of the Final Partition Decree in Case No. 18036/P.

The Nature and Character of the Plaintiffs' Action

[11] At the hearing of this appeal, the learned Counsel for the Defendant submitted that the action filed by the Plaintiffs was a *rei vindicatio* proper and thus, the cause of action in *rei vindicatio* action is, based on the sole ground of the violation of the Plaintiffs' rights of ownership. He strenuously contended that although the burden was on the Plaintiffs to prove title, the Plaintiffs have failed to prove title to the land in dispute and hence, the Plaintiffs' action must necessarily be dismissed.

[12] The question whether the action is to be treated as a *rei vindicatio* or declaration of title and ejectment or even possessory action depends on the choice made by the Plaintiffs in their pleadings, including the prayer to such pleadings, which enable the Court to understand the type and the character of the action presented by the Plaintiffs to the Court.

[13] The curious feature of this action is that the Plaintiffs are seeking a declaration that they are the owner of the subject matter of the property, ejectment of the Defendants and damages. Paragraph 10 of the Amended Plaint dated 23.11.1987 reads as follows:

> 10. මෙසේ හෙයින් විත්තිකරුට විරුද්ධව මෙහි පහත උපලේඛනයෙහි සවිස්තරව විස්තර කරන ඉඩම පැමිණිලිකරුවන්ට අයිතිබවට ප්‍රකාශ කර ගැනීමටත් විත්තිකරු එකී ඉඩමෙන් පිටමන් කොට පැමිණිලිකරුවන්ට සාමකාමී නිරවුල් බුක්තිය ලබා ගැනීමටත් අලාභ වසයෙන් මුල් පැමිණිල්ලේ දින තෙක් රු. 5000/00 ක් සහ එතැන් සිට ඉඩමේ නිරවුල් බුක්තිය පැමිණිලිකරුවන්ට දෙන තෙක් මසකට රු. 1200/00 බැගින් අයකරගැනීම සඳහා නඩු පැවරීම සඳහා නඩු නිමිත්තක් පැමිණිලිකරුට උදා විය.

[14] The main prayer in the Amended Plaint is for a declaration of title to the said property and ejectment of the Defendants from the land depicted in Plan No. 1346 dated 11.09.1986 made by Mr. T.N. Cader, Licensed Surveyor. It reads as follows:

1. මෙහි පහත උපලේඛනයෙහි විස්තර කොට ඇති ඉඩමේ හිමිකරුවන් පැමිණිලිකරුවන් ලෙස ප්‍රකාශ කර දෙන ලෙසත්.
2. එම ඉඩමෙන් විත්තිකරු පිටමන්කොට පැමිණිලිකරුවන් සාමකාමී නිරවුල් බුක්තියේ පිහිටුවන ලෙසත්.
3. මුල් පැමිණිල්ලේ දිනය දක්වා විත්තිකරුට විරුද්ධව රුපියල් පන්දාහක අලාභ මුදලක් ද එතැන් සිට ඉඩමේ බුක්තිය පැමිණිලිකරුවන්ට ලැබෙන තෙක් රුපියල් එකදහස් දෙසීයක මාසිකව අලාභ සහ ඊට නීති පොලිය පැමිණිලිකරුවන්ට විත්තිකරු විසින් ගෙවිය යුතු බව නියෝග කරන ලෙසත්.
4. නඩු ගාස්තු සහ මෙම අධිකරණයට මැනැවැයි සිතෙන අනිකුත් සියලුම සැනසීම් ලබා දෙන ලෙසත්.

[15] The Plaintiffs have raised issues 2, 3 and 4 on the basis that the Plaintiffs are the owners of the land depicted in Plan No. 1346 dated 11.09.1986 made by Mr. T.N. Cader, Licensed Surveyor. The said issues are as follows:

> 2 එම ඉඩම සංශෝධිත පැමිණිල්ලේ සඳහන් පිරිදි එක් අවදියක මුදියන්සේට හිමිව තිබුණේද ?

3 එම මුදියන්සේගේ අයිතිවාසිකම් වලින් 1/2 ක් සංශෝධිත පැමිණිල්ලේ සඳහන් පිරිදි පළවන පැමිණිලිකරුට හිමිව තිබේද ?

4 මුදියන්සේගේ ඉතිරි අයිතිවාසිකම් සංශෝධිත පැමිණිල්ලේ සඳහන් පරිදි 1-7 පැමිණිලිකරුවන්ට හිමිව තිබේද ?

[16] It is crystal clear that the present action of the Plaintiffs, as has been presented, is purely based on the vindication of their title on the basis of the Title Deed pleaded in paragraph 3 and the right of inheritance as pleaded in paragraph 4 of the Amended Plaint. Thus, the Plaintiffs have set out the nature and character of the action in their Pleadings without any ambiguity in such a manner to enable the court to understand the style and character of their action, which is one of *rei vindicatio* proper.

Requisites of a rei vindicatio Action

[17] As this is a rei vindicatio action, the Plaintiffs who seek a declaration of title must set out their title and prove their title to the land which is the subject matter of the action. In *Wanigaratne v. Juwanis Appuhamy* 65 N.L.R. 167, the Supreme Court stated that (i) in an action *rei vindicatio,* the Plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the Defendant in the action; and (ii) it is imperative for the Plaintiff to prove that the Plaintiff is the owner of the land in question and the Defendant is in possession of the land in question.

[18] A *rei vindicatio* action arises from the right of dominium and it is an action *in rem* (founded on ownership) and therefore, the Plaintiff's ownership of the thing is the very essence of *rei vindicatio* action where the main issue that arises for the adjudication is the Plaintiff's ownership of the property.

[19] An owner can institute a *rei vindicatio* action to recover his property from whoever is in possession, irrespective of whether possession is bona

fide or mala fide (Wille's Principles of South African Law, 9th Ed. P. 539). According to *Voet*, 6.1.22, 6.1.20.24, 6.1.24, 6.1.2 and Wille's Principles of South African Law, at page 539:

> *"to succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property....In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name, Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed....Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted".*

[20] The above-mentioned passage from Wille's Principles of South African Laws has clearly stressed that to succeed with a vindicatory action, an owner must prove on a balance of probabilities the following three important elements:

(1) the property in respect of which the action has been instituted exists and is clearly identified (identification of the property); and

(2) he is the owner of the property (ownership in the property in respect of which the action has been instituted, in the absence of an admission on the pleadings of his title); and

(3) the defendant is in possession or detention of the property at the commencement of the action.

Identification of the Property in Dispute

[21] The fundamental importance of the identification of the property that is subjected to ownership in a vindicatory action was clearly emphasized by Marsoof J. in the case of *Latheef and another v. Mansoor and another* 2011 (B.L.R.) 206 in the following manner:

> *"It is trite law that the identity of the property with respect to which a vindicatory action is instituted is as fundamental to the success of the action as the proof of the ownership (dominium) of the owner*

(dominus). The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method, It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of section 323 of the Civil procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision."

[22] The important feature of the action presented by the Plaintiffs is that the Plaintiffs are seeking a declaration of title to the land called "Kudumeeriya" *alias* "Goluwellukapuhena" now watta, in extent of 2 Amunam of paddy situated in the village of Asmadalle in the Galbadakorale Egodapatha Patttuwa of the Kegalle District. In the original Plaint filed by the Plaintiffs on 09.10.1979, the property had been described only by metes and bounds. There was no reference to any survey plan and the land called "Kudumeeriya" *alias* "Goluwellukapuhena" now watta in extent of 1 Amunam was described in the following manner:

කුඩු මේරිය හෙවත් ගොලවෙල්ලුකාපු හේන දැනට වත්තට මායිම්:- උතුරට සහ නැගෙනහිරට:- ඇපලාව තේවත්තේ අගලද,දකුණට :ගෙරතැන් මුල්ලේ හේනේ ඉමද,බස්නාහිරට : දික්හේනේ පේරිය සහ ගෙරතැන් මුල්ලේ හේනද, යන මෙකී මායම් තුල වී එක් අමුණක වපසරිය ඇති ඉඩම සහ ඊට අයිති සියලු දේත් වේ.

[23] The above-mentioned schedule to the Plaint filed by the Plaintiffs is identical to the 3rd schedule to the Deed No. 1411 marked P3 dated 19.02.1953 which also has no reference to any survey plan. The Defendant in his Answer however, denied the existence of the land called "Kudumeeriya" *alias* "Goluwellukapuhena" now watta, as described in the

schedule to the original Plaint and challenged the Plaintiffs to survey and depict the said land described in the schedule to the original Plaint by way of a survey plan.

[24] Originally, the Plaintiffs did not wish to have the land described in the schedule to the Plaint surveyed in the erroneous belief that they had got title to the said land by virtue of a decree of a District Court Case (journal entry dated 14.07.1980). The case referred to by the Plaintiffs is a possessory action (Case No. 15759) filed by the 1st Plaintiff and his father Punchirala against three Defendants by Plaint dated 31.01.1963 in respect of the same land described in the schedule to the present case. In the possessory action too, no reference to any survey plan is mentioned in the schedule to the said Plaint and the land is described by means of metes and bounds of the said land (P6).

Survey Plan No. 1346 (P1)

[25] The subject matter of the action was surveyed and the land called "Kudumeeriya" *alias* "Goluwellukapuhena" now watta is depcted in Plan No. 1346 dated 11.09.1986 (P1) made by Mr. T.N.Cader, Licensed Surveyor in extent of 4 acres 2 roods and 16 perches. **(Annexure "A").**

Final Partition Plan No. 3589 (V1)

[26] The Defendant strongly relied on the Final Partition Plan No. 3589 dated 15.03.1968 made by Mr. J. Aluvihare in D.C. Kegalle Case No. 18036/P (V1) to support his position that the land called "Delgahamulahena" was partitioned in D. C. Kegalle No. 18036/P and the said land is identical to the corpus claimed by the Plaintiffs. The Defendant has further produced a certified copy of the Final Decree entered by the District Court of Kegalle in Case No. 18036/P marked V4.

[27] The said Final Partition Plan depicts the land called "Delgahamulahena" in extent of **4 acres 2 roods and 8** perches (V1). It is remarkable that the extent of the land depicted in Plan No. 1346 (P1) and Final Plan No. 3589 by Mr. J. Aluvihare (V1) is more or less the same except a mere discrepancy of 10 perches **(Annexure "B").**

[28] A perusal of the certified copy of the said Plan No. 3589/P marked V1 and the Final Decree marked V4 reveals that the land called "Delgahamulahena" in extent of 4 acres 2 roods and 6 perches had been partitioned in D.C. Kegalle Case No. 18036/P by virtue of the Final Partition Decree entered by the District Court of Kegalle on 27.06.1968.

Superimposed Plan No. 1346/A (V2)

[29] The superimposed Plan No. 1346/A dated 05.03.1991 made by Mr. T.N.Cader (V2) depicts a land in extent of **4 acres 2 roods and 26** perches **(Annexure "C").**

[30] Mr. T.N. Cader has stated in his Plan No. 1346 (P1) and superimposed Plan No. 1346/A that at the time the survey, the Plaintiffs claimed the corpus as "Kudumeeriya" *alias* "Goluwellukapuhena" now watta while the Defendant had identified the corpus as "Delgahamulahena". It is remarkable that the extent of the land depicted in all three Plans, No. 1346 (P1), No. 1346/A and Final Plan No. 3589 is more of less the same extent, except a mere discrepancy of about 10-18 perches.

[31] At the hearing, the learned Counsel for the Defendant submitted that the superimposed Plan made by Mr. T.N. Cader No. 1346/A (V2), his Report and evidence at the trial clearly establishes that the land claimed by the Plaintiffs and depicted in Plan No. 1346 (P1) is the identical land called "Delgahamulahena" which was partitioned in D.C. Kegalle Case No.

18036/P and the said land is depicted in the Final Partition Plan No. 3589 made by Mr. J. Aluvihare, Licensed Surveyor.

[32] Thus, he submitted that the Plaintiffs are claiming title to substantially the same land called "Delgahamulahena" by preparing a Survey Plan No. 1346 made by T.N. Cader for the present case (P1) as clearly confirmed by Mr. T.N.Cader himself in his Report marked V3 and his evidence given in the District Court of Kegalle. A perusal of the superimposed Plan No. 1346/A made by Mr. T.N.Cader (V2) and Report marked V3 reveals that the said Plan was made by superimposing the Final Partition Plan No. 3589 on the Plan No. 1346 (P1) made by Mr. T.N. Cader (P1). Mr. T.N. Cader has stated in his Plan No. 1346/A as follows:

> කෑගල්ල දිසා අධිකරණයේ නඩු අංක. 18036 හි ගොනු කර ඇති බලයලත් මිනින්දෝරු ජේ.අලුවිහාරේ මයා විසින් සාදන ලද පිඹුරු අංක. 3589 හි මායිම් අධිෂ්ඨාපනය කර රතු පාට රේඛාවලින් පෙන්වා ඇත.

[33] Mr. T.N. Cader, who prepared the superimposed Plan No. 1346/A has clearly stated that lots 2 and 3 of the superimposed Plan No. 1346/A depict lot 1 of the Plan No. 3589 made by Mr. J. Aluvihare and lots 5, 9 and 12 of the superimposed Plan correspond to lot 2 of Mr. J. Aluvihara's Plan No. 3589 (V1). His observations in his report (V3) at page 161 of the brief read as follows:

> බලයලත් මිනින්දෝරු ජේ.අලුවිහාරේ මයා විසින් කෑගල්ලේ දිසා අධිකරණයේ නඩු අංක. 18036 බේ හි ගොනු කර ඇති 12.03.1968 දිනයෙන් පිළියෙල කරන ලද පිඹුරු අංක. 3589 හි මායිම් මගේ පිඹුරු අංක. 1346 මත අධිෂ්ඨාපනය කර රතු පාට රේඛා වලින් පෙන්වා ඇත. මෙම අධිෂ්ඨාපනය කරන ලද පිඹුර 1346/ආ වශයෙන් ඉදිරිපත් කරමි.
>
> .....
>
> කැබලි අංක 02 හා 03 බලයලත් මිනින්දෝරු ජේ.අලුවිහාරේ විසින් සාදන ලද පිඹුරු අංක. 3589 හි කැබලි අංක. 01 වේ.
>
> .....
>
> මෙම කැබලි අංක 05 ,09 හා 12 ඉහත සඳහන් පිඹුරු අංක. 3589 හි කැබලි අංක. 02 වේ.

