

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

Yacoob Lebbe Mohamed Mubarak D
35, Kaludamada, Hapugastalawa,
Nawalapitiya

Plaintiff

CA Case No: CALA 341/2006

Vs:

DC (Nawalapitiya) Case No: L 10

1. Ayesha Mohamed
2. Abdul Hameed Mohamed Sally
03, Sally Noorul Misiriya
All of No: B 130,
Hapugastalawa, Nawalapitiya
3. Farhana Mansoor
41, Rupasinghe Road,
Nedimala, Dehiwala.
4. Added party
P.M.M.M.Rumzy
41, Rupasinghe Road,
Nedimala, Dehiwala.

Defendants

AND BETWEEN

In the matter of an application for
Leave to Appeal in terms of Section
754(2) and 757 of the Civil
Procedure Code against the Order
made on 22/08/2006 by the
Learned District Judge of
Nawalapitiya.

P.M.M.M. Rumzy

41, Rupasinghe Road,

Nedimala, Dehiwala

5th Defendant – Petitioner

Vs:

Yacoob Lebbe Mohamed Mubarak

D 35, Kaludamada, Hapugastalawa,

Nawalapitiya

Plaintiff – Respondent

Ayesh Mohamed

B 130, Hapugastalawa,

Nawalapitiya.

1st Defendant – Respondent

Abdul Hameed Mohamed Sally

03, Sally Noorul Misiriya

No: B 130,

Hapugastalawa, Nawalapitiya

2nd Defendant – Respondent

Sally Noorul Misiriya

No: B 130,

Hapugastalawa, Nawalapitiya

3rd Defendant – Respondent

Farhana Mansoor

41, Rupasinghe Road,

Nedimala, Dehiwala.

4th Defendant – Respondent

AND NOW BETWEEN

**In the matter of an Application for
Intervention.**

Jefry Tilny Morris Amarasinghe

No: 89/3, Kadawatha Road,

Dehiwala.

Intervient – Petitioner

Vs:

P.M.M.M. Rumzy

41, Rupasinghe Road,

Nedimala, Dehiwala

5th Defendant – Petitioner – Respondent

Yacoob Lebbe Mohamed Mubarak D 35,

Kaludamada, Hapugastalawa, Nawalapitiya

Plaintiff – Respondent - Respondent

Ayesh Mohamed

B 130, Hapugastalawa,

Nawalapitiya.

1st Defendant – Respondent - Respondent

Abdul Hameed Mohamed Sally

03, Sally Noorul Misiriya

No: B 130,

Hapugastalawa, Nawalapitiya

2nd Defendant – Respondent-Respondent

Sally Noorul Misiriya

No: B 130,

Hapugastalawa, Nawalapitiya

3rd Defendant – Respondent-Respondent

Farhana Mansoor

41, Rupasinghe Road,

Nedimala, Dehiwala.

4th Defendant – Respondent-Respondent

BEFORE

:

P.W.D.C. JAYATHILAKE, J

COUNSEL : Indunil Bandara for the Intervenient
Petitioner
Miskin for the 5th Defendant –Petitioner -
Respondent
M.C.M. Muneen with Ms. S.Karunaratne for
Plaintiff- Respondent -Respondent

Decided On : 11.07.2014

P.W.D.C. Jayathilake J.

Jacob Lebbe Mohomed Mubarak, the Plaintiff Respondent filed this case against 1st to 4th Defendant Respondents alleging that his peaceful possession of the property in dispute was disturbed by forcibly entering three rooms of the eight roomed house. The property which he refers to as

the subject matter is undivided 5 acres 3 roods and 30 perches out of the land of 8 acres, 3 roods and 30 perches in extent with the 8 roomed house and the Tea Plantation. According to the plaint filed by the Plaintiff Respondent, original owner of this land was Payingamuwe Gedara Yacoob Lebbe who owned this property by a crown grant. When the said Yacoob Lebbe was living in the house built by himself in the said property, the Plaintiff Respondent and Payingamuwe Gedara Mohammad Mansoor, the brother of the Respondent were also living there with the other members of the family. Yacoob Lebbe imposed a condition that if Mohammad Mansoor wants to get the rights of the said property he must either build a house worth of Rs: 5000/- for the Plaintiff Respondent or must pay Rs:5000/- to the Plaintiff Respondent. As Yacoob Lebbe died in 1970, the said property devolved upon the Plaintiff Respondent and said Mohammad Mansoor. Since Mansoor failed in fulfilling the said condition he peacefully handed over the house to the Plaintiff Respondent and went to Colombo to reside. Mansoor died in 1989.

