

**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 127(2) of the Constitution read with Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 64 of 2006.

SC. Appeal No. 119/2010

**NCP/HCCA/ARP/622/2009
DC. Polonnaruwa No.5414/L**

Wimala Herath
Rajawila,
Hingurakgoda.

Plaintiff

-Vs-

1. M.D.G. Kamalawathie,
No. 27/5, Flower Lane,
Pepiliyana Road,
Nugegoda.
2. S..A. Piyasena,
Trackmo Institute,
Wickramasinghe Road,
Hingurakgoda.

Defendants.

And Between

1. M.D.G. Kamalawathie,
No. 27/5, Flower Lane,
Pepiliyana Road,
Nugegoda.
2. S.A. Piyasena,
Trackmo Institute,
Wickramasinghe Road,
Hingurakgoda.

Defendant-Appellants

-Vs-

Wimala Herath (Deceased)

1. Sarathchandra Rajapakshe.
2. Ananda Kumara Rajapakshe
3. Wasantha Kumara Rajapakshe

All are of:

Rajawila,
Hingurakgoda.

Plaintiff-Respondents.

And Now Between

Wimala Herath (Deceased)

1. Sarathchandra Rajapakshe.
2. Ananda Kumara Rajapakshe
3. Wasantha Kumara Rajapakshe

All are of:

Rajawila,
Hingurakgoda.

Plaintiff-Respondent-Appellants

-Vs-

1. M.D.G. Kamalawathie,
No. 27/5, Flower Lane,
Pepiliyana Road,
Nugegoda.
2. S.A. Piyasena,
Trackmo Institute,
Wickramasinghe Road,
Hingurakgoda.

Defendant-Appellant-Respondents

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SC. Appeal No. 119/2010

BEFORE : **Saleem Marsoof, PC. J.**
S.I. Imam,J.
Eva Wanasundera, PC.J.

COUNSEL : Uditha Egalahewa PC. With Gihan Galabadage for
the Plaintiff-Respondent-Appellants.

W. Dayarathne PC. With Shiroma Peiris and Nadeeka
K. Arachchi for the 2nd Defendant-Appellant-
Respondent.

ARGUED ON : **07-11-2012**

**WRITTEN SUBMISSIONS OF
THE PLAINTIFF-RESPONDENT-
APPELLANT FILED ON:** 28-11-2012

**WRITTEN SUBMISSIONS OF
THE 2ND DEFENDANT-APPELLANT-
RESPONDENT FILED ON:** 05-12-2012

DECIDED ON : **05- 02-2013**

* * * *

Eva Wanasundera, PC.J.

The Plaintiff-Respondent-Appellant Wimala Herath filed action on 16th October 1991 in the District Court of Polonnaruwa in case No. 5414/L seeking a declaration that she is the owner of the lands described in the two schedules "අ" and "ආ" to the plaint under the Permit No. 156 dated 11.8.1987 issued under the Land Development Ordinance and further sought to eject the Defendant-Appellant-Respondents from the land in schedule "ආ" (the 2nd schedule). Schedule to the plaint "අ" related to an allotment of land of an extent of 2A. 1R. 26P, and Schedule "ආ" referred to a land smaller in extent. The salient point of

fact to be noted in this case is that the 30 perch block of land referred to in Schedule "ආ" is within the boundaries of the 2A. 1R. 26P. block of land referred to in Schedule "ඇ". In other words land in the 2nd Schedule "ආ" is part and parcel of land in the 1st Schedule "ඇ". The 30 P. parcel of land is carved out of the 2A. 1R. 26P. block of a bigger land bordering the main road named "Wickremasinghe Road".

The Defendant-Appellant-Respondents' position in the District Court in the answer dated 9th March 1995 was that the 1st Defendant--Appellant-Respondent was the holder of a permit for the 30 perch block of land under the Land Development Ordinance permit No. 156A, ie. the land described in Schedule "ආ" to the plaint which is the 2nd Schedule. Furthermore the Defendant-Appellant-Respondents moved for compensation for improvements done on the land.

At the end of the trial before the District Court the District Judge held in favour of the original Plaintiff and delivered judgment dated 15.08.2001, holding that,

- a) the Plaintiff was the lawful owner of the lands in both schedules to the plaint,
- b) that other permits if any issued to any other person in respect of the said lands were null and void,
- c) that the Defendants and whoever holds under them should be ejected and
- d) ordered compensation of 2 lakhs of Rupees to be paid to the Defendants by the Plaintiffs as compensation for improvements on the land in schedule "ආ"(ie. Schedule No. 2).

The Defendants in the District Court case being aggrieved by the judgment of the District Judge appealed to the Civil Appellate High Court of the North Central Province holden at Anuradhapura and the appeal was heard under case No.