[34] Mr. T.N. Cader has testified in Court and stated that Mr. Aluvihare's Plan No. 3589 in D.C. Kegalle Case No. 18036/P is identical to the land surveyed and depicted by him in Plan No. 1346 (P1). The oral evidence of Mr. Cader and documentary evidence produced by the Defendant (Plan No. 3589 (V1), Plan No. 1346/A (V2), the Final Partition Decree (V4) and the Report (V5) plainly proved that the land called "Delgahamulahena" which was partitioned in D.C. Kegalle Case No. 18036 is identical to the corpus claimed by the Plaintiffs in Plan No. 1346.

His evidence at pages 70-71 of the brief is as follows:

ප්‍ර :- එම සැලැස්ම ජේ.අලුවිහාරේ මිනින්දෝරු මහතාගේ අංක. 3589 දරණ සැලැස්ම ?

උ :- ඔව්

ප්‍ර :- එම සැලැස්ම ඉදිරිපත් කරනවා වී. 01 හැටියට. මහත්මයා දන්නවද එම සැලැස්ම එනම් කෑගල්ල දිසා අධිකරණ බෙදුම් නඩු අංක. 18036 දරණ නඩුවේ අවසාන බෙදුම් නඩු සැලැස්ම බව ?

උ :- ඔව්.

ප්‍ර :- එම ආරෝපණය කිරීම අනුව මහත්මයා මෙම අධිකරණයට එවා තිබෙන්නේ 1991.03.05 වෙනි දින අංක. 1346/ඒ දරණ සැලැස්ම ?

උ :- ඔව්

ප්‍ර :- එම සැලැස්ම මම ඉදිරිපත් කරනවා වී. 02 හැටියට. එම සැලැස්මත් සමග මෙම අධිකරණයට එවා තිබෙන වාර්තාවක් ?

උ :- ඔව්

ප්‍ර :- එම වාර්තාව වී. 03 හැටියට ලකුණු කර සිටිනවා. මහත්මයාගේ ඒ ආරෝපණය කිරීම අනුව මහත්මයාට කියන්න පුලුවන්ද කෑගල්ල දිසා අධිකරණයේ 18036 දරණ බෙදුම් නඩුවේ අංක. 3589 දරණ පිඹුරේ අලුවිහාර මිනින්දෝරු මහතා 1968.03.12 වෙනි දින පෙන්වා තිබෙන ඉඩමද මෙම නඩුවට මහත්මයා 1346 දරණ සැලැස්මට මැනපු ඉඩම කියලා.

උ :- ඔව් (පිඹුර පෙන්වයි)

ප්‍ර :- මහත්මයාගේ සැලැස්මේ එනම් වී. 02 දරණ සැලැස්මේ රතු පාටින් පෙන්වා තිබෙන්නේ ආරෝපණය කරපු බව සඳහන් කර තිබෙනවා.

උ :- ඔව්

ප්‍ර - එම ආරෝපණය කිරීම අනුව මහත්මයාට කියන්න පුලුවන්ද 1346 දරණ මහත්මයාගේ සැලැස්මේ පෙන්වා තිබෙන ඉඩමද 18036 දරණ බෙදුම් නඩුවේ අවසාන බෙදුම් නඩුව සැලැස්මේ පෙන්වා තිබෙන්නේ කියලා

උ :- ඔව්

[35] It is of significance that the Plan No. 1346 (P1) prepared by Mr. T.N.Cader, Licensed Surveyor on a commission taken out by the Plaintiffs has admitted that the land called Delgahamulahena" which is

depicted in Mr. Aluvihare's Final Partition Plan No. 3589 (V1) is substantially the same land which is depicted in Survey Plan No. 1346 made by him for the purpose of this Case.

[36] The learned Counsel for the Plaintiffs, however, submitted that the extent of the land depicted in the schedule to the Plaint in D.C Kegalle Partition Case No. 3589/P called "Delgahamulahena" was 12 lahas which is 120 perches whereas the land depicted in Plan No. 3589/P is 4 acres 2 roods and 8 perches and therefore, a larger land in extent of 4 acres and 2 roods and 16 had been surveyed in Plan No. 1346 (V2). He submitted that the boundaries described in the schedule to the Plaint filed in D.C. Kegalle Partition Case are totally different from the land described in the schedule to the present case and the boundaries depicted in Plan No. 3589 (V1).

[37] The present Defendant who was the Plaintiff in D.C. Case No. 18036/P Case had set out pedigree the Plaint (P13(a) and paragraph 2 of the said Plaint and the schedule to the said Plaint refer to a land called "Delgahamulahena" in extent of 12 lahas of paddy sowing on the basis of the oldest Title Deed No. 1380 dated 14.04.1871. The Plaintiffs now seek to challenge the Final Partition Decree in this case on the basis of a mere discrepancy in the ancient sowing extent stated in the said Plaint and extent depicted in Plan No. 3589 according to the English system of measurement.

[38] As submitted by the learned Counsel foe the Defendant, the schedule to the Plaint filed in the present case also refers to a land in extent of 1 Amunam of paddy sowing, which the learned Counsel for the Defendant submitted was equivalent to only two and half areas. He argued that if the identity of the extent is decided on the basis of sowing extent only, the Plaintiffs' action fails on that score alone as the land depicted in Plan No. 1346 (P1) is in extent 4 acres 2 roods and 16 perches.

[39] It is my opinion that the extent given in oldest title deeds in paddy sowing under ancient land measuring methods may not be 100% accurate as the extent of land required to sow paddy or kurakkan vary due to several factors. As observed by Weerasuriya J. in *Ratnayke v. Kumarihamy* 2002 (1) Sri LR 65 quoting from Ceylon Law Recorder, Vol. XXII, page XLVI:

> *"The system of land measure computed according to the extent of land required to sow with paddy or kurakkan vary due to the interaction of several factors. The amount of seed required could vary according to the varying degrees of the soil, the size and quality of the grain, and the peculiar qualities of the sower. In the circumstances, it is difficult to correlate sowing extent accurately by reference to surface areas.".*

[40] Even if it is assumed that there is a discrepancy in the extent of the land described in the schedule to the Plaint and the land surveyed as submitted by the learned Counsel for the Plaintiffs, the identity of a land sought to be partitioned is not determined purely on the discrepancy in extent of the land surveyed with the land described in the schedule to the Plaint, but by the boundaries of the land surveyed in the preliminary plan. It is settled law that where in a deed, the portion of land conveyed is cleanly described and can be precisely ascertained, a mere inconsistency as to the extent thereof will not affect the question of identity of the corpus of the action (Vide- *Gabriel Perera v. Agnes Perera* 43 CLW 82 and *Yapa v. Dissanayake Sedara* 1989 1 Sri L. R. 361).

[41] To identify the premises in dispute in an action involving ownership of land, whether it is a partition action or rei vindicatio action, the Court must examine and take into consideration the boundaries described in the schedule to the Plaint and depicted in the preliminary plan and then, examine whether the boundaries of the corpus of the action tally with the boundaries described in the said preliminary plan.

