

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

C.A.No.856/98(F)

D.C.Pugoda Case No.71/P

Jasin Pathiranalage Saiman Siknyo
Bandarawatte,
Mandawela.

Appellant

Vs.

Jasin Pathiranalage Salaman Siknyo
Nagaha Junction,
Mandawela.

Respondent

C.A.No.856/98(F)

D.C.Pugoda Case No.71/P

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : S.A.D.S. Suraweera, Attorney-at-Law for the 1st
Defendant-Appellant

Palitha Ranatunga, Attorney-at-Law for the Plaintiff-
Respondent

**ARGUED AND
DECIDED ON** : **27.02.2013**

K. T. CHITRASIRI, J.

Heard both Counsel in support of their respective cases.

This is an appeal seeking to set aside the judgment dated 30th October 1998 of the learned District Judge of Pugoda. In that judgment he made order to partition the land in accordance with the pedigree submitted by the plaintiff-respondent. (hereinafter referred to as the plaintiff)

Basically, the contention of the learned Counsel for the 1st defendant-appellant is that it is wrong to have allocated ½ share of the land to the plaintiff relying upon the deed bearing No.8666 marked as P2 considering it as a deed capable of transferring clear title, because there had been a mortgage existed over the land referred to in the schedule thereto at the time it was executed.

He also contended that the learned District Judge could not have decided to allocate $\frac{1}{2}$ share of the land to the plaintiff on the strength of the said deed 8666 marked P2 if he took into consideration of the said encumbrance refers to in the Fiscal's Conveyance bearing No.18092 dated 17.05.1937 marked as 1V5. Then the issue is whether in fact there had been a mortgage over the property subjected to the said deed 8666 when it was executed.

Admittedly, the land sought to be partitioned and the land referred to in the Fiscal's Conveyance and the land referred to in the schedule to the deed 8666 is identical. Fiscal's Conveyance had been executed pursuant to the action bearing No.7420, filed in the Court of Request in Gampaha which had been instituted by V. Alice Nona on the strength of the mortgage had in her favour over the property in question. In the said fiscal's Conveyance, it is clearly stated that there had been a mortgage executed on 17.07.1932 in respect of this property.

The **deed 8666** marked P2 by which the plaintiff was given rights by the learned District Judge **had been executed on 01.05.1936 which is a date subsequent to the execution of the Mortgage Bond namely 17.07.1932** and the conveyance by the Fiscal is dated 17.05.1937. Hence, it is abundantly clear that there had been a mortgage over the property sought to be partitioned at the time the deed 8666 was executed. Therefore, it is wrong on the part of the learned District Judge to have concluded that the vendor Poloris Appu in the deed 8666 had clear title when he sold the property to Podi Nona. If Poloris had no clear title to the land at the time the deed 8666 (P2) was executed, the plaintiff cannot claim shares of the land as decided by the learned District Judge.

Explanation of the learned District Judge in this regard is that the rights of Alice Nona in whose favour the Fiscals Conveyance had been executed will not be affected as the deed 8666 had been executed around one year, before the Fiscals Conveyance was executed. However, he had failed to take into account the reference to the mortgage, found in the Fiscal's Conveyance which clearly states that there had been a mortgage existed over the property by the time the deed 8666 was executed. Therefore, it is my view that the learned District Judge has misdirected himself when he decided to accept that the vendor Poloris Appu had clear title to the land when he conveyed the property to Podi Nona by deed 8666. In fact, Alice Nona's rights derived from the Fiscal's Conveyance should prevail over the rights claimed by the plaintiff through the deed 8666.

Indeed, the learned Counsel for the plaintiff conceded that there had been a mortgage over the property at the time the deed 8666 was executed and therefore Poloris Appu had no clear title to the land when he transferred the property to Podi Nona. Therefore, he moves Court to withdraw the plaint filed by the plaintiff having obtained instructions from his client who is present in Court today.

Now that this Court has decided that it is wrong on the part of the learned District Judge to have given rights to the plaintiff on the strength of the deed 8666 marked P2, I have no option than to allow the appeal and to grant the reliefs prayed for in the petition of appeal. However, the learned Counsel for the 1st defendant-appellant, at this stage agrees to allow the application of the plaintiff to withdraw his plaint. Therefore, I am not inclined to dismiss the plaint as prayed for in the petition of appeal but for the reasons mentioned hereinbefore; I

decide to set aside the judgment dated 30.10.1998 of the learned District Judge of Gampaha. Learned District Judge is free to make an appropriate order if an application to withdraw the plaint is made before him. However, if no such application is made by the plaintiff, the plaint dated 26.01.1982 should stand dismissed.

At this stage, it must be mentioned that the Registrar of the District Court of Pugoda by his letter dated 7.12.2012 had informed the Registrar of this Court that although the deeds marked 1V1 to 1V5 had been tendered to Court, the deeds of the plaintiff which are being referred to in the Journal Entry 62 made on 18.09.1998, are not found in the Safe kept at the District Court. The side note made underneath the said journal entry dated 18.9.1998 shows that those deeds of the plaintiff that were tendered had been returned to the Attorney for the plaintiff as those were torn. Therefore, it must be noted that the deeds marked in evidence by the plaintiff were not before the learned District Judge for him to peruse at the time he wrote the judgment.

For the aforesaid reasons, I set aside the judgment dated 30.10.1998 delivered on 4.11.1998 by the learned District Judge of Pugoda.

As mentioned hereinbefore, the plaintiff is directed to make his application to withdraw the plaint before the learned District Judge and to seek an appropriate order accordingly. If he fails to do so, the plaint dated 26.01.1982 should stand dismissed.

This appeal is allowed but without costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL