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

Rev. Waralle Nandaloka Thero
Viharadhipathi,
Paragoda Rajamaha Viharaya, Paragoda, Imaduwa.

**Plaintiff**

**Case No. C. A. 1192/98(F)**
**D. C. Galle Case No. 10707/L**

Vs.

John Francis Wimalawathie
Wijesinghe Tours, Paragoda, Imaduwa.

**Defendant**

**AND BETWEEN**

John Francis Wimalawathie (Deceased)
Wijesinghe Tours, Paragoda, Imaduwa.

**Defendant-Appellant**

Wijesinghe Acharige Hemalal
Paragoda, Imaduwa.

**Substituted Defendant-Appellant**

**Vs.**

Rev. Waralle Nandaloka Thero
Viharadhipathi,
Paragoda Rajamaha Viharaya, Paragoda, Imaduwa.

**Plaintiff-Respondent (De-robed)**

Rev. Wellane Chandrasiri Thero
Bodhirukkaramaya, Udukawa, Thelijjavila.

**Substituted Plaintiff-Respondent**

**Before:** Janak De Silva J.

K. Priyantha Fernando J.

**Counsel:**

Sudharshani Coorey for the Substituted Defendant-Appellant

J.P. Gamage with Rasika Wellappili for Substituted Plaintiff-Respondent

**Argued on:** 27.03.2019

**Written Submissions tendered on:**

Substituted Defendant-Appellant on 24.05.209

Substituted Plaintiff-Respondent 03.06.2019

**Decided on:** 17.10.2019

**Janak De Silva J.**

This is an appeal against the Judgment of the learned Additional District Judge of Galle dated 08.05.1998.

The Plaintiff–Respondent (Plaintiff) instituted the above styled action in the District Court of Galle seeking inter alia a declaration of title to the allotments of land (Lots 1A, 1B and 2) containing in extent A.0-R.3-P.6 morefully described in paragraph 2 of the plaint dated 14.08.1985 [Page 41 of the Appeal Brief]. The Plaintiff averred in his plaint that –

1. Paragoda Raja Maha Viharaya (Viharaya) is a temple exempted from the operation of Section 4(1) of the Buddhist Temporalities Ordinance;
2. The Plaintiff is the Controlling Viharadhipathi of the said Viharaya;
3. The said allotments of land, which form the subject matter of the action, are temporalities belonging to the said Viharaya;
4. The late husband of the Defendant-Appellant (Defendant) and Ven. Deegoda Pagnasekera Thero, the then Controlling Viharadhipathi of the said Viharaya entered into Lease Agreement No. 1384 dated 17.11.1945 attested by N. U. A. Wijayasiriwardane, Notary Public (පැ.1) for a period of 10 years and as a result, the Defendant and her late husband came into the possession of the said allotments of land;

5. In terms of 'පැ.1', the Lessee (the late husband of the Defendant) was allowed to construct a house, a well and a toilet on the western portion of the said allotments of land [Page 46 of the Appeal Brief];
6. After the expiration of the said lease, the late husband of the Defendant and Ven. Deegoda Somaratne Thero, the then Controlling Viharadhipathi of the said Viharaya entered into the Lease Agreement No. 4104 dated 28.03.1961 attested by A. V. D. A. Ranaweera, Notary Public (පැ.2) for a period of 5 years;
7. An action was instituted by the late husband of the Defendant in the District Court of Galle (Case No. 3037/L) seeking a declaration that 'පැ.2' is null and void. Accordingly, 'පැ.2' was declared null and void;
8. The Defendant is in unlawful occupation of the said allotments of land causing damages to the Plaintiff.

The Defendant filed her answer on 03.09.1986 [Page 53 of the Appeal Brief] and took up the position that –

1. The said allotments of land never belonged to the said Viharaya;
2. 'පැ.1' and 'පැ.2' were null and void and therefore, the Defendant is not bound by them;
3. The Plaintiff cannot maintain the action without establishing as to how he became the Controlling Viharadhipathi of the said Viharaya;
4. The Defendant has acquired the prescriptive title to the said allotments of land by being in the undisturbed and uninterrupted possession for over 10 years.