[42] The boundaries described in the schedule to the Amended Plaint filed by the Plaintiffs in the present case, the Plaintiffs' Deed marked P3 and the schedule to the Plaint filed in D.C. Kegalle Case No. 15759 (P6) are as follows:

North	-	Ditch of the Epalawa Tea Estate
East	-	Ditch of the Epalawa Tea Estate
West	-	Dikhena Periya and Geratemullehena
South	-	Geratemullehena Ima

[43] The boundaries of the land described in Plan No. 1346 and Plan No. 1346/A (V2) are as follows:

North	-	Ditch of Epalawa Estate
East	-	Ditch of Epalawa Estate
West	-	Geratemullehena and Dikhena Periya (according to the Plaintiffs) Moragahamulahena (according to the Defendant)
South	-	Geratemullehena (according to the Plaintiffs) Bulugahakadahena (according to the Defendant)

[44] The land partitioned in D.C. Kegalle Case No. 18036/P called "Delgahamulahena" had been described in the schedule to the Plaint filed in the said Case (P13a) and the boundaries of the land called "Delgahamulahena" are as follows:

North	-	Agala
East	-	Agala -
West	-	Galenda
South	-	Kurumeeroyahena

[45] The boundaries of the land called "Delgahamulahena" described by Mr. Aluvihare in the Final Partition Plan No. 3589 (V1) are as follows:

North	-	Agala and Epalawa Estate
East	-	Epalawa Estate
West	-	Galenda and Moragahahena
South	-	Galenda and Bulugahamankadahena

[46] It is remarkable that the northern boundary of the land described in the schedule to the Amended Plaint filed in the present case and the schedule to the Plaint filed in D.C. Kegalle Case No. 18036 is the Ditch of Epalawa Estate. The northern boundary of the land depicted in all three Plans is clearly Epalawa Estate or AGala of Epalawa Estate and hence, the northern boundary of the land depicted in all three Plans is the same northern boundary described in the schedule to the Amended Plaint, the Plaint filed by the Defendant in D.C. Kegalle Case No. 18036 and the Partition Plan No. 3589 made by Mr. Aluvihare.

[47] The eastern boundary of the land described in the schedule to the Amened Plaint filed in the present case and the Plaint filed in the Partition Case is the Ditch of Epalawa Estate. The eastern boundary of the land depicted in all three Plans marked P1, V2 and V1 is the same Ditch of Epalawa Estate. Accordingly, the eastern boundary of the land described in the schedule to the Amened Plaint filed in the present case and the Plaint filed in the Partition Case No. 18036 is the same eastern boundary depicted in Mr. Aluvihare's Plan No. 3589.

[48] The western boundary of the land described in the schedule to the Amened Plaint filed in the present case is Geratemullehena and Dikhena Periya and the Defendant has described the western boundary in the schedule to the Plaint filed in the Partition Case as Galenda. The western

boundary is depicted in the Preliminary Plan (P14) and the Final Plan (V1) in D.C. Kegalle Case No. 18036 as **Galenda/Ganweta and Moragahahena.**

[49] The Defendant has identified the western boundary before Mr. Cader as Moragahamulahena. A careful perusal of Mr. Cader's Plan No. 1346 (P1) and 1346A (V2), Mr. Aluvihare's Preliminary Plan No. 3324 (P14) and Mr. Aluvihare's Final Plan No. 3389 (V1) reveals that the western boundary of the corpus is separated from Galenda. The Preliminary Plan marked P14 produced by the Plaintiffs at the trial clearly confirms that the land called "Delgahamulahena" is separated on the west from Galwetiya **(Annexure "D").**

[50] It is manifest that irrespective of the fact that the western boundary is described by the Plaintiffs and the Defendant in different names, the corpus of the action is clearly separated on the west from Galwetiya. In the circumstances, it is my opinion that the western boundary of the corpus described in the schedule to the Amended Plaint, the Plaint filed in the Partition Case No. 18036 is substantially the same western boundary of the land depicted in Plan No. 1346, (P1) 1346A (V2), Preliminary Plan No. 3324 (P14) and the Final Plan No. 3389 (V1).

[51] The southern boundary of the land described in the schedule to the Amended Plaint is "Geratemullehena" and the southern boundary of the land described in the schedule to the Plaint filed in the Partition Case (P13a) is "Kurumeeriyahena". The Defendant has stated in evidence that it was described in the Plaint according to the old Title Deeds of the Defendant. The Plaint filed in the Partition Case marked P13 (a) shows that the oldest Title Deed set out in the Defendant's Pedigree was Deed No. 4380 dated 14.04.1871. The Preliminary Plan marked P14 had been prepared in 1966 and the southern boundary of "Delgahamulahena" is

described in the Preliminary Plan made in 1966 (P14) and the Final Plan made in 1968 (V1) as **Galenda and Bulugahakadahena.**

[52] It seems that Galenda is clearly shown on the southern boundary of the corpus of the action depicted in Plan No. 1346 (P1) and the same southern boundary is depicted in Plan No. 1346A (V2), Preliminary Plan (P14) and the Final Plan No. 3589 (V1). Mr. Cader has clearly identified the said Galenda and Galwetiya on his Plan No. 1346 (P1) and shown the curved shaped Galwetiya marked in red on the southern boundary of the corpus in Plan No. 1346A, which is consistent with the Galenda shown in the Preliminary Plan No. 3324 (P14) and the Final Plan No. 3589 (V1).

[53] In these circumstances, it is reasonable to assume that with the advent of time the name of the land which described the southern boundary as "Kurumeeriyahena" in the old title Deed made in 1871 would have been non-exist with the passage of time and a new name would have been inserted in place of the old name on the southern boundary. However, the Galenda which remained unchanged as a vital identification mark separates the corpus of the action from the land on the south as is shown by Mr. Cader and Mr. Alivihare in their respective Plans.

[54] Accordingly, I am of the view that irrespective of the fact that the southern boundary of the land described in the schedule to the Plaint filed in the Partition Case is "Kurumeeroyahena" according to the old Title Deeds of the Defendant, the southern boundary of the corpus is physically Galenda as depicted in all four Plans.

[55] The learned Counsel for the Defendant submitted, however, that the learned Additional District Judge has totally disregarded the superimposed Plan (V2) and Report (V3) and the evidence given by Mr. T.N. Cader and rejected the superimposition solely on the basis of his evidence given in re-examination that he cannot now remember who produced the Plan for

superimposition, which Plan was used and he cannot remember the criteria applied for the superimposion. The relevant parts of his evidence at page 73 of the brief is as follows:

ප්‍ර :- මහත්මයාගෙන් ප්‍රශ්ණ කලා ආරෝපණය කිරීමට බෙදුම් නඩු පිඹුර පාවිච්චි කලාද කියලා ?

උ :- එහෙම පිඹුරක් මා ලග නෑ. මම ලග ආරෝපණය කිරීමට පාවිච්චි කිරීමට තිබු සිද්ධාන්ත එකක් වත් නෑ.

ප්‍ර :- විත්තියෙන් මහත්තයා ප්‍රශ්න කරනකොට පිඹුර ආරෝපණය කලාද කියලා ?

