

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

**In the matter of an Appeal from the  
Civil Appellate High Court.**

Seyyadu Mohommaduge Razik,  
Gallenbindunuwewa,  
Horowpotana.

**Plaintiff**

**SC APPEAL 89/2010**

SC/HC CA/LA 311/2009

D. C. Anuradhapura 15625/L

**Vs**

1. Suleiman Adam Kandu,  
Kivul Kade, Horowpathana.
2. Abdul Hameed Mahamad Mihilar,  
Fancy Textiles, Mahaveediya,  
Horowpathana.

**Defendants**

**AND THEN**

Seyyadu Mohommaduge Razik,  
Gallenbindunuwewa,  
Horowpotana.

**Plaintiff Appellant**

**Vs**

1. Suleiman Adam Kandu,  
Kivul Kade, Horowpathana.
2. Abdul Hameed Mahamad Mihilar,  
Fancy Textiles, Mahaveediya,  
Horowpathana.

**Defendant Respondent**

**AND NOW BETWEEN**

Seyyadu Mohommaduge Razik,  
Gallenbindunuwewa,  
Horowpotana.

**Plaintiff Appellant Appellant**

**Vs**

1. Suleiman Adam Kandu,  
Kivul Kade, Horowpathana.
2. Abdul Hameed Mahamad Mihilar,  
Fancy Textiles, Mahaveediya,  
Horowpathana.

**Defendant Respondent Respondent**

**BEFORE : S. EVA WANASUNDERA PCJ.  
PRIYANTHA JAYAWARDENA PCJ. &  
MURDU FERNANDO PCJ.**

**COUNSEL : Mahanama de Silva with K.M.N.Dilrukshi for the  
Plaintiff Appellant Appellant.  
N.M.Shaheed with Husni M. Rizni for the first  
Defendant Respondent Respondent.**

**ARGUED ON : 23.07.2018.**

**DECIDED ON : 10.10.2018.**

## **S. EVA WANASUNDERA PCJ.**

In the District Court of Anuradhapura, Seyyadu Mohammaduge **Razik** filed action against two persons, namely Sulaiman **Adam Kandu** and Abdul Hamid Mohamed **Mihilar** to obtain a declaration as the owner of a portion of land and the building thereon which was described in the Schedule to the Plaint containing in extent of 4.25 Perches, as well as to evict the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from the building on the said land. The date of the Plaint is 29.02.1996. The Plaintiff has claimed damages against the Defendants as well. The 2<sup>nd</sup> Defendant is a tenant of the 1<sup>st</sup> Defendant. The main contest is between the Plaintiff Razik and the 1<sup>st</sup> Defendant Adam Kandu.

Having gone through the brief, I find that the declaration sought by the Plaintiff as the owner of an extent of 4.25 Perches is truly on the ground a “boutique room”. The Northern boundary of the said land is the other “boutique room” of the 1<sup>st</sup> Defendant. These two boutique rooms are adjoining each other. Each boutique room is exactly the same in extent. Both of these boutiques were originally owned by one Seinul Abdeen and his brother in law Adam Kandu who is the 1<sup>st</sup> Defendant situated on the land contained in the Schedule to the original Deed No. 246 dated 03.06.1978 which land was purchased by both of them together from three vendors as mentioned in the deed from Point Pedro.

The Plaintiff Razik claims title by deed No. 79 dated 28.09.1993 attested by Herath Banda Ratnayake Notary Public. The original owner of the land and building had been Sella Marikkar Seinul Abdeen. He had passed away and the heirs were his wife and children. The wife and the children had signed as heirs of Seinul Abdeen and transferred the corpus to the Plaintiff by the said Deed 79. Seinul Abdeen had got title to the same by Deed 246 dated 03.06.1978 attested by Kanagasegeram Muthukumar Notary Public. By this deed Adam Kandu, the 1<sup>st</sup> Defendant and Seinul Abdeen had become co-owners of an extent of land of 1/4<sup>th</sup> share of the bigger land of an extent of 34 Perches with the buildings thereon. So, each one was entitled to half share of 1/4<sup>th</sup> of 34 Perches, i.e. 4.25 Perches. It can be concluded that according to the deeds, the Plaintiff's predecessor and the 1<sup>st</sup> Defendant had become co-owners to the land of 8.5 Perches.