On 24.07.1991, the Defendant amended her Answer and stated that an action has already been instituted in the District Court of Galle (Case No. 10818/L) regarding the Viharadhipathiship of Paragoda Raja Maha Viharaya and prayed for the action to be laid by until the final determination of Case No. 10818/L. However, the application to lay by the action was rejected.

After a lengthy trial, the learned Additional District Judge entered judgment in favour of the Plaintiff. It was further held that the Defendant is entitled to recover a sum of Rs. 150,000/- as compensation for the improvements done and that she can remain in possession (*jus retentionis*) until the said sum is paid to her. Hence this appeal.

In a rei vindicatio action, the plaintiff must prove and establish his title [*D. A. Wanigaratne v. Juwanis Appuhamy et al* (65 N.L.R. 167)]. However, where the legal title is in the plaintiff but the property is in the possession of the Defendant, the burden of proof is on the defendant [*Siyaneris v. Jayasinghe Udenis De Silva* (52 N.L.R. 289)].

Even though the Defendant has stated in her Answer that both 'පැ.1' and 'පැ.2' are null and void, during the cross-examination, she admitted that she and her late husband entered into the possession of the said allotments of land in 1945 under and by virtue of 'පැ.1' [Page 238 and Page 241 of the Appeal Brief]. Moreover, it must be noted that 'පැ.1' was never declared null and void by a court having competent jurisdiction.

Section 116 of the Evidence Ordinance reads –

> *"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and*
>
> *No person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."*

Section 116 of the Evidence Ordinance gives statutory recognition to the well-known doctrine that during the existence of the relationship of landlord and tenant, the tenant is estopped from denying the landlord's title or from asserting that another person has a better title than the landlord [*Wahab v. Jayah* (1988) 1 Sri.L.R. 78].

The learned counsel for the Substituted Defendant-Appellant (Appellant) submitted that inasmuch the tenancy was for a 10-year period commencing in 1945 there is no prohibition to the Appellant denying the tenancy now as section 116 of the Evidence Ordinance only prevents such action during the continuance of the tenancy. I have no hesitation in rejecting this submission.

Section 116 of the Evidence Ordinance prevents any assertion being made even now that during the said ten year period beginning from 1945 Ven. Deegoda Pagnasekera Thero, the then Controlling Viharadhipathi of the said Viharaya who is a party to Lease Agreement No. 1384 dated 17.11.1945 attested by N. U. A. Wijayasiriwardane, Notary Public (පැ.1) did not have valid title as Viharadhipathi to the said land.

A tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord [*Wahab v. Jayah* (supra)]. Where a person entered into possession of immovable property by the licence of the person in possession thereof, it is unnecessary, and indeed irrelevant, for the purposes of an argument on estoppel, to consider what the licensor's title truly was. The question is what was the title which the licensee was apparently recognizing, and this depends on the title which the licensor was apparently claiming [*Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pangnananda Terunnanse* (70 N.L.R. 313)].

Hence even if Ven. Deegoda Pagnasekera Thero was not the viharadhipathi according to law, when the late husband of the Defendant entered into the Lease Agreement No. 1384 dated 17.11.1945 attested by N. U. A. Wijayasiriwardane, Notary Public (පැ.1) with Ven. Deegoda Pagnasekera Thero for the land in dispute, neither he nor the Defendant can deny the title of the said Ven. Deegoda Pagnasekera Thero.

Furthermore, this amounts to an admission that the land in issue belongs to Paragoda Raja Maha Viharaya. A temple is an institution, *sui generis* which is capable of receiving and holding property that has attributes of a corporation for the purpose of acquiring and holding property [*Kosgoda Pangnaseela v. Gamage Pavisthinahamy* [(1986) 3 C.A.L.R. 48], *Ven. Omare Dhammapala Thero v. Rajapakshage Peiris* [(2004) 1 Sri.L.R. 1].