උ :- පිඹුරේ කොපියක් නැහැ. මොකක් පාවිච්චි කලාද කියලා කියන්නත් බැහැ.ආරෝපණය කිරීමක් කලා කියන්න මුකුත් නැහැ. මෙම පිඹුර ආරෝපණය කිරීමට මොකක් භාවිතා කලාද කියන්න මට බැහැ. දැනට නැහැ. වගඋත්තරකරුවන් විසින් මොන පිඹුරක් දුන්නාද කියලත් මම දන්නේ නැහැ.

[56] The learned Additional District Judge has, however, rejected the Plan No. 1346/A on the sole basis of Mr. Cader's inacapacity to explain or remember in re-examination the criteria used for the superimposition as the said Plan was not with him at the time he gave evidence in Court nearly 8 years after the said Plan No. 1346/A was submitted to Court. The findings of the learned Additional District Judge in her judgment at page 184 of the brief are as follows:

> **විත්තිකරු ප්ලෑනක් දුන්නු බව කීමට මිනින්දෝරු මහතා දන්නේය. නමුත් එම ප්ලෑනය කුමක් ද කියා තමන් නොදන්නා බවත් ආරෝපිත කිරීමේදී මිනින්දෝරු මහතා පාවිච්චි කල සිද්ධාන්ත කිසිවක් මේ අවස්ථාවේදී ඔහු ලග නොමැති බවත් සාක්කි දෙමින් පිළිගෙන තිබේ.** කාදර් මිනින්දෝරු මහතා හරස් ප්‍රශ්ණ වලට පිළිතුරු දෙමින් පැ. 01 වශයෙන් ලකුණු කර තිබෙන අංක. 1346 දරණ සැලැස්මේ පෙන්වා තිබෙන ඉඩම වී. 01 වශයෙන් ලකුණු කර තිබෙන පේ.අලුවිහාරේ මිනින්දෝරු මහතාගේ 3589 දරණ සැලැස්මේ පෙන්වා දී තිබෙන බව පිළිගෙන තිබේ. කෙසේ වෙතත් කාදර් මිනින්දෝරු මහතා අධිකරණයේ දුන් සාක්ෂි වලින් මට ඒත්තු යන්නේ ඔහු විසින් කරන ලද අධිෂ්ඨාපනය සාර්ථක අධිෂ්ඨාපනයක් ද යන්න සම්බන්ධව කිසිදු සාක්කියක් ඉදිරිපත් වී නැති බවයි.

[57] It is settled law that the Court of Appeal will not lightly disturb the findings of facts, especially with regard to the credibility of witnesses unless the findings are highly unreasonable or perverse. In *Fraad v. Brown & Company Ltd* 20 NLR 282, the Privy Council stated thus:

"It is rare that a decision of a judge so express, so explicit, upon a point of fact purely, is over ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any Judge of the Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare, in questions of veracity, so direct and so specific as these, a Court of Appeal will overrule a Judge of first instance."

[58] In *Alwis v. Piyasena Fernando* 1993 (1) Sri LR 119 at 122, His Lordship the Chief Justice G.P.S. de Silva observed that "it is well established that the finding of primary facts by the trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.". In *Gunewardene v. Cabral and Others* 1980 (2) Sri LR 220, Rodrigo J. held that the Appellate Court will set aside inferences drawn by the trial judge only if they amount to findings of fact based on:

(a) Inadmissible evidence; or

(b) After rejecting admissible and relevant evidence; or

(c) If the inferences are unsupported by evidence; or

(d) If the inferences or conclusions are not rationally possible or perverse.

[59] It is true that in deciding the issues of facts, the advantage which a trial judge has of seeing and hearing the witnesses however, an Appellate Court will set aside the finding of a trial judge when the reasons given by him for accepting a party's story are contrary to what is plainly proved by documents produced in evidence by the opposite party (*Selvaguru v. Thaoyalpagar* 54 N.L.R. 361 (P.C). Where the disbelief of a witness is based on the ground that the witness has contradicted himself and where on examination, the contradictions do not amount to anything more than an incapacity to explain or remember certain facts, an Appellate Court is

entitled to examine the evidence and arrive at an independent decision (*Abdul Sathar v. Bogtstra* 54 N.L.R. 102).

[60] Mr. Cader has, in re-examination, only expressed his incapacity to explain the criteria adopted by him for the superimposition in the absence of Mr. Aluvihare's Plan No. 3589/P at the time he testified in Court. I am of the view that the learned Addditional District Judge should not have rejected Mr. Cader's evidence on superimposition on that score alone. His evidence that the Plan No. 1346 (P1) and Mr. J. Aluvihare's Plan No. 3589 marked V1 is identical is supported by his own observations in his Report (V3) and thus, the reliability of his evidence in regard to the identity of the two Plans remains unchanged in reexamination as well. Under such circumstances, the learned Addditional District Judge should not have rejected Mr. Cader's evidence on superimposition on that score alone. rejection of the superimposed Plan No. 1346/A does not amount to anything more than his incapacity to explain or remember the criteria adopted for the superimposition in the absence of Mr. Aluvihare's Plan No. 3568 (V1) with him at the time he testified in Court 8 long years after the preparation of the said Plan.

[61] I hold that the reasons given by the learned Additional District Judge for rejecting Mr. Cader's superimposition and accepting only his Plan No. 1346 are contrary to what is plainly proved by the oral evidence of Mr. Cader and the contents of the Plan No. 1346/A (V2) and the Report (V3) which specifically state that Mr. Aluvihare's Plan No. 3589 in D.C. Kegalle Case No. 18036 is identical to the land depicted in Plan No. 1346 (P1).

[62] In these circumstances, I am inclined to agree with the learned Counsel for the Defendant that the corpus of the action claimed by the Plaintiffs and depicted in Plan No. 1346 (P1) is the identical land called "Delgahamulahena" which was partitioned by virtue of the Final Partition

Decree entered by the District Court in Case No. 18036 (P13a) and depicted in Mr. Aluvihare's Final Plan No. 3589 (V2).

Title to the Corpus of the Action

[63] A *rei vindicatio* action arises from the right of dominium and it is an action *in rem* (founded on ownership) and therefore, the Plaintiff's ownership of the thing is the very essence of *rei vindicatio* action where the main issue that arises for the adjudication is the Plaintiff's ownership of the property. As noted, a Plaintiff who is seeking a declaratory relief in a *rei vindicatio* action must prove and establish his title to the land in dispute (*Wanigaratne v. Juwanis Appuhamy* (supra), *Luwis Singho and others v. Ponnamperuma* (1996 2 Sri LR 320). Thus, in a *rei vindicatio* action, the Plaintiff must prove his or her title and in establishing his or her title, the Plaintiff cannot rely on the weaknesses of the Defendant's title. In *Samarapala v. Jagoda* (1986) 1 Sri LR 378, it was held that (i) in a vindicatory suit, the Plaintiff must prove his title and having failed to prove his own title, he cannot rely on the weaknesses of the Defendant's title; and (ii) whatever the strength of the Defendant's case, if the Plaintiff fails to establish his title, the Plaintiff's case must necessarily fail.

