

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

*In the matter of an appeal in terms of Section
755(3) of the Civil Procedure Code.*

Inul Marliya

No.124B, Madewell Bazaar, Madewell.

PLAINTIFF

C.A. NO.521/97 (FINAL)

DC Kandy Case No.16968/L.

Vs.

1. Sultan Pitchai Jalaldeen

No.60, Main Street, Pinwila.

DEFENDANT

AND BETWEEN

Sultan Pitchai Jalaldeen (Deceased)

No.60, Main Street, Panwila.

DEFENDANT-APPELLANT

Mohemed Hajija Bee Bee Jalaldeen

No.60, Main Street, Panwila.

SUBSTITUTED DEFENDANT-APPELLANT

VS.

Inul Marliya (Deceased)

No.124B, Madawala Bazaar, Madawala.

PLAINTIFF-RESPONDENT

Noorul Hidaya

No.124B, Madawala Bazaar, Madawala.

SUBSTITUTED PLAINTIFF-RESPONDENT

**BEFORE: M. T. MOHAMMED LAFFER, J. &
K. K. A. V. SWARNADHIPATHI, J.**

COUNSEL: Kushan D Alwis (P.C.) with Chamath Fernando

For Defendant-Appellant

Shantha Jayawardena with Chamara Nanayakkarawasam

For Substituted Plaintiff-Respondent

Argument: By Written Submissions

Date of Judgment: 09.11.2021

K. K. A. V. SWARNADHIPATHI, J.

JUDGMENT

The Defendant of case No.16968/L of the District Court of Kandy, aggrieved by the judgment delivered on the 22nd of January 1997, had invoked the jurisdiction of this court to set aside the said judgment.

Plaintiff filed the case in the District Court, seeking a declaration of title for the land depicted in the second schedule to the Plaint. Furthermore, to eject Defendant and all those holding under him. According to Plaintiff under the final decree in partition case, No.5365/P in the District Court of Kandy, Mohamed Meera Labbe and Mohamed Salih became owners to lots 1 and 2. Mohamad Salih, who was given Lot 2, transferred his share to Mohamad Meera Labbe. Thereby said Mohamad Meera Labbe became the owner of both the lots. He gifted both lots to Sayed Shahabuddin Dean by Deed No.12010 dated 05.01.1998 attested by R.M.C. Ratnayake N.P. After that, Sayed Shihadeen Dean gifted Lot 2 to Inal Marilia, the Plaintiff by Deed No.18478 dated 29.05.1991 attested by R.M.C.

Ratnayake N.P., marked as [P6] at the trial. Defendant has lived at No.60, which is in lot 2 of the Plaintiff. Lot 2 is the same as in the previous partition case in which the devolution of title the Plaintiff had described in the present case. In the premisses, Defendant had lived under the leave and license of Ahamad Meera Labbe and Shabdeen. However, from about September 1989, Defendant had rejected Plaintiff's title.

In Kandy District Court, Plaintiff filed Case No. 16968/L, seeking an order ejecting Defendant from the premises. In the answer, Defendant had rejected the devolution described by Plaintiff. He stated that Plaintiff is acting on behalf of Sayed Shihabdeen as the power of Attorney holder. Therefore, the Plaintiff should be the said Seyed Shihabdeen and not the power of Attorney holder. He further claims the property on prescription. However, Defendant had admitted that the original owner of Lot two was Mohamad Salih. Defendant further states that he had obtained title to an undivided extent of 3,375 square feet on Deed No.2244 dated 25.081985 attested by W.A. Amarasooriya, N.P.

When Defendant's case was taken up at the trial, Defendant had moved for a date to call an official witness from the Registrar of Lands. On the first date, the learned Judge had given a date on the subsequent date when a date was moved as the official witness was not present. The learned Judge had refused a date. Not granting a date to call the official witness was one of the grounds of appeal. Defendant's duty was to rectify the position at that instance and not after the judgment was pronounced. Our courts are not willing to help those who sleep over their rights. Therefore in this court, we need not discuss arguments regarding not granting a date to call the witness from the registrar of lands as the Appellant had failed to act at the appropriate time. He is now estopped from asking to rectify an issue he had not taken then and there. If the learned Judge pronounced the judgment on the same day, this position is an excellent ground to argue?