As I observed earlier, the Defendant admitted that she and her late husband entered into the possession of the said allotments of land under and by virtue of 'පැ.1'. It was never declared null and void. The Lessee (the late husband of the Defendant) recognized and acknowledged the title of the Viharaya to the said allotments of land by the execution of 'පැ.1'.

Therefore, I hold that in terms of Section 116 of the Evidence Ordinance the Defendant is estopped from denying that the said allotments of land belonged to Paragoda Raja Maha Viharaya prior to 1945.

Section 34 of the Buddhist Temporalities Ordinance reads –

> *"In the case of any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance.*
>
> *Provided that this section shall not affect rights acquired prior to the commencement of this Ordinance."*

In *Piyaratana Thero v. Jothiya and Another* [(1985) 2 Sri.L.R. 418] the Supreme Court held that where title by prescription to Buddhist temple land had not been acquired prior to 1931, Section 34 of the Buddhist Temporalities Ordinance bars the acquisition of prescriptive title to temple land.

In any event it is observed that the Defendant has not in the Answer given the starting point for her or her husband's acquisition of prescriptive rights. Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights [*Chelliah v. Wijenathan et al* (54 N.L.R. 337)]. Therefore, even if the land in issue is not temple land, the prescriptive claim of the Defendant must fail for failure to specify the staring point for prescriptive rights.

Furthermore, if a person goes into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal [*Siyaneris v. Jayasinghe Udenis De Silva* (52 N.L.R. 289)].However, neither the evidence given by the Defendant nor the documents marked by her show 'an overt act' whereby the Defendant or her late husband started to hold the said allotments of land adversely to the owner (i.e. Paragoda Raja Maha Viharaya).

The decision on this appeal could have been made on the legal principles set out above if there was no change of circumstances.

However, the learned counsel for the Substituted Defendant-Appellant (Appellant) had another bow to her string. On 04.05.2018, the Appellant made an application under and in terms of Section 773 of the Civil Procedure Code praying fresh evidence to be admitted. The Appellant sought to produce the following–

1. The Judgment of the D. C. Galle Case No. 10818/L dated 23.11.2007
2. The Judgment of the P. H. C. of Southern Province Case No. SP/HCCA/GA 135/2007(F) dated 22.10.2013
3. The Judgment of the S. C. Case No. SC/HCCA/LA 493/2013 dated 15.09.2016

The learned Additional District Judge, in D. C. Galle Case No. 10818/L, has held that the Plaintiff is not the lawful Viharadhipathi of Paragoda Raja Maha Viharaya. The said determination was affirmed by both the Provincial High Court of Southern Province and the Supreme Court.

Based on this evidence the learned counsel for the Appellant submitted that the said decisions have retrospective effect and as that the Plaintiff could not have maintained this action as he was not the Viharadhipathy and as such the action must fail.

The question is whether the Judgment of the D. C. Galle Case No. 10818/L dated 23.11.2007 (and the confirmation thereof) has retrospective effect over the judgment of the learned Additional District Judge of Galle dated 08.05.1998 as claimed by the learned counsel for the Appellant.

***Retrospective/Prospective Effect of a Judgment***

As this issue has been raised before me and in view of the dearth of local decisions on it, I wish to discuss the retrospective effect of a judgment in detail.

The historical view of the common law, expressed by Blackstone in his *Commentaries*, is that judges "discover" the law as it truly is and that overruled precedents were misrepresentations of the law and were never law. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law" [Blackstone's *Commentaries*, Vol. 1 4th Ed. Oxford (1771) 69]. This is the basis of the declaratory theory of law. This theory negates any question of only a prospective application of a judgment as the judges do not make new law but only declare what the law was always.

It is no longer accepted that judges do not make law. They have a legitimate role to play in the development of the law. Even though most law reform will and should come through legislation, there are many instances where judges play a creative role. Bentham J in "Truth versus Ashhurst" [5 The Works of Jeremy Bentham 235 (1863]) asserted that Judge-made law was "dog-law". Further he explained the role of judge's law making as follows:

> "It is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything, you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me"

This approach raises the issue of the prospective application of a judgment and I wish to consider it after a survey of the approach adopted by other jurisdictions.