[64] It is also important at this stage to consider the defences open to a Defendant in an action *rei vindicatio*. In *Allis Appu v. Endris Hamy and others* (1894) 3 SCR 87, Withers J. referring to the authority of Maynz Vol. 1 page 786 said that a Defendant in a *rei vindicatio* action can defend himself:

(i) by denying Plaintiff's title, which must be strictly proved;

(ii) by setting up his own title and establishing a title superior to that of the Plaintiff;

(iii) prescription of the action;

(iv) the plea of *res judicata*;

(v) right of tenure under the Plaintiff's as for *usufruct*, pledge, lease, loan, etc.

(vi) right to retain possession subject to indemnity from the Plaintiff under peculiar conditions; *jus retentionis;*

(vii) (The plea of exception *rei venditae et traditae*, that is, by the Plaintiff or his qualified agent, to him-the Defendant-in possession; and (viii) the *jus tertii* (the title of third parties-one having a superior title to the Plaintiff).

[65] The Plaintiffs sought to establish title to the corpus of the action by Title Deed No. 1411 dated 19.02.1953 (P3) and inheritance from Esmadalle Koswatte Ralalage Mudiyanse. The Plaintiffs have pleaded that the original owner of the land called Kudumeeriya" *alias* "Goluwellukapuhena" now watta was one Esmadalle Koswatte Ralalage Mudiyanse who transferred undivided ½ share to the 1st Plaintiff and upon the demise of the said Mudiyanse, his remaining ½ share devolved on the Plaintiffs who are the children of Mudiyanse.

[66] The Plaintiff's pedigree, however, commences only from their father Esmadalle Koswatte Ralalage Mudiyanse but the Amended Plaint is silent as to how and when the said Esmadalle Koswatte Ralalage Mudiyanse acquired title to the land claimed by them in their Amended Plaint. At the trial, the Plaintiffs called the daughter of the 1st Plaintiff, Indrani Menike, who gave evidence on behalf of all the Plaintiffs. However, the 1st Plaintiff who was alive was not called as a witness at the trial. The only Title Deed produced by the Plaintiffs to establish title to the property was the Deed No. 1411 marked P3, which states that the said Mudiyanse had transferred ½ share to the 1st Plaintiff. No other Title Deed was produced by the Plaintiffs to establish as to how Mudiyanse acquired title to the corpus of the action.

[67] The daughter of the 1st Plaintiff, Indrani Menike has admitted in evidence that she was not aware how Mudiyanse acquired title to the said land. Her evidence at pages 83- 84 of the brief is as follows:

ප්‍ර :- තමා ඉදිරිපත් කලා පැ. 03 හැටියට ඔප්පුවක්. තමාලගෙ අයිතිය සම්බන්ධයෙන් නඩු කියන ඉඩමට ඔප්පුවේ කොයි ඉඩමද ?

උ :- (ඔප්පුව පරීක්ෂා කර බලයි) මෙම ඔප්පුවේ තිබෙන 03 වන ඉඩම.

ප්‍ර :- මෙම ඔප්පුව අනුව සඳහන් වෙන්නේ තමාගේ පියාට දුන්නු තැනැත්තා වන මුදියන්සේ කියන තැනැත්තෙකුට ඔප්පුවක් පිට අයිති වුනා කියලා.

උ :- ඔව්.

ප්‍ර :- ඔප්පු පිටද මුදියන්සේට අයිති වුනේ මෙම ඉඩම ?

උ :- මම දන්නේ නෑ.

[68] In view of the aforesaid evidence of Indrani Menike, the learned Additional District Judge has accepted the Defendant's position in her judgment at page 181 of the brief that the Plaintiffs have failed to adduce any evidence to prove as to how Esmadalle Koswatte Ralalage Mudiyanse became entitled to the property in dispute as follows:

> පැමිණිලිකරුගේ සාක්ෂියෙන් කිසිම අවස්ථාවක ඉඩමේ මුල් අයිතිකරු බව කියන මුදියන්සේට දේපල අයිති වුනේ කෙසේද යන්න පිළිබඳව සාක්කි ඉදිරිපත් වී නැත.

[69] It is crystal clear that the Plaintiffs have failed to establish that the Plaintifffs' purported predecessor in title, Esmadalle Koswatte Ralalage Mudiyanse was the owner of the property in dispute and in the absence of any proof that Mudiyanse became entitled to the property in dispute, the said Mudiyanse could not have transferred ½ share of the said property to the 1st Plaintiff and thus, upon his demise, the Plaintiffs could not have inherited to the balance ½ share of the property from Mudiyanse.

Posseessory Action filed in the District Court of Kegalle

[70] A perusal of the judgment of the learned Additional District Judge clearly reveals that the Plaintiffs were declared owners of the property in question on the basis that the Defendant filed the Partition Action bearing No. 18036/P after the judgment was entered in favour of Mudiyanse and

Punchirala in a previous Partition Case bearing No. 15759 and without making Punchirala and Mudiyanse parties to the said action.

[71] The relevant parts of her findings at page 183 of the brief are as follows:

> අංක. 15759 බෙදුම් නඩුවේ පැමිණිලිකරු මෙම නඩුවේ විත්තිකරු වන අප්පුහාමි මිල්ලන්ගොඩ වෙයි. ඒ අනුව පැහැදිලිව පෙනී යන කරුණක් වන්නේ අංක. 15759 බෙදුම් නඩුවේ තත්ත්වය එලිදරව් නොකරමින් අංක. 18036 බෙදුම් නඩුවේ පැමිණිලිකරු එම නඩුව පවරා තිබෙන බවත් ය. තවද එකී අංක. 18036 බෙදුම් නඩුවේ දී අංක. 15759 බෙදුම් නඩුවෙන් අයිතිවාසිකම් හිමි වූ පුංචිරාළ සහ මුදියන්සේ යන දෙදෙනා පාර්ශවකරුවන් කර නොමැති බවත් ය.

[72] The said District Court Case bearing No. 15759 filed by Mudiyanse and Punchirala (1st Plaintiff) on 31.01.1963 was only a possessory action (15759/L). The Plaintiffs in that case prayed for the restoration of the possession and ejectment of the Defendants from the land called "Kudumeriya" alias "Golawellaukapuhena" now watta. By the said judgement dated 06.08.1965, the District Court restored the Plaintiffs' possession and made order to eject the Defendants in that case (P9). The Appeal against the said judgment was dismissed by the Supreme Court on 25.09.1966. (P11).

[73]. In the possessory action, the cause of action is based on the enjoyment of an earlier peaceful possession and subsequent ouster leaving the question of title open for further investigation in another suit and hence, the possessiosry action constitutes an action *in personam.*

[74] The Plaintiffs' own documents marked P6-P12 clearly indicate that Case No. 15759 was only a land case (a possessory action) which only binds the parties to the action. Thus, it has no binding effect on the Defendant who was not a party to the said action. The question of ownership or prescriptive possession were never tried and decided in the said action. The learned Additional District Judge was clearly in error in making her findings on the basis that there were two parallel partition

action, one filed by the 1st Plaintiff and Mudiyanse (Case No. 15759/L) and another by the Defendant (Case No. 18036/P).

[75] The reasons given by the learned Additional District Judge that the Plaintiffs are the owners of the property in question are contrary to what is plainly proved by documents produced and evidence adduced by the parties and are clearly erroneous, irrational, unreasonable and unacceptable and cannot stand. For those reasons, I hold that the Plaintiffs have not proved title to the property in dispute and hence, the Plaintiffs' action should fail for the failure to establish title to the land in question.

