

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

Case Number: CA 1101/98 F
DC Galle case No: 12768/P

Kosgama Salman,
Devinigoda,
Rathgama.

Plaintiff-Appellant

Vs.

1. Dineththi Jayaneris, (Deceased)
2. Yaddehi Udaris Appu, (Deceased)
3. Yaddehi Vineetha Malani,
All of
Devinigoda , Rathgama.

Defendants -Respondents

C.A.No.1101/98 (F)

D.C. Galle No.12768/P

Before : K.T.Chitrasiri,J.

Counsel : Rohan Sahabandu P.C. with Dulani Warawewa
for the Plaintiff-Respondent

Dr. Sunil Coorey with Subashini Coorey for the
substituted 2 C defendant-Respondent and for
the 3rd defendant-Respondent

Rakith Abeysinghe for the substituted 1 D
Defendant-Respondent

Argued and

Decided on : 23.01.2014

K.T.Chitrasiri,J.

Heard all three Counsel in support of their respective cases. This is an appeal seeking to set aside the judgment dated 18/12/1998 of the learned District Judge of Galle. In the petition of appeal, the plaintiff-appellant (hereinafter referred to as the plaintiff) also sought for a judgment to have the land subjected to this action partitioned, in accordance with manner in which he has set out the title in his plaint. The defendants in their answer as well as in evidence have claimed prescriptive title to the entire corpus of this partition action.

Admittedly, the land sought to be partitioned is depicted in the plan bearing No. 0078 dated 24/5/1996 marked as X in evidence. It is the subdivided lot 01, shown in the final plan 1253 filed in an earlier partition action bearing No P/0798. The said final plan filed in that earlier partition case is found at page 40 in the appeal brief. Also, it is undisputed that the 3rd defendant-respondent is the daughter of the deceased 2nd defendant. Both Counsel appearing for the three respondents also submit that there is no dispute amongst the three defendants as to the rights they claim in this action.

Since the plaintiff has taken over prosecuting this action, it is his duty to have the evidence brought in, as to the title of the parties in the manner set out in the pleadings filed in the case. The defendants also are then entitled to call witnesses to establish their respective claims. Then only the trial judge would be placed in a position to investigate title of the parties to the action as required in Section 25 of the Partition Act. **[Galagoda V Mohideen 40 N L R 92, Gunatilleka V Murieal Silva 79 (1) N L R 481, Kularatne V Ariyasena 2001 B L R 06, Richard and Another V Seibel Nona 2001 (2) S L R 01, Abeysinghe V Kumarasinghe 2008 B L R 300]**

Therefore, it is first necessary to look at the evidence, adduced in this case in order to determine the rights of the parties. Significantly, though he is the plaintiff in this case has produced only one deed in order to establish the

rights of all the parties to the action. It is the deed bearing number 1552 marked P1. The rights in that deed emanate from the final decree entered in the partition action P/0798 referred to above. The said deed upon which the plaintiff claim title to the aforesaid lot 1 in plan 0078 is a deed which refers to seven vendors and upon which the plaintiff became a co-owner to the land [Lot 1 in plan 0078] subjected to this partition action. According to the schedule found in the final decree in the previous partition action, (at page 129 in the appeal brief) the said lot 1 had been allocated in common to the plaintiff and to the 2nd,3rd,9th,10th,90th/100th,76th,76A,77th 80th,14th and 15th defendants in that partition case. Therefore, it is seen that fair number of parties were entitled to lot 1 in that case which is the land subjected to this action. However, no evidence is forthcoming as to the way in which their title had been devolved subsequently. Hence, it is clear that the plaintiff has failed to establish his exact entitlement to the corpus in this partition case. Moreover, he has not adduced any evidence as to the entitlements of the defendants though he has shown shares to the defendants in the pedigree he has filed along with the plaint. Therefore it is clear that the plaintiff has failed to establish even his own title in order to determine his share to the land sought to be partitioned. In such a situation the District Judge could not have determined the exact entitlement of the parties to decide the case finally.

The learned District judge in his judgment dated 18/12/1998 has accepted the prescriptive claim of the 1st and 2nd defendant- respondents. This decision of the learned District Judge has been made having considered the evidence of the plaintiff as well. Plaintiff in his evidence has stated that the 2nd defendant has been living on this land for a period, well over 20-25 years despite the rights of the plaintiff to this land by virtue of the deed marked P1. His evidence to that effect is found at pages 60 and 67 in the appeal brief. Moreover, the plaintiff has never stated that he possessed this land. Therefore, I do not see any wrong when the learned District Judge decided that the defendant-respondents had longstanding possession against the rights of the plaintiff to the land sought to be partitioned.

Learned Counsel for the plaintiff-appellant submitted that the defendants being co-owners should have established an overt act or an act of ouster of the co-owners, if they are to claim prescriptive title to this co-owned land. However, having perused the final decree upon which the title of the plaintiff supposed to have derived, it is clear that the 2nd defendant had not given any shares or has derived title from the parties who were allotted shares in that action for him to be a co-owner. Even though the mother of the 2nd defendant namely Waraliyas Hamy is the 41st defendant in that case, she was not given shares by the decree entered in that case. Furthermore, no evidence has been adduced in this case to show that even the other defendants have

become entitled to the land for them to become co-owners to the land. Also, it is necessary to note that such a position, not being a matter raised in the original court, cannot be taken up at this appeal stage since it involves facts and circumstances of the case. Therefore, the questions of ouster will not arise in this instance. Accordingly, I do not see any merit in this appeal.

For the aforesaid reasons, this appeal is dismissed with costs fixed at Rs,75000/-.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

WC/-