In or about the year 2000, the 1st, 2nd and 3rd Respondents forcibly entered the house and occupied several rooms. They claimed that the property was handed over to them by the 4th Respondent. P.M.M.M.Rumzy the 5th Defendant Petitioner was added to the case on his application for

intervention. Subsequent to the said intervention, the Plaintiff Respondent filed an amended plaint adding a claim against the 5th Defendant Petitioner. The 5th Defendant Petitioner filed a motion to invite the attention of the court that the amended plaint appears to be barred by positive rule of Law. It has been submitted that the amended plaint should be rejected in limine under Sec. 46 (2)(i) of the Civil Procedure Code on the following grounds.

- I. The claim against the 5th Defendant Respondent is based on a condition imposed in the year 1956 and the Respondent has filed this action 50 years later. This cause of action is barred by section 3, 7 and 10 of the Prescription Ordinance.
- II. There is no averment to the existence of a written agreement and therefore the said cause of action is barred by Sec. 18, 19 and 2 of the Prevention of Frauds Ordinance.
- III. Although it is stated that the property devolved on succession, as it is alleged that the property is a land alienated under the Land Development Ordinance, the title devolves on only one person and that the older is preferred to the younger.

The learned District Judge who has considered the motion and the said submission in her order delivered on 22.08.2006 has stated that those matters raised by the 5th Defendant Petitioner are the facts in issue of the case and therefore, has to be decided on evidence after the trial. She has added that it is a matter for the court to decide whether the plaint to be rejected or corrected on the matters of technicalities and or legal requirements. Therefore, the Learned District Judge has rejected the application of the 5th Defendant Respondent.

The entire procedure which has been described above has taken place in the District Court from 2nd January 2006 to 22nd August 2006, within a period of 7 months and 20 days.

5th Defendant Petitioner filed this "Leave to Appeal" application in this court on 30th August 2006. The Court has made an order to support the application with notice to the parties on November 14th. Accordingly the Petitioner and the Plaintiff Respondent were represented and the Application has been supported on that day and court has made an order to issue notices on the other Respondents who were not present in court, returnable on 08.12.2006. As the other parties were not present on that day too, the same order has been made and same took place on the following day as well. The 4th notice returnable day, namely, 12.03.2007, it has been

recorded that even though the notices have been dispatched on the other Respondents on 3 occasions and notices never been returned the other Respondents were absent. It has been ordered to mention on 29.03.2007 to fix a date for inquiry. On that day of consent, inquiry has been fixed for 04.06.2007. On the date of inquiry, both counsel who represented the Petitioner and the Respondent have agreed to dispose the inquiry by way of filing written submissions and accordingly, it has been fixed for written submissions on 27.08.2007. On 27.08.2007 as both counsel have requested further time to file written submissions, the next date has been fixed for 09.10.2007. The next date according to journal entries is 09.01.2008. On that date when both parties were represented by counsel and as both parties have filed written submissions, matter has been fixed for order, for 04.07.2008. This order has been postponed for several dates. On 17.11.2008, it has been recorded that as the bench is re-constituted, the case has to be fixed for argument before the new bench and argument has been fixed for 08.06.2009. Argument re-fixed for 17.11.2009 on that date and on 17.11.2009, it is recorded that inquiry is re-fixed for 16.02.2010. On 16.02.2010 the case has been taken off from inquiry on an application made by the counsel for the Petitioner to consider whether to withdraw the application. On the mentioned day given for that purpose, namely,

02.03.2010, it has been fixed for inquiry again for 01.06.2010. On 01.06.2010 counsel for both parties have informed court that there is a possibility of settlement and moved to mention to see the possibility of settlement. Thereafter, the case has been mentioned on 27.08.2010, 06.12.2010, 08.03.2011 and 12.07.2011 for that purpose. By 12.07.2011 another episode set in as an intervenient – Petitioner has filed an application for intervention. Both counsel appearing for the 5th Defendant Petitioner and the Plaintiff Respondent, have taken notice on the said application and moved for time to file Objections.