Prescritive Possession of the Plaintiffs

[76] At the trial however, the Plaintiffs have further raised issue 5 to indicate their position that the Defendant forcibly entered the land in dispute on 16.02.1974 and dispossessed the Plaintiffs. It reads as follows:

5- මෙම නඩුවේ විත්තිකරු මෙම නඩුවට අදාල සංශෝධිත පැමිණිල්ලේ උපලේඛනය සඳහන් වන්නා වූ ඉඩමට කිසිම අයිතිවාසිකමක් නොමැතිව අයුතු ලෙස සහ බලහත්කාරයෙන් 1974.02.16 දින ඇතුලු වී බලහත්කාරයෙන් බුක්ති විඳින්නේද ?

[77] The Plaintiffs raised the issue 6 to indicate that they together with their predecessors in title possessed the said land for more than 10 years and acquired prescriptive title to the same.

6- මෙම පැමිණිලිකරුවන් සහ ඔවුන්ගේ පෙර අයිතිකරුවන් මෙම නඩුවට අදාල කුඩු මීරියේ නොහොත් ගොලු බෙල්ලෝ කාපු හේන දැනට වත්ත නැමති මෙම නඩුවට මැන ඇති කාදර් මිනින්දෝරු මහතාගේ අංක. 346 පිඹුරේ පෙන්වා ඇති ඉඩම ආරවුලට පෙර දස වසරකට අධික කාලයක් බුක්ති විඳීමෙන් කාලාවරෝධි අයිතිවාසිකම් හිමිකර ගෙන තිබේද ?

[78] Perusal of the Judgement of the learned Additional District Judge further reveals that she has further decided that the Plaintiffs have acquired prescriptive title by uninterrupted and undisturbed possession for well over 10 years and thus, answered the issue 6 in favour of the Plaintiffs.

[79] The learned Additional District Judge has heavily relied on the documents marked P4 to P6 and the judgement of the Possessory action to hold that the Plaintiffs and their predecessors had undisturbed and uninterrupted possession in the land depicted in Plan No. 1346 (P1). The documents marked P4-P6 relate to a permit granted and Payments made by the 1st Plaintiff for Rubber Replanting Subsidy Scheme in 1961 and the documents marked P13 and P15 relate to payments of acreage taxes by Punchirala from 1967-1969, 1970.

[80] A perusal of the documents marked P10 (judgment) and P12 (Fiscal Report) reveals that after the possessory action was decided in favour of Mudiyanse and Punchirala in 1965, the possession was handed over to them by the Fiscal on 27.07.1967. The evidence of Indrani Menike was that (i) Punchirala replanted bud Rubber in 1960 and thereafter, when the brother of the Defendant disturbed the possession of the land, a case was filed in the District Court bearing No. 15759; (ii) the Fiscal handed over possession thereof to Punchirala and then, Punchirala attempted to clear the land, but the Defendant forcibly entered into the land on 15.02.1974 and destroyed the rubber plantation in 1986.

[81] She has, however, admitted in evidence that although Punchirala replanted bud rubber in 1960, he was not allowed to possess them by the Defendant and in the result, no party made use of the land after 1960. Her evidence at pages 84-87 and 104 of the brief is as follows:

ප්‍ර :- බඩ් රබර් අක්කර 03 ක වැවිවේ මොන අවුරුද්දේද ?
උ :- 1960 අවුරුද්දේ.
.....
ප්‍ර :- අක්කර 03 ම විනාශ කරලා දැම්මාද ගලවලා ?
උ :- ඔව්
ප්‍ර :- කොයි අවුරුද්දේද විනාශ කලේ ?
උ :- 74 ආරවුලු වෙලා ඊට පස්සේ තමයි විනාශ කළේ.
ප්‍ර :- 74 මෙම නඩු කියන ඉඩමට විත්තිකරුවන් ඇතුල් වෙලා බඩ් රබර් වගාව විනාශ කර බව තමා කියන්නේ ?

උ :- ඔව්.
ප්‍ර :- කොයි අවුරුද්දේදීද විනාශ කළේ ?
උ :- 86 අප්‍රේල් මාසෙ.
ප්‍ර :- කොහොමද විනාශ කළේ?
උ :- කපලා ගලෝලා විනාශ කලා.
ප්‍ර :- උදුරලා දැම්මා නම් අක්කර 03 හිම රබර් වගාව ගැලෙව්වාද?
උ :- මම දන්නෙ නැහැ. මම ගියෙ නෑ ඉඩමට (pages 83-84)
.....
ප්‍ර :- මෙම ඉඩමේ 1960 වැව්ව බඩි රබර් කොයි අවුරුද්දේ දීද කිරි කපන්න පටන් ගත්තේ?
උ :- කිරි කැපුවේ නැහැ.
ප්‍ර :- කවුද කිරි කැපුවේ ?
උ :- කවුරුවත් කිරි කැපුවේ නැහැ. 67 තමයි ඉස්සර වෙලා නඩුව තිබුනේ. ඊට පස්සේ සුද්ද කරගෙන යනකොට 74 අවුරුද්දේ පෙබරවාරි 17 සුද්ද කර ගෙන යනකොට තමයි මේ කට්ටිය ආරවුල් කලේ.
ප්‍ර :- 60 වවපු බඩි රබර් කවුරුවත් කිරි කැපුවේත් නැහැ. කවුරුවත් ප්‍රයෝජනයක් ගත්තේත් නැහැ.
උ :- නැහැ (page 87)

[82] Indrani Menike has further stated in evidence that although her grant father, Mudiyanse had given the land in question to Punchirala, she was not aware of when her father Punchirala possessed the land in question. Her evidence at pages 98-99 of the brief is as follows:

ප්‍ර :- මම අහන්නේ තමාගෙන් තමාගේ පියා කොයි කාලේ ඉදලද මෙම ඉඩම බුක්ති වින්දේ ?
උ :- තාත්තා අත්තලා දීලා බුක්ති විඳින්න ඇති. මම දන්නේ නැහැ කියන්න.

[83] No complaint was produced by the Plaintiffs to substantiate the position that the Defendant forcibly entered into the land in question in 1974 and thereafter destroyed the rubber plantation in 1986. Apart from the said documents P4 to P6, P13 and P15 which relate to the period from 1967-1971, there is no other documents produced by the Plaintiffs to establish that after the possession was handed over to Punchirala and Mudiyanse on 27.07.1967 in the possessory action, they continued to possess the said land until such time they were dispossessed by the Defendant on 16.02.1974.

[84] In this context, the learned Additional District Judge has held that the Plaintiffs have not proved that the Defendant forcibly entered into the land in question on 16.02.1974 and dispossessed the Plaintiff and hence, answered the issue no. 5 as "not proved'.

[85] In the circumstances, the Plaintiffs have failed to adduce credible evidence to prove that the Plaintiffs and their predecessors had undisturbed, uninterrupted and adverse possession in the said land for more than 10 years and acquired prescriptive title to the same. Accordingly, the findings of the learned Additional District Judge that the Plaintiffs and their predecessors possessed the land in question for more than 10 years and acquired prescriptive title to the said cannot stand.