***United States***

In the US prospective overruling was recognized as far back 1848 in *Bingham v. Miller* [(1848) 17 Ohio 445]. Until the landmark decision in *Chevron Oil Co. v. Huson* [404 U.S. 97 (1971)] the Federal and State courts functioned on the premise that it was constitutionally permissible and often equitable for judgments to be given a prospective operation. Justice Cardozo in *Great Northern Railway. Co. v. Sunburst Oil & Refining Co.* [287 U.S. 358 (1932)] held that the Constitution neither prohibits nor requires prospective overruling. The US federal courts during this era was of the opinion that to hold otherwise would lead to an inequitable situation where

transactions that had been concluded relying on a previous state of the law would be undermined by the retroactive application of a new rule recognized in a recent judgment.

However, in 1971 the US Supreme Court in *Chevron Oil Co. v. Huson* (supra) took a different approach to this question of operation and held that judgments **should as a rule apply retroactively, and that there should be exceptional circumstances for the judgment to be applied on a purely non-retroactive (prospective) basis.**

The test applied by the US Supreme Court to decide whether a judgment should apply prospectively hinged on the manner in which the following 3 questions would be answered.

1. whether the decision to be applied non-retroactively establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression; (was the rule genuinely new?)
2. if, in light the new rule's purpose and effect, retroactive operation would further or retard its operation (retroactive application was not necessary to further the operation of that rule) and
3. the extent of the inequity imposed by retroactive application, namely the injustice or hardship that would be caused by retroactive application.

This test underwent further modification in the 1990s. During this period the US Supreme Court took the position that whenever a particular issue has been newly decided in a case **and applied to the parties to that litigation, that proposition of law would necessarily have to be applied retroactively to other pending litigation on the same question**, irrespective of whether such litigation had been initiated prior to the judgment.[1]

This position was succinctly explained in the case of Harper v. VA. Dep't of Taxation [509 U.S. 86, 97 (1993)] in the following manner:

> *"When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in* ***all cases still open on direct review***[2] *and as to all events, regardless of whether such events predate or postdate our announcement of the rule ...."*

[1] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543-44 (1991)

[2] In James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543-44 (1991), it was held that transactions which had attained a degree of firm finality either because of a statute of limitations or the doctrine of res judicata would not be affected by the retroactive application of a new legal rule.

Thus, the widely accepted legal position regarding this question at federal level is that a new proposition of law that has been applied to the parties to the litigation must necessarily be applied retroactively to other **pending cases** on the same question of law. In other words, it is not possible to selectively apply the new proposition of law retroactively to just the parties to the litigation and exempt the application of the rule to other pending cases on the same question. In an immigration case decided in 2011, the US Ninth Circuit Court of Appeal[3] held that judgments cannot be made prospective in relation to third party cases on the same question but at the same time be applied retroactively to the parties to the litigation. The Court went further and held that one can still rely on the tests in the *Chevron Oil Co.* case (*supra*) and decide to apply the judgment prospectively *vis a vis* all parties concerned.[4] (i.e. parties to the specific litigation and third parties)

It has often been said that courts in the US will be more inclined to apply a new rule of law on a purely prospective basis when it comes to the fields of contract and property. This is because litigants in this area of the law would generally have *relied substantially* on the previous state of the law when ordering and implementing their transactions.[5] Similarly, due to the US legal system's discomfort with ex-post facto criminality, the courts there have often applied judgments which criminalize conduct that was previously legal (i.e. judgments that expand criminal liability) on a prospective basis i.e. to acts and conduct which occur subsequent to the date of the decision.[6]

In sum therefore, the US system has now embraced the position that judgments should as a rule be applied retroactively to the parties' concerned and pending litigation of third parties on the same question. Nevertheless, the US courts have left the door ajar for purely prospective application of judgments, when justice and equity so desire such a step.

