

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

In the matter of an Appeal in terms
of Section 754(2) of the Civil
Procedure Code.

Abdul Wahab Mohamed
Badoordeen,
182, Garagoda, Yatiyantota.

Plaintiff

Case No: CA 897/99(F)
DC Avissawella 19413/L

Vs

Paliskara Mudiyansele
N. Amarasiri,
Pahala Garagoda, Yatiyantota.

Defendant

AND NOW BETWEEN

Abdul Wahab Mohamed
Badoordeen,
182, Garagoda, Yatiyantota.

Plaintiff-Appellant

Vs.

Paliskara Mudiyansele
N Amarasiri,
Pahala Garagoda, Yatiyantota.

Defendant-Respondent

BEFORE : A.W.A. SALAM,J.
COUNSEL : Nirma Karunaratna for the Appellant and
T. Weragoda for the Respondent.
ARGUED : 11.07.2012
WRITTEN SUBMISSIONS TENDERED ON : 13.07.2012
DECIDED ON : 08.08.2012

A.W.Abdus Salam,J.

The plaintiff filed action for a declaration of title to the land set out in schedule 2 of the plaint and for ejection of the defendant. He also claimed damages from the defendant for wrongful removal of a Jak tree stood on the subject matter. As has been disclosed in the plaint the land in schedule 2 of the plaint is a divided and defined portion of a larger land set out in schedule 1 of the plaint.

The title to the larger land starts with one Sopi Nona who was a co-owner of 1/20 share. The plaintiff's main contention was that the larger land was partitioned, in terms of a settlement entered in the conciliation board in 1974. The plaintiff stated that a defined portion of the

larger land, namely Lot 7 was allotted to the said Sopi Nona in the year 1974 and she possessed the same as an independent entity from 1974 onwards and then transferred it to her son one Jayaratna in the year 1991 who in turn transferred it to the plaintiff by deed No 129 dated 19th January 1991. The plaintiff complained that the defendant without any manner of title on 1st December 1993 entered the subject matter and cut a jak tree thereby disputing the title of the plaintiff and causing damages to him. The defendant in his answer denied the principal allegation made against him and moved for a dismissal of the action.

At the commencement of the trial 9 issues were raised by the plaintiff and the defendant raised 5 issues. The plaintiff gave evidence and then called his immediate predecessor in title to testify on his behalf. The defendant gave evidence and called the Grama Sevaka to corroborate his version. The learned district judge at the conclusion of the trial after granting the parties an opportunity to tender written submissions delivered his judgment dismissing the

plaintiff's case on the ground that the plaintiff has failed to establish the ingredients necessary to be entitled to judgment in a rei-vindicatio action.

As far as the plaintiff's case is concerned, the land in question is a portion of a larger land which was owned in common by several people. Sopy Nona, the predecessor in title of the plaintiff who is said to be the original owner (in so far as as the plaintiff has traced), was the owner of an undivided 1/20 share. The plaintiff sought to establish that the larger land was partitioned consequent upon a settlement entered in the Conciliation Board. It is common ground that Sopi Nona is a sister of the father of the defendant and the plaintiff has conceded that the defendant's father was also a co-owner of the larger land at one point of time. In order to prove his case against the defendant, the plaintiff maintained that due to the father of the defendant not having discharged a mortgage, his rights in the land had got wiped out. I can not understand as to how the soil rights of a co-owner can get wiped out, if a mortgage bond is not discharged unless the

rights sold on a hypothecary decree. It is basic law that the failure to discharge a mortgage bond affecting land continues to burden the land with such encumbrance but the title remains with the mortgagor.

Although, the burden in an action of this nature to prove title to the land is squarely on the plaintiff, there has been an obvious failure on the part of the plaintiff to prove that the co-ownership of the original land namely the larger land described in schedule 1 of the plaint had ceased to exist at a particular time. Besides, he has failed to tender in evidence the settlement arrived at the Conciliation Board. The original of the amicable partition plan also has not been tendered by the plaintiff. The learned district judge having analyzed the evidence has come to the finding that the plaintiff has failed to adduce cogent evidence with regard to his claim of prescription for lot 7.

The amicable plan of partition relied upon by the plaintiff has not been signed by all the co-owners. Further no amicable partition deed has been executed among the

parties either. The defendant and his family members have been resident on the land according to the electoral registers produced at the trial for a long period of time.

The learned District Judge has emphasized that the plaintiff in a rei-vindicatio action cannot rely on the defects of the defendant's title or the infirmities of the defence as a ground to strengthen his case or to fill the omissions. This principle of law has been succinctly laid down in the case of Wanigarathne Vs Juwanis Appuhamy 65 NLR 168 and the learned District Judge has correctly applied this principle to the facts of the present case and dismissed the plaintiff's action. Having given my anxious consideration to the approach adopted by the learned District Judge to ascertain as to whether the plaintiff is entitled to the relief claimed, I am in total agreement with the reasoning of the trial judge that had culminated in the dismissal of the action. Hence, I see no reason to deviate from the findings of the learned district judge and in the circumstances, the appeal warrants no intervention of

this court. For reasons stated, this appeal stands
dismissed without costs.

JUDGE OF THE COURT OF APPEAL

LAJ-