Final and conclusive effect of the partition decree

[86] The learned Counsel for the Plaintiffs further submitted that as the lis pendens had not been registered in respect of a larger land and the Plaintiffs in the previous partition case No. 18036/P had not made the present Plaintiffs parties to the said Partition Action, the judgment in the said partition action is not conclusive as per section 48 (3) of the Partition Law.

[87] The District Court of Kegalle Case No. 18036 is a Partition action and lot 2 of the Final Plan No. 3589 (V1) was allotted to the present Defendant who was the Plaintiff in the said case, while lot 1 of the the said Final Plan was allotted to the 1st to 3rd Defendants by virtue of the Final Decree of the said Case marked V4. Final Decree Decree entered by the District Court on 27.06.1968 (V4).

[88] The Defendant's position is that he was placed in possession to lot 2 of Plan No. 3589 (V1) on 27.06.1968 by virtue of the Final Decree Decree entered by the District Court on 27.06.1968 (V4). The final decree entered in a partition action is a decree *in rem* and it binds the whole world as

manifest from the provisions of Section 48(1) of the Partition Act No. 21 of 1977. Section 48 (1) of the Partition Law reads as follows:

(1) Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever rights title or interest they have, or claim to have to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection "omission or defect of procedure " shall include an omission or failure-

(a) ***to serve summons on any party;*** *or*

(b) *to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or*

(c) *to appoint a guardian ad litem of a party who is a minor or a person of unsound mind.*

(2) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

The powers of the Supreme Court by way of revision and restitutio inintegrum shall not be affected by the provisions of this subsection.....

(5) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title

or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, if, but only if, he proves that the decree has been entered by a court without competent jurisdiction.

[89] In *Odiris Appuhamy v. Caroline Nona* 66 N.L.R. 241, Basnayake C.J. analysed the three sub-sections, 1, 2 and 3 of Section 48 of the Partition Law and stated as follows:

"The three sub-sections taken collectively indicate that notwithstanding-

a) ***any omission or defect of procedure;*** *or*
b) in the proof of title adduced before the court; or
c) ***the fact that all persons concerned are not parties to the partition action;***

the decrees are final and conclusive against all persons whomsoever except against a person who has not been a party to the partition action and claims a title to the land independently of the decree. Such a person must assert his claim ***in a separate action*** *and can only succeed if:*

a) he proves that the decree had been entered by a court without competent jurisdiction; or

b) that the partition action has not been duly registered as a lis pendens.....

The District Judge has no power to set aside his own decree. All decrees passed by the Court are, subject to appeal, final between the parties (sec. 207 Civil Procedure Code) and may not be varied except in the circumstances set out in section 189 of the Code which empowers the Court to correct any clerical or arithmetical mistakes in any judgment or order or any error arising therein from any accidental slip or omission. The Court may also make any amendment which is necessary to bring a decree into conformity with the judgment. There is no inherent power in a Court of subordinate jurisdiction to set aside its own decree even though it be wrong."

[90] The present action does not fall within the ambit of any exceptions to the final and conclusive effect of a final decree of a partition action as set out in section 48 of the Partition Law. Section 48 (5) restricts the grounds

depriving an interlocutory decree of its " final and conclusive" character to (i) want of jurisdiction in the court; and (ii) want of due registration of lis pendens; and (iii))is concerned with a person who was not a party to the partition action.

[91] Although the learned Counsel for the Plaintiffs has merely stated in the written submissions that no lis pendens was properly registered in Case No. 18036/P and therefore, the final decree is defective, no material was placed before the District Court to substantiate this position by the Plaintiffs.

[92] It has been clearly established by the Final Partition Decree entered in the District Court of Kegalle Case No. 18036/P that the present Defendant was declared entitled to lot 2 and the 1st to 3rd Defendants in that case were declared entitled to lot 1 in Plan No. 3589 made by Mr. J. Aluvirare, Licensed Surveyor.

[93] For those reasons, I hold that the Final Partition Decree entered by the District Court of Kegalle in Case No. 18036/P shall be final and conclusive against all persons notwitstnading any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action. The learned Additional District Judge has clearly disregarded the final and conclusive effect of the Final Decree entered in the Partition Case No. 18036/P which binds the whole world.

[94] For those reasons, I am of the opinion that the findings of the learned Additional District Judge are not rationally possible, unsupported by oral and documentary evidence and are contrary to facts and law and therefore, the judgment of the learned Additional District Judge of Kegalle dated 13.07.1999 cannot stand.

Conclusion

[95] For those reasons, I set aside the judgment of the learned Additional District Judge of Kegalle dated 13.07.1999 and make order dismissing the action filed by the Plaintiffs in the District Court of Kegalle Case bearing No. 1995/L.

[96] The Appeal is allowed without costs.

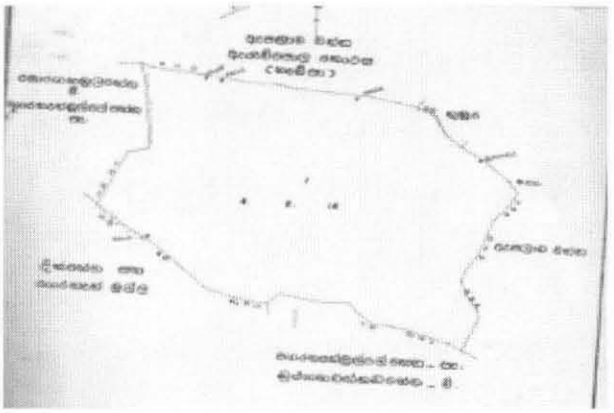
JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

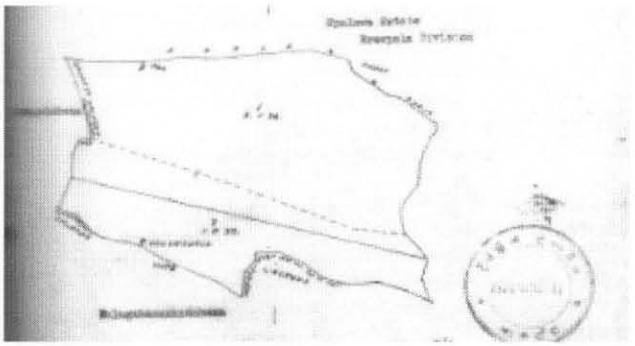
I agree.

JUDGE OF THE COURT OF APPEAL

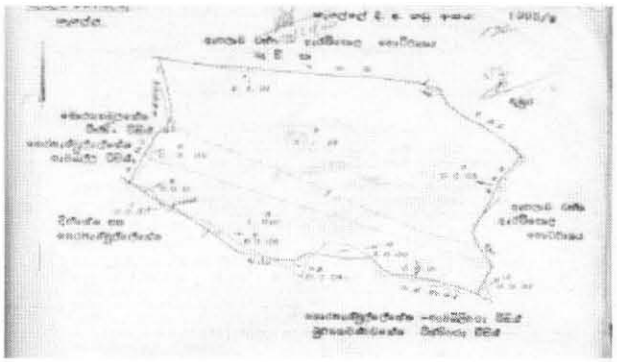
ANNEXURE "A" - Plan No. 1346 (P1)



ANNEXURE "B" - Plan No. 3589 (V1)



ANNEXURE "C-" Plan No. 1346/P (V2)



ANNEXURE "D"- Preliminary Plan No. 3324 (P14)