According to the evidence on record, I observe that these are two boutiques were possessed separately, one boutique by the Plaintiff's predecessor in title, namely

Seinul Abdeen and the other by the 1<sup>st</sup> Defendant. They enjoyed the two boutiques separately for some time by renting the same out, to outsiders. One deed of lease giving out the boutique which was owned and possessed by the 1<sup>st</sup> Defendant Adam Kandu was produced at the trial. It was a lease of the boutique for two years. The Deed of Lease number is 6862 dated 23.02.1988 attested by Lionel Peter Dayananda Notary Public. It is evident that Adam Kandu was the Lessor and S.A.M. Muhuthar was the Lessee. In the Schedule thereof it is specifically mentioned that the premises leased out is “ boutique number 148, in length 80 feet and in width 13 feet.” This boutique is the one possessed by Adam Kandu which was on the Eastern Side of the co-owned land of 8.5 Perches.

Then in the year 1991, Seinul Abdeen died. The heirs of Seinul Abdeen sold the boutique owned by Seinul Abdeen to the Plaintiff, Razik on 28.09.1993 by Deed No. 79 attested by Herath Banda Rathnayake, Notary Public.

The 1<sup>st</sup> Defendant, who was the brother in law of Seinul Abdeen had got a transfer deed done in his favour by forging the signature of Seinul Abdeen. The said transfer deed No. 9075 dated 06.07.1991 was attested by L.P. Dayananda Notary Public. It is on this Deed that the 1<sup>st</sup> Defendant claimed that he was the owner of the boutique of which the former owner was Seinul Abdeen , his brother in law. When she came to know about that fraudulent Deed, Seinul Abdeen’s wife complained to the police with regard to the said deed of transfer No. 9075 on the ground that the signature thereof was not that of her husband who used to sign in English and not in Tamil as it was in Deed 9075. Furthermore she had pointed out that on the date of the said deed, her husband was inside the Anuradhapura hospital and that he had expired the next day.

The Police had investigated and filed action in the Magistrate’s Court of Anuradhapura under case number 7395 **against Adam Kandu** and two others who had signed as witnesses. On 10.12.2012 he was **convicted** on charges under Sections 459 read with Section 457 and under Section 402 of the Penal Code by the Magistrate. The decision of the Magistrate was appealed to the High Court of Anuradhapura. The **Appeal was considered** under Case No. Appeal 04/2013 and judgment was delivered by the High Court Judge on 03.04.2014, **dismissing the Appeal**. The Certified copies of the said Judgements have been filed in this Court with an Affidavit and a motion dated 23.10.2014 marking them as A1 and A2. Thereafter the 1<sup>st</sup> Defendant Adam Kandu again filed papers in Appeal against the

judgment of the High Court , firstly seeking ‘leave to appeal to the Supreme Court’, under case number **SC Spl Leave to Appeal No. 67/2014**. I have the original Supreme Court brief with me, which was called for by me from the Supreme Court Registry to verify what the position of the matter as it is, as at the moment. I find that on the 5<sup>th</sup> of October, 2016, the **Supreme Court has refused Special Leave from the judgment of the High Court.**

Therefore, on this day, it is a concluded matter that the **Deed No. 9075 dated 06.07.1991 is a fraudulent deed and it has no legal validity in law.** The 1<sup>st</sup> Defendant is not the legal owner of the boutique which was formerly owned by the deceased Seinul Abdeen.

The action filed by the Plaintiff was dismissed by the District Court. The Plaintiff had preferred an Appeal to the Civil Appellate High Court. That Appeal was also dismissed on 20.10.2009. Then the Plaintiff Appellant preferred this Appeal to the Supreme Court and leave to appeal was granted on two questions of law which read as follows:

1. Has the High Court misdirected itself in holding that the corpus was an undivided and co-owned land on the basis of Deed P1 since the evidence was that after the execution of the said deed, the Vendees, namely the 1<sup>st</sup> defendant and the said Seinul Abdeen had possessed their respective shares separately and as two distinct and divided lots?
2. Has the High Court misdirected in law in holding that the order made in respect of the said preliminary issue No. 22 is not final and conclusive? Is the said determination obnoxious to Section 147 of the Civil Procedure Code?

Section 147 of the Civil Procedure Code reads thus:

“When issues both of law and of fact arise in the same action, and the court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues on fact until after the issues of law have been determined.”

In the case in hand while the case was going on after parties had settled the issues on fact which were 21 in number, another issue was raised as Issue No. 22 by the Counsel for the 1<sup>st</sup> Defendant. This issue No. 22 can be narrated as follows:

“ Since what has been received is a co-owned title,  
(a) have the said co-owned property been legally partitioned?  
(b) If it has not been done so, can the Plaintiff file an action regarding land and pray that the co-owner be evicted?  
(c) As such, should the Plaintiff get the relief against the Defendants by way of a Partition Action? ”

The District Judge thought it fit and proper to take up this issue as a preliminary issue under Section 147 of the Civil Procedure Code and directed the parties to file written submissions on the same and thereafter made order on 07.12.1998 concluding that “ As at present, the Plaintiff seems to be the only owner of the whole land and premises since he has bought the undivided portion of the same land. Prior to the Plaintiff purchasing the said undivided share, the parties had been in possession of the separated divided portions for a very long time and enjoying them separately as specific portions owned by them. Therefore there is no legal bar to allow the Plaintiff to proceed with the case as a re-vindicatio action against the Defendants.”