In this case, the refusal was made on the 26th of April 1996, and judgment was entered on the 22nd of January 1997. There was ample time to move in revision. Before the judgment, there was a date for written submissions, documents and steps. From 26th of April 1996, the court had given a date for 13th of June 1996. If the Appellant was keen to record the witness's evidence, there was enough time to move in revision to set aside the order during

that period. Complain immediately is the rule not to let time pass and then cry over spilt milk. He had enough time to move up in revision if that evidence was necessary. Since Defendant had not taken steps to safeguard his rights, he cannot complain after the judgment. Our courts have decided on many occasions that those who sleep over their rights will not be helped.

The next point on which Defendant had appealed was what deed should prioritise: [V1] or [P4]? Defendant's position is that Mohamed Meera Labbe had died, leaving his children Abbas, Inul Maraliya and Sharbdeen. Abbas had executed the deed of transfer marked as [V1] in favour of Defendant. On the strength of that deed, Defendant is entitled to an undivided share from Lot 2 in Plan No.2567. According to Defendant, since his deed had got registered before Plaintiff's deed, he should have been given the safeguards of prior registration, which the learned District Judge had failed to follow.

When perusing the judgment, the learned Judge had considered that the deed marked [P6] was not objected to or challenged by Defendant. In studying the evidence of Abdul Jebal Irud, through whom [P6] was marked, I observe that at the time of marking [P6], Defendant had not even asked it to be marked as a document to be proved. Therefore the document should be treated as accepted by parties. In a situation of this nature, that document will have to be treated as concrete evidence. Once the deed marked [P6] becomes a proved document, the learned District Judge must consider and evaluate evidence accordingly.

The learned District Judge had observed in evidence that Defendant had taken various defences. At one time, he pleads as a tenant and seeks protection. At another time, Defendant states that he owns an undivided share of the land. Again, yet another time pleads under the leave and license of Plaintiff's predecessors. Another time, he tries to claim on prescription.

In evidence, Defendant takes the position that he was a tenant of Meera Labbe from 1965-1992. After the death of Meera Labbe, he claims he had deposited rent at Pinwale Praesidia

Sabha. However, in the answer, he had not pleaded regarding rent being paid. Therefore, the learned District Judge's observation that Defendant took several causes of actions that are not compatible with one another can be accepted.

Perusing the document marked [P4] indicate that entire land [Lot 1 and 2] was transferred to Sayed Shibdeen in 1981. Therefore, the pedigree shown by Plaintiff runs uninterrupted. Even though Defendant claims the property on deed V1 Defendant failed to prove the continuity of title., there is a vacuum in the pedigree. It was the duty of Defendant to prove that Meera Lebee died without executing deed P4. However, in perusing the document, it is evident that Seyed Aaaaas had no title to transfer when signing V1. He should prove that Abbas had a clear title to transfer at the time of executing V1. Therefore the question of prior registration need not be discussed.

The learned Judge observed that Meera Lebbe had enjoyed lots 1and 2 described in case No: 5365|p when making P4 the perchers 33 was not separately described but shown as one land. Therefore, the observations of the learned District Judge need not be disturbed.

The last ground of appeal of Defendant is that Plaintiff acts as a Power of Attorney holder. Therefore the Plaint is bad in law Plaintiff should file the case as an attorney and not as the owner. If this was not an afterthought as a ground of appeal, the fact Plaintiff had no statuesque to file the Plaint should have been an issue at the district court.

For reasons given above, I affirm the judgment entered in this case by the learned District Judge. Accordingly, the appeal is dismissed subject to taxed costs.

Judge of the Court of Appeal

M. T. MOHAMMED LAFFAR, J.

I agree.

Judge of the Court of Appeal