

In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka

CA 962/96 F

DC Kurunegala : 3077/L

Deceased) Walimuni
Arachchige Dingiriya
Udahena Katiyawa,
Ibbagamuwa.

Walimuni Arachchige
Jayathhilake,
Udahena, Katiyawa.

Substituted-Plaintiff

Vs.

1. Aruma Wedakarayalae
Themanis,
Udahena, Kattiyawa,
Ibbagamuwa.
2. W.M.Selesthina
Udahena, Ibbagamuwa.

Defendants.

And Now

Aruma Wedakarayalae
Themanis,
Udahena, Kattiyawa,
Ibbagamuwa.

1st Defendant-Appellant.

Vs.

Walimuni Arachchige
Jayathilake,

Udahena, Katyawa.

Substituted-Plaintiff-
Respondent.

W.M.Selesthina,
Udahena, Ibbagamuwa.

2nd Defendant-Respondent.

Before : A.W.A. Salam, J.

Counsel : R.M.Perera for the Appellant.

N.S.Welgama for the Substituted-
Plaintiff-Respondents.

Written Submissions Tender on: 06/04/2011

Decided on : ^{23/05}~~25/03~~/2011

A.W. Abdus Salam, J.

he plaintiff filed action originally against A V Monis
and later by the amended plaint cited another defendant
by the name W M Selesthina. The reliefs claimed by the
plaintiff were a declaration of title to the subject
matter and ejectment of the defendants. According to

Journal entry dated 8 September 1992 the original defendant A V Monis had disclosed in his answer his son by the name A. V. Thilakaratra as a necessary party to the action. Consequently the plaintiff had moved for notice on the said Thilakaratra and notice had been issued on him returnable on 18 December 1992 and the said Thilakaratra had filed his proxy nominating Mrs S Ginige as his registered attorney at law. (Vide folio 194 of the record). Immediately thereafter on the same day the said Thilakaratra has been added as the 2nd defendant into the case but she has not filed an answer.

By amended plaint dated 15 March 1991 the plaintiff maintained that one Salu and Babanissa had been issued with the certificates title under the Land Settlement Ordinance in that year 1939 and after the death of Babanissa the aforesaid Salu inherited his $\frac{1}{2}$ share and thus became the sole owner of the subject matter of the action. Thereafter by virtue of deed of transfer no 18786 dated 28 January 1987 the plaintiff has become the owner of the subject matter. His complaint is that the defendants have obstructed the plaintiff from enjoying the property from that year 1987.

Significantly, Thilakaratna who was added as a defendant had not filed answer nor participated at the trial. The original defendant in his answer took up the position that the property in question was purchased by his son Thilakaratna and that he had been in possession of the said property on the strength of the deed of transfer in favour of his son Thilakaratna.

The learned district judge after trial gave judgment in favour of the plaintiff. The present appeal has been preferred by the original defendant identified in the petition of appeal as the 1st defendant-appellant. One of the grounds of appeal urged by the appellant is the alleged failure on the part of the learned district judge to hear the 2nd defendant. As stated above the 2nd defendant has appeared in court, filed his proxy and thereafter failed to file an answer. He had not even taken the trouble to participate at the trial. In the circumstances no blame can be attributed to the learned district judge as the 2nd defendant has to blame himself for not espousing his cause if any. Even otherwise it is not open to the 1st defendant to complain against the 2nd defendant not being heard as the latter has not appealed against the judgment.

By production of P1 and P2 and other oral evidence the plaintiff has clearly established his title to the property.

It was contended on behalf of the appellant that the subject matter had not been properly identified by the plaintiff. It is to be noted that the schedule to the amended plaint specifically refers to the plan No 383 dated 17 July 1990 prepared by S G Gunasingha, licensed surveyor. Besides the surveyor has given uncontradicted evidence substantiating his report marked as X1. As a matter of fact the original defendant was present at the survey when the plaintiff had identified the corpus to assist the surveyor in the preparation of the plan. The learned district judge has come to the specific finding that the allotment of lands numbered as 226 and 228 in the final village plan No 2459 has been properly identified.

Both defendants have not given any satisfactory evidence to claim the subject matter of the action either by right of prescription or upon an instrument of deed.

In the circumstances, the findings of the learned district judge do not appear to me as blameworthy. The findings arrived at by the learned district judge after hearing the witnesses and the impression formed by him as to their credibility should not lightly be interfered with. As such, I do not see any merit in this appeal and therefore dismiss the same subject to costs.

Judge of the Court of Appeal

Rc/-