The mentioned dates given thereafter to file objections were 29.09.2011 and 14.11.2011. On 14.11.2011, as the counsel have informed court that they have filed objections, the inquiry has been fixed for 01.03.2012. The case has come up before a new bench on 01.03.2012 and parties have agreed to file written submissions to dispose the question of intervention and a mentioned date has been given. On the said mentioned date, namely, 02.05.2012, the matter has been fixed for argument on 31.10.2012 and a mentioned date too has been given for 28.09.2012. By 31.10.2012, the 5th Defendant Petitioner Respondent had filed written submissions, but the counsel for the intervenient Petitioner wanted to file counter objections with regard to the objections filed by the Plaintiff Respondent. The

application has been allowed and it has been directed to file counter objections in the registry and a mentioned date has been given to fix a date for argument. The said step has taken place before a new bench. On the next mentioned date namely, 24.01.2013 counsel for the Petitioner wanted to file written submissions and a date has been granted for that purpose. By 01.04.2013, as the parties have filed their written submissions, the matter has been fixed for argument again for 05.07.2013. On 05.07.2013, as the parties have filed their written submissions, order with regard to the question of intervention has been reserved for 11.10.2013. The case has mentioned on 14.10.2013 and the said order has been re-fixed for 26.11.2013. On 26.11.2013, it has been postponed for 18.12.2013. On 18.12.2013, as the court has observed that some of the parties have not filed their reply written submissions, the Registrar has been directed to issue notices on the 1st to 4th Defendant Respondents returnable on 18.02.2014. As the said parties were absent and unrepresented on that day, the Registrar has been directed to re-issue notices on them and their registered attorneys returnable on 06.05.2014. On 06.05.2014, intervenient Petitioner, 5th Defendant Petitioner, Plaintiff Respondent - Respondent, 2nd and 3rd Defendant Respondent - Respondent were represented by their counsel and the court has been informed that written submissions have been tendered

with regard to the question of intervention. Accordingly, order with regard to the question of intervention has been reserved for 11.06.2014 on which day this case came up before me. By this date 7 years 9 months and 11 days have passed after filing of this application in this court and the case has been mentioned before a number of benches for various steps for 40 times. The order with regard to the main matter has been reserved and postponed 4 times and the order with regard to the application for intervention has been reserved and postponed 3 times.

Although it doesn't appear that a stay order has been issued to stay proceedings in the District Court case, one of the reasons stated by the intervenient Petitioner to make his application for intervention is that proceedings of the District Court case have been stayed. If the District Court itself had not stayed its proceedings for the reason that this case is pending, most probably the District Court case would have by now been concluded. It is difficult to understand whether the parties themselves earned time deliberately for some purpose by prolonging this matter before this court or this simple application of "leave to appeal" against the District Judge's order was dragged for more than 7 years due to a lapse of the procedure adopted in this court. However, somewhere of the legal system is responsible for wasting time in this manner in administration of justice.

The intervenient Petitioner in his application has stated that he has instituted testamentary proceedings with regard to the estate of late Yacoob Lebbe Mohammad Mansoor and it is revealed that the subject matter of this case is jointly owned by the Plaintiff Respondent and said Yacoob Lebbe. He further states that he has been reliably informed that the parties to the instant application are now trying to enter into a settlement with regard to the property subjected to this case. It seems that he has no interest at all in the "Leave to Appeal" application. His concern is that whether the parties will come to a settlement and share the rights among themselves. Though, it is apparently impossible for the parties to settle the main case in this application, nobody could exactly predict whether it will so happen or not.

The District Court case still at its initial stage. The intervenient Petitioner has come on the basis that he is a son of Mansoor who inherited half share of the subject matter of the case at one stage according to the averments of the plaint. He has made this application to intervene due to two reasons as stated earlier. One is that the procedure of the District Court case has been stayed. The other is that in case the present parties of the case settle the case among themselves, his rights will be deprived. As stated above there is no assurance of the possibility that the present parties will not come to a

settlement on their own in this court and the District Judge will not be directed to enter the decree according to the settlement. If this situation is feasible, it has to be accepted that the application for intervention is justifiable.