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[3] Nunez-Reyes v. Holder, 646 F. 3d 684, 690-95 (9th Cir. 2011)
"For those aliens convicted before the publication date of this decision [July 14], LujanArmendariz applies. For those aliens convicted after the publication date of this decision, Lujan-Armendariz is overruled

[4] An example of a judgment that has been applied on a 'purely prospective' basis is Barnett v. First National Insurance Co. of America, 110 Cal. Rptr. 3d 99, 104 (Cal. Ct. App. 2010)

[5] See Traynor, "Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility" (1977) 28 *Hasting Law Journal* 533 at 543

[6] See State v Jones 107 P.2d 324 (N.M. 1940); James v United States 366 U.S. 213 (1961)

***United Kingdom***

Although traditionally the UK courts have been reluctant to adopt a practice of prospective overruling [*Birmingham Corporation v. West Midland Baptist (Trust) Association Inc.* (1970) AC 874, 898-899, *Launchbury v. Morgans* (1973) AC 127, 137, *Kleinwort Benson Ltd. v. Lincoln City Council* (1999) 2 AC 349, 379] the ability to do so has been raised from time to time [*R. v. National Insurance Commissioner, Ex p Hudson* (1972) AC 944, 1015, 1026, *Miliangos v. George Frank (Textiles) Ltd.* (1976) AC 443, 490, *R. v. Grovenor of Brockhill Prison, ex p Evans (No. 2)* (1999) QB 1043, 1058, *Arthur J S Hall & Co. v. Simons* (2002) 1 AC 615, 710].

in *Arthur J S Hall & Co. v. Simons* (supra) Lord Hope made the first judicial statement which endorsed the idea that prospective overruling may be a legitimate court function. He stated as follows:

> *"I consider it to be a legitimate exercise of your Lordships' judicial function to declare prospectively whether or not the immunity - which is a judge-made rule - is to be available in the future and, if so, in what circumstances."*

Later, in *National Westminster Bank plc v. Spectrum Plus Ltd and Others (in liquidation)* [(2005) UKHL 41], the House of Lords attempted to reconcile these seemingly divergent strands of judicial opinions. Lord Nicholls writing for the majority acknowledged the principled objections taken to prospective overruling by the UK system in the past viz. the usurpation of the legislative function by court when they declared law as only applying to the future and treating decisions taken before and after the judgment differently. However, Lord Nicholls and the House of Lords were willing to leave the door ajar for prospective only operation of judgments as long as the following high threshold was met [para. 40]:

> *"Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law.* ***There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings*** *that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions"*(emphasis added)

Accordingly, a few decisions given subsequently have endorsed the possibility of UK courts giving judgments that would apply prospectively [*Cadder v. Her Majesty's Advocate* [2010] UKSC 43, para 58; *Ahmed v. HM Treasury (no 2)* [2010] UKSC 5]. However, in all these instances the UK Courts deemed that there were no sufficiently exceptional reasons to apply the judgments only on a prospective basis.

Finally, much like the US approach, the UK Courts accept that if it is decided that a judicial decision applies retroactively, it must apply retroactively to both the parties to the litigation and to pending disputes of third parties on the same question [*A v. The Governor of Arbour Hill Prison* [2006] 4 IR 88] However retroactive decisions cannot affect decided cases (ibid. page 117).

***India***

In *Golaknath v. State of Punjab* [(1967) 2 SCJ 762, (1967) AIR 1643] Chief Justice Subba Rao first invoked the doctrine of prospective overruling inspired by the approach taken by US judges. However, he was concerned of its future development and laid down following principles of guidelines regarding the applicability of prospective overruling:

> "As this court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions:
>
> (1) the doctrine of prospective overruling can be invoked only in matters arising under our Constitution;
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> (2) it can be applied only by the highest court of the country, i.e., the Supreme Court, as it has the Constitutional jurisdiction to declare law binding on all the courts in India;
>
> (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its 'earlier decisions' is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

In India non-retroactive effect can be given not only to cases where an earlier decision is overruled but also to cases which decides an issue for the first time [*India Cement Ltd v. State of Tamil Nadu* (1990) 1 SCC 12].

However, it appears that in India prospective overruling has been made only in constitutional cases.

