

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

Alvitigalage Padmasiri  
No. 202, High Level Road  
Pannipitiya.

**PLAINTIFF**

C.A. 323/1997(F)  
D.C. Mt.Lavinia 270/94 L

Vs.

K. L. Anulawathie  
No. 203 (215) High Level Road  
Pannipitiya.

**DEFENDANT**

AND NOW BETWEEN

Alvitigalage Padmasiri  
No. 202, High Level Road  
Pannipitiya.

**PLAINTIFFAPPELLANT**

Vs.

K. L. Anulawathie  
No. 203 (215) High Level Road  
Pannipitiya.

**DEFENDANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** W. Dayaratne P.C with R. Jayawardene  
For the Plaintiff-Appellant

Rohan Sahabandu for the Defendant-Respondent

**ARGUED ON:** 26.08.2011

**DECIDED ON:** 06.10.2011

**GOONERATNE J.**

This was an action filed in the District Court of Mt. Lavinia for a declaration of title and ejectment of the Defendant from the land described in the 2<sup>nd</sup> schedule of the plaint. 5 admissions were recorded and Plaintiff had raised 6 issues. Defendant had suggested issue Nos. 7 & 8 and moved court to have them tried as preliminary issues. Both parties tendered written submissions in the original court and the learned District Judge having answered the preliminary issues in favour of the Defendant dismissed Plaintiff's action by his judgment of 25.4.1997.

Issue Nos. 7 & 8 reads thus.

7. Has the Plaintiff disclosed a cause of action in the plaint as the land in dispute as described in the 2<sup>nd</sup> schedule to the plaint is an undivided land and as in paragraph 5 of the plaint?
8. Is the plaint liable to be dismissed in limine in view of admission Nos. 3, 4 & 5?

The learned President's Counsel for the Appellant inter alia submitted to this court that the learned District Judge erred in law and fact, as such failed to appreciate that though the 2<sup>nd</sup> schedule to the plaint refer to an undivided share the deed marked P2 refer to a divided portion which could be identified as a specific and a divided portion which land could be clearly identified without any difficulty. He also maintains that the plaint disclose a cause of action and dismissal of the action is a gross error on the part of the learned District Judge. Learned counsel for Respondent Mr. Rohan Sahabandu supported the judgment of the learned District Judge and emphasized the fact that plaint does not disclose a cause of action i.e non compliance with the mandatory provisions of Section 41 of the Civil Procedure Code. Section 41 enacts that land sued for to be described by metes and bounds or sketch plan. He also submitted to court that even if the land in question is an undivided portion and at the stage of execution of writ

fiscal cannot execute the writ, where the land is undivided. He drew the attention of this court to the following decided cases to stress his point of view.

**Gunasekera Vs. Punchimenike (2002 (2) S.L.R 43)**

Plaint was filed seeking a declaration of title to an undivided share of a land. It was pleaded that the defendant-appellant had encroached upon a portion. The encroached portion was not described with reference to physical metes and bounds or by reference to any map or sketch. The matter was fixed for ex-parte trial; after ex-parte trial application was made to issue a commission to survey the land and identify same. The ex-parte trial did not end up in a judgment. After the return of the commissioner, the plaint was amended, a fresh ex-parte trial was thereafter held. After the decree was served, the defendant-appellant sought to purge default, which was refused .

Held that,

- (1) Court was obliged initially to have rejected the original plaint since it did not describe the portion encroached upon section 46 (2) (a) read together with section 41 of the Civil Procedure Code.

**David Vs. Gnanawathie (2000 (2) S.L.R. 352)**

The Court after holding that the dominant tenement and the servient tenement are lands owned by the State, granted the reliefs prayed for by the plaintiff-respondent. On the appeal it was held that, when the plaintiff claimed that he has exercised by prescriptive user a right of way over a defined route, the obligation of the plaintiff to comply with section 41, of the Civil Procedure Code is paramount and imperative, Strict compliance with section 41 of the Civil Procedure Code is necessary as the Fiscal would be impeded in the execution of the decree/judgment if the servient tenement is not described with precision and definiteness.

I am inclined to agree with the learned counsel for the Respondent. Compliance with Section 41 of the Code is mandatory. Even if a co-owner of undivided share of land could sue a trespasser to have his title to the undivided share declared and for ejection of the trespasser from the entire land, unless the plaint identifies the property in dispute clearly and in a specific manner writ cannot be executed.

A party who claims prescriptive title to a particular allotment of land is obliged to clearly describe it either by boundaries or with reference to metes and bounds. In the case in hand party seeks a declaration of title and eviction of the Defendant. District Court should have in this case acted in terms of Section 46(2) of the Civil Procedure Code and returned the plaint for amendment. However it was not done. Pleadings were complete and the case had been fixed for trial. Issues were raised and parties moved court to try a very basic issue. As observed by Wigneswaran J. in Gunasekera Vs. Punchimenike Defendants could very well kept quiet in the case with the type of plaint filed because writ could not have been executed in terms of a decree entered on the basis of the plaint. What exact portion was occupied? Fiscal would definitely be impeded in the execution of the decree due to Vagueness of boundaries and exact description.

In Mohideen Vs. Gnanapragasam 14 N.L.R 33, held it is not competent for a Judge to reject plaint after having once accepted it and ordered summons, if the summons have been duly served; he should leave it to the Defendant to raise any question as to it's legal sufficiency to support the intended action.

Views have been expressed in the above decided case both ways. i.e plaint once accepted cannot be rejected. Section 46 of the Code permits to reject plaint only before it is allowed to be filed. The other view is that if the plaint has been improperly filed court may reject at any time or stage.

I am convinced that parties could not have proceeded to trial on the plaint filed of record. Court on it's own motion could have rejected the plaint at the earliest available opportunity. If that was the case Plaintiff would have been able to present a fresh plaint without difficulty or even at an earlier stage (may be prior to issue of summons) it could have been rejected if the Defendant by way of motion objected to the plaint. Section 46(2) of the Civil Procedure Code is designed to cure such defects by giving an opportunity to remedy the situation and permit filing of a fresh

Plaint. In the case in hand it has passed all initial stages of the suit. The case had been fixed for trial and parties thought it fit to suggest issues, and raised preliminary issues.

It appears to me that the stage to return the plaint for amendment and rejection of plaint which gives rise to present a fresh plaint has long passed and the original court has lost control to permit Plaintiff to rectify a material defect, i.e. non compliance with Section 41 of the Civil Procedure Code. In all the above circumstances though the learned District Judge's Judgment on certain aspect of the case does not connect the preliminary issue, his ultimate decision to dismiss the action need not be altered or reviewed by this court. As such judgment of the original court is affirmed. Appeal dismissed without costs.

JUDGE OF THE COURT OF APPEAL