NCP/HCCA/ARP/622/2009. Judgment of this case was delivered on 17.02.2010, setting aside the judgment of the District Court and thus the plaint was dismissed.

When the Plaintiff-Respondent-Appellants being aggrieved by the judgment of the Civil Appellate High Court sought leave to appeal from this Court, leave was granted on 15.09.2010 on three questions of law contained in paragraph 11(e),(f) and (h) of the Leave to Appeal application to this Court which I would like to enumerate as follows:-

11 (e) Did the Honourable Judges of the said Civil Appellate High Court err in law by holding that the Petitioners, though entitled to the title and the possession of the land morefully described in the Schedule "ආ" to the plaint on permit bearing No. 156 dated 11th August 1987, that the Respondent was entitled to the land morefully described in the schedule "ආ" to the plaint on permit bearing No. 156/A, which formed part of the land morefully described in the said permit bearing No. 156?

(f) Did the Honourable Judges of the said Civil Appellate High Court err in law by holding that it was unnecessary to cancel the permit bearing No. 156 prior to the issuance of permit bearing No. 156A that contained a portion of land morefully described in the permit bearing No. 156?

(h) Did the Honourable Judges of the said Civil Appellate High Court err in evaluating the provisions of the Land Development Ordinance No. 19 of 1935 as amended?

The material facts in this case could be summarized as follows for better understanding of the factual background for the purpose of deciding on the contentions of law arisen to be decided by me which in turn would be finally affecting the parties to this case. The Plaintiff in the District Court was Wimala

Herath whose husband was D.W. Rajapaksha alias R.A. Dharmawansa. The original permit holder of permit No. 156 for the land of 2A. 1R. 26P. was D.W. Rajapakse in 1946. In 1967 one N.D. Gunathilaka was given permission by D.W. Rajapaksha to run a garage on a portion of the land bordering the main road. That portion of the land was about 30P. When D.W. Rajapaksha died, his wife the Plaintiff, Wimala Herath received the said permit under him for lot 156. From 11.08.1987 Wimala Herath was the permit holder. The Govt. Agent granted a permit, 156A, for the aforesaid 30P. to N.D. Gunathilaka on 20.7.1973, after an inquiry and taking into consideration the alleged consent in writing given by the deceased D.W. Rajapaksha. Thereafter N.D. Gunathilaka died and his wife M.D.G. Kamalawathie in turn was issued the said permit 156A for 30P. While the case was pending in the Civil Appellate High Court the Plaintiff Wimala Herath died and the present Plaintiff-Respondent-Appellants are the three children of D.W. Rajapaksha and Wimala Herath.

On the questions of law aforementioned I have viewed the judgment of the Civil appellate High Court. The permit No. 156 was issued for 2A. 1R. 26P. The Appellants are holding under that permit and that fact was not an issue at any time. The permit No. 156 is admittedly legal and valid. The Govt. Agent issued permit No. 156A for 30P. which land is situated inside the land described in permit No. 156. According to the Provisions of the Land Development Ordinance No. 19 of 1935 as amended, there is no way to expunge a portion out of this land already given on a permit, and grant a separate permit for that expunged portion, with or without the consent of the first permit holders. In fact no permit holder could agree to do so, according to the provisions of law. If at all, the 1st permit could be cancelled on lawful grounds and it is only thereafter that the land could be divided and separate permits be issued. The Govt. Agent at that time has issued permit 156A in the most wrongful way. He has neither considered the provisions of law nor the repercussions which could arise thereafter. In the case of *Seenithambi vs. Ahamadulebbe* 74 NLR 222, the Gal-Oya Development Board issued one permit to A in 1954 and another to B in 1960 for the same allotments of land. The Supreme Court held that strict proof of

due cancellation of the permit issued to A was necessary before his title could be defeated. The Learned Judges of the Civil Appellate High Court have interpreted the decision of this case in the wrong way and dismissed the plaint. The ratio decidendi of that judgment is that once a permit is given for a particular allotment of land, without a cancellation of that permit, no other permit granted for the same could be legally valid. It goes without saying that no other permit granted for part of the same land could be legally valid. Therefore it is quite clear in this case that with the admission of both parties, that permit 156 is legally valid and prevailing from that time up to date, that a portion or part of the same land cannot be expunged and be given to another person on another permit, ie. 156A. Therefore I hold that permit 156A is illegal and void.

The Respondents' argument that permit 156A was given with the consent of the original permit holders and long possession does not hold water in the light of the permit being illegal and void.

I set aside the judgment of the Civil Appellate High Court of the North Central Province holden at Anuradhapura dated 17th February 2010 and uphold the judgment of the District Court of Polonnaruwa dated 15th August 2001. However I order no costs.

Judge of the Supreme Court

Saleem Marsoof, PC. J.

I agree

Judge of the Supreme Court

S.I. Imam,J

I agree

Judge of the Supreme Court