***Canada***

In *Re Edward and Edward* [(1987) 39 DLR (4th) 654] the Saskatchewan Court of Appeal rejected the possibility of prospective overruling as it would distort the expectation of the judicial role as independent, neutral and non-legislative.

***Australia***

In *Ha and another v. State of New South Wales* [(1997) 189 CLR 465, 503-504] the High Court of Australia rejected prospective overruling by determining that prospective overruling is inconsistent with judicial power on the simple ground that the new regime that would be ushered in when overruling took effect would alter existing rights and obligations whereas the adjudication of existing rights and obligations as distinct from creation of rights and obligations distinguishes the judicial power from non-judicial power.

This comparative examination of the possibility of only a prospective application of a judgment establishes one main point which is that the question of prospective operation of judgments arises only when a decision by court on a point of law represents a change from what it was previously thought to be. This may be by express overruling or a new interpretation to the relevant statutory provision or the creation of a new legal principle in common law.

The judgments in D. C. Galle Case No. 10818/L dated 23.11.2007, P. H. C. of Southern Province Case No. SP/HCCA/GA 135/2007(F) dated 22.10.2013 and S. C. Case No. SC/HCCA/LA 493/2013 dated 15.09.2016 did not make a change on a point of law. Instead it applied the law to the evidence led before the trial court and decided the question of Viharadhipathi of Paragoda Raja Maha Viharaya. The question then is what is its relevance to the issues in this case.

The issue of Viharadhipathy in this case was decided based on the evidence led before the trial judge. The judgments in D. C. Galle Case No. 10818/L dated 23.11.2007, P. H. C. of Southern Province Case No. SP/HCCA/GA 135/2007(F) dated 22.10.2013 and S. C. Case No. SC/HCCA/LA 493/2013 dated 15.09.2016 were made on the evidence led before the trial judge in that case. That is not a judgment in rem and therefore not applicable to the issue in this case.

There is no application of the doctrine of res judicata as at a minimum the parties and the cause of action are different. Previously I have held that issue estoppel is part of our law of evidence in civil cases [*Gunasena v. Yogarathne and Others* (CA 471/2000, C.A.M. 23.09.2019)]. Notwithstanding the issue of Viharadhipathi of Paragoda Raja Maha Viharaya arising for determination in both cases, the identity of the parties in the two actions are different. Accordingly, issue estoppel also does not arise.

The Supreme Court has, in Oman *Ekanayake and others v. Ratranhamy* [(2012) Part II B.L.R. 19] quoted with approval the decision in W.A. *Ratwatte v. A. Bandara and another* (70 N.L.R. 231) where the Supreme Court adopted the test enunciated by Denning L.J. in *Ladd v. Marshall* [(1954) 3 All E.R. 745] in admitting fresh evidence at the stage of appeal. Three conditions have to be fulfilled. They are:

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive.

(3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

Evidence of judgments in D. C. Galle Case No. 10818/L dated 23.11.2007, P. H. C. of Southern Province Case No. SP/HCCA/GA 135/2007(F) dated 22.10.2013 and S. C. Case No. SC/HCCA/LA 493/2013 dated 15.09.2016 was admitted as fresh evidence in appeal on 10.10.2018 by a different bench on the agreement of parties and as such it was not necessary for the Court to have considered the above tests.

It must also be observed that the contention of the Defendant was that the Plaintiff, not being the lawful Viharadhipathi, does not have the locus standi to institute an action to obtain a declaration of title regarding the said allotments of land and seek the ejectment of the Defendant. Yet, subsequent to the Judgement of the D. C. Galle Case No. 10818/L dated 23.11.2007, the lawful Viharadhipathi was substituted in the place of the Plaintiff in the present appeal by the Appellant herself.

For all the foregoing reasons, I see no reason to interfere with the Judgment of the learned Additional District Judge of Galle dated 08.05.1998.

Appeal is dismissed with costs.

Judge of the Court of Appeal

**K. Priyantha Fernando J.**

I agree.

Judge of the Court of Appeal