On the other hand there is no point in adding the Petitioner to the "leave to appeal" application, if there is no merit in that application. Even if this court allows the application for intervention and adds the Petitioner as another Respondent this court will have to again consider the application for "Leave to Appeal" made against the order of the District Judge. As all the materials are available before this court for the consideration of the said application, I am of the opinion that this court must merge the both matters and make an order considering the both applications together. In fact the judgment in respect of the "Leave to Appeal" application has been reserved long before the application for intervention was made. I took this stand for two reasons. One is for the convenience of the parties and the other is avoidance of this case being any longer prolonged.

It has been submitted by the Learned Counsel for the 5th Defendant Petitioner that when attention of the court is being called by a motion, even if the answer is not filed court could reject the plaint applying the principle of nunc pro tunc.

Proviso (i) to section 46 is as follows.

(i) When the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected.

It is very clear that if the plaint is contrary to positive rule of law, court is compelled either to reject the plaint or return it to be corrected. The principle based here is that there is no point of accepting a plaint, if the entire claim of the plaint is illegal. There is a series of decided cases on this principle of law. The counsel for the 5th Defendant Petitioner has cited some of those judicial precedents.

In Read V.Samsudin plaint has been rejected as the plaintiff had no status to sue the Defendants. It has been held that “ when a plaint is defective in some material respect, it has been filed, it is not necessary to move that it be taken off the file, but it is the duty of the court of its own accord or upon its attention being called, to reject the plaint or return it to plaintiff for amendment. If the plaint is good, ex facie, any objection thereto must be taken by the answer.” In Soysa V. Soysa² Pereira J has decided that “..... if the action appears from the statement in the plaint to be barred by any positive rule of law, the court should reject the plaint”. The claim made was clearly prescribed on the footing of the averments in the plaint in that case. It was held in Ratnam V. Dheen³ action was not maintainable for the reason

that notice of termination of tenancy is in conformity with the requirements of Sec 13 (i) a of the Rent Restriction Act. Ameen V. MAIship (Ceylon) Ltd⁴ is a case that course of action was based on an agreement which was non noterial. It has been decided that the plaint is barred by a positive rule of law on the basis that the contract related to that case cannot be enforced in the absence of a noterially attested agreement.

Plaint in this case, on the face of it, is an ordinary statement of grievances. It may have been drafted purely on the instructions received from the plaintiff without forming them into formal forms of legality. Plaintiff has claimed rights of the subject matter on several basis according to the amended plaint. Firstly, it has been stated that original owner owned the property on a crown grant and the plaintiff and another person became owners to the property on the demise of the original owner. Secondly, he claims that he became the sole owner of the property as the other person failed to comply with the condition imposed on him by the original owner. Thirdly, the Plaintiff claims his rights on prescription.

The Plaintiff had filed the case against the 1st to 4th Defendants for declaration of title and ejectments for the reason that his possession was disturbed 5th Defendant Appellant intervened claiming his rights to the subject matter. This intervention resulted in filing the amended plaint. There

is no direct claim against the 5th Defendant Appellant in the amended plaint. However informal the claim made in the amended plaint against the 5th Defendant Appellant, the claim is to challenge the 5th Defendant Appellant to fulfill the condition, if he is claiming the rights to the property. However it is, the burden of the plaintiff to frame issues on pleadings in accordance with provisions of the Civil Procedure Code at the commencement of the trial subject to the rights of the defendants including the 5th Defendant Appellant to raise their objections for whatever the issues contrary to any positive rule of law. I, therefore, see no reason to grant leave to appeal against the order of the District Judge. Therefore Court refuses the application for intervention and refuses to grant leave to appeal against the order of the Learned District Judge. However the Interveniens Petitioner is at liberty to make his application for intervention in the District Court case.

Application for intervention dismissed.

Application for leave to appeal dismissed.



JUDGE OF THE COURT OF APPEAL

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1. 1895 1 NLR 29
 2. 17 NLR 118
 3. 70 NLR 21
 4. CA/LA 113/81