

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

C.A. No. 957/2000 (F)
D.C. Kalutara No. 6465/P

K. Irawathi
Praknyatissa Road,
Hadigalla,
Gurulubedda.

Appellant

-Vs-

S. Anil Priyantha
Duwegoda,
Payagala.

Respondent

C.A. No. 957/2000(F)

D.C. Kalutara No. 6465/P

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

Counsel : Uditha Bandara with D.P. Dassanayake
for the Plaintiff-Appellant
Lasitha Chaminda with Mihiri Abeyrathne
for the 2nd and 3rd Defendant-Respondents

Argued &

Decided on : 24.03.201

K.T.Chitrasiri, J

Heard, the Counsel for the appellant in support of this appeal.

This is an appeal seeking to set aside the judgment dated 30th August 2000. By that judgment, learned District Judge dismissed the action of the plaintiff-appellant on the ground that the plaintiff had no rights to the land sought to partition, at the time the action was filed i.e. by the 28th March 1995.

The plaintiff-appellant filed this partition action stating that Bopage Nado was the original owner by virtue of the deed of partition bearing No. 409 marked P1 in evidence. Appellant has further averred

that the entitlement of Bopage Nado had devolved on to his two children Bopage Annie and Chartin. According to the plaint Annie has transferred her half share of the land to the appellant by the deed 822 marked P3. Accordingly, the appellant has claimed half share of the land sought to be partitioned in view of the said deed 822 marked P3.

The aforesaid partition deed marked P1 had been executed on 31st July 1927. However, a Fiscal's Conveyance affecting this land also had been executed on the 5th January 1931 in favour of M.Uparis and it was marked as 2V1 in evidence on behalf of the 2nd and the 3rd defendant-respondents. Accordingly, those two respondents have contended that Bopage Nado who claim to be the original owner could not have claimed clear title to the land, relying upon the partition deed P1 since the property referred to therein had been subjected to a mortgage by then. However, the learned Counsel for the appellant contended that the rights derived from the partition deed marked P1 should prevail over the rights in the Fiscal's Conveyance marked 2V1.

Learned District Judge seems to have identified the aforesaid issue correctly. He has considered the sequence of events and had come to the conclusion that the plaintiff is not entitled to claim rights to the land under the partition deed marked P1 in view of the Fiscal's Conveyance marked 2V1. Findings of the learned District Court Judge in this regard is as follows:

“පැමිණිල්ලෙන් කියා සිටිනු ලබන්නේ පැ. 1 බෙදුම් ඔප්පුවෙහි 1 වන පාර්ශවකරු ඉහත කී උපාරිස් නැමැත්තාම වන හෙයින් ඉහත විත්තියෙන් කියන පරිදි නළො විසින් උපාරිස්ව බෙදීමට යෝජිත ඉඩම උගස් කොට උගස්කරයක් තිබුණේ වුවද එම උගසින් ලැබෙන අයිතිවාසිකම් නළො විසින් අත්හරිමින් ඉහත කී පැ. 1 ඔප්පුව සහතික කිරීමට යෙදී ඇති බවය. කෙසේ වෙතත් බෙදීමට යෝජිත ඉඩම සහ පැ. 1 ඔප්පුවෙහි උපලේඛණයේ දක්වා ඇති ඉඩමද ඉහත 2ව1 දරණ පිස්කල් ඔප්පුවෙහි දක්වා ඇති ඉඩමද එකම ඉඩම බව පැ. 1, 2ව1 සහ 2ව2 පැමිණිල්ලේ උපලේඛණයද සංසන්දනය කර බැලීමේදී පැහැදිලිව ම පෙනී යන කරුණකි.

කෙසේ වෙතත් 1933 දී එනම් පැ. 1 ඔප්පුව සහතික කිරීමෙන් පසුව බෙදීමට යෝජිත ඉඩම 2ව1 මගින් පිස්කල් වෙන්දේසියෙන් එම්. උපාරිස් විසින් මිලදී ගෙන ඇති අතර, මෙම පිස්කල් වෙන්දේසිය සම්බන්ධයෙන් නළො හෝ වාර්ටින් හෝ සිවිල් නඩු විධාන සංග්‍රහ පනතේ 325 හෝ 332 වගන්ති යටතේ කටයුතු කරමින් මෙම පිස්කල් වෙන්දේසිය සම්බන්ධයෙන් විරුද්ධවී නැති බවට අධිකරණය විසින් සෑහීමට පත් විය යුතු වන්නේ 2ව1 සහ 2ව2 ලේඛණ සැලකිල්ලට ගැනීමේදීය. ඒ අනුව පැ.1 බෙදුම් ඔප්පුව සහතික කිරීමේදී එයට පෙර නළො විසින් උපාරිස් නැමැත් අයට බෙදීමට යෝජිත දේපල උගස් කර ඇති බවත්, එකී උගසට යටත්ව පැ. 1 ලේඛණය නළො විසින් අත්සන් තබා ඇති බවත් පෙනී යන කරුණකි.”

(Vide Proceedings at page 116 in the appeal brief)

Fiscal’s Conveyance marked 2V1 shows that Bopage Nado had been a party to a mortgage bond action in which the corpus in this

case was the subject matter. Hence, it is seen that the said Nado has mortgaged the property in question to an outsider. It is also evident that a mortgage action had been filed in connection with the said mortgage and a decree also had been entered in that action. The property claimed by the appellant had been auctioned by the Fiscal in terms of the decree entered in the said Mortgage Bond action. Consequent upon the Fiscal's sale, the Fiscal's Conveyance marked 2V1 also had been executed. The deed of partition bearing No. 409 upon which the appellant claim title also is clearly mentioned in that Fiscals Conveyance. Moreover, the name and the boundaries of the land referred to in the Fiscals Conveyance are same as the name and the boundaries of the land referred to in the partition deed 409.

In the circumstances, it is clear that the plaintiff's predecessor in title namely Bopage Nado had mortgaged the land put in suit, prior to the execution of the partition deed P1. The said mortgage bond had been the subject matter in the mortgage bond action referred to above. Consequent upon the decree entered in that mortgage bond action, the land claimed by the appellant had been auctioned by the Fiscal and accordingly the Fiscal Conveyance 2V1 had been executed. Therefore, it is clear that Nado, the original owner [as alleged by the appellant] could not have become a party to an amicable partition and claim clear title to the land subjected to in this case as the land said had been subjected to a mortgage by then. Accordingly, I am not inclined to agree with the

aforesaid contention of the learned Counsel for the appellant. Therefore, the rights in the partition deed P1 has to be considered subject to the rights in the Fiscal's Conveyance marked 2V1.

In the circumstances, I do not see any error on the part of the learned District Judge when he decided to reject the rights of the appellant that he claimed relying upon the deed marked P1.

For the aforesaid reasons this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

/mds