There was no attempt made by the Defendants to appeal from that order and the case proceeded to trial. The judge who made this order had got transferred and the next Judge had proceeded with the matter. Then again, a third Judge had concluded the matter and written the judgment. **He had answered the issue No. 22 which was already taken up and decided on by the first Judge , once again.** It is hard to believe that the judge who wrote the judgment had not seen or observed that a preliminary objection had been raised and argued and considered by his predecessor and **that the matter was concluded.**

Once a question of law is taken up as a preliminary question and a decision is made, there will be no room for that question to be considered by the judge again before the same court. **It amounts to one issue being answered twice in the same proceedings.** That is not legal. It is not proper and highly unnecessary and unwarranted. Any trial Judge should go through the proceedings thoroughly before he steps on to writing the judgment. There is no room for the Judge to

consider once again an issue which was already decided within the same trial. It can lead to absurdity if it is done so. In the case in hand the judge who decided on the preliminary issue had held in one way and the Judge who wrote the final judgment had held in another way, contrary to the former order. I hold that the trial Judge was legally wrong in having done so.

At the time of filing the action, the Plaintiff Razik was the owner of the boutique room which covered the land co-owned **earlier** by Seinul Abdeen and his brother in law the 1<sup>st</sup> Defendant. Razik's position is that when Seinul Abdeen died, he purchased the share of the dead person, from his wife and children, by Deed No.79 dated 28.09.1993. Seinul Abdeen had died on the **07.07.1991** and the 1<sup>st</sup> Defendant claims that he bought the share of Seinul Abdeen on **06.07.1991**, i.e. the day prior to his death in the hospital, by Deed No. 9075 attested by Lionel P. Dayananda Notary Public. This transfer Deed 9075 was allegedly signed by the deceased Seinul Abdeen one day prior to his death. The wife complained to the Police and the Police filed action against the 1<sup>st</sup> Defendant. As I have explained earlier in this Judgment, **the 1<sup>st</sup> Defendant was convicted for the fraud** of getting such a deed executed and therefore the said Deed 9075 is invalid, illegal and has no force or avail in law.

The 1<sup>st</sup> Defendant is not the owner of the boutique which was formerly owned by Seinul Abdeen. The legal heirs of the deceased owner had sold the same to the Plaintiff.

So, the Plaintiff's position is that he has not filed a re vindicatio action against **any co-owner**. The Plaintiff Razik, when he filed action in 1996, filed the said action for a declaration of title to the land and premises containing in extent only of 4.25 Perches which he had purchased by **Deed P1**, namely Deed 79 dated 28.09.1993 which had been a boutique room separately owned and possessed by Seinul Abdeen. He prayed for ejectment of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, Mihilar who was occupying the boutique room as the tenant of the 1<sup>st</sup> Defendant.

The land of 8.5 Perches were co-owned by Seinul Abdeen and the 1<sup>st</sup> Defendant Adam Kandu, brothers in law by Deed P1(a), namely Deed No. 246 dated 03.06.1978 until the death of Seinul Abdeen. Even then, according to the said Deed, which was again marked by the 1<sup>st</sup> Defendant as 1V1, it is specifically mentioned that each of them, i.e. Atham Kandu and Seinul Abdeen will hold it in

equal share. So, each one, according to the evidence on record had possessed one boutique room separate from the other, each covering the land of 4.25 Perches which two boutique rooms were already on this land of 8.5 Perches. Since the day of the purchase in 1978 they had been possessing the two boutique rooms separately.

However, whether I consider the Plaintiff as the owner of the particular boutique room or whether I consider the Plaintiff as a co-owner of the whole land containing the two boutique rooms, **the Plaintiff has a right to evict a trespasser** who is the 2<sup>nd</sup> Defendant Respondent Respondent, Mihilar, who had come into occupation of the boutique room as a **tenant of the 1<sup>st</sup> Defendant** and who has remained therein against the wish of the 1<sup>st</sup> Defendant after the lease period without paying rent. The 1<sup>st</sup> Defendant himself has filed a rent and ejectment case against the said 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant has taken advantage of the dispute between the Plaintiff and the 1<sup>st</sup> Defendant and has continued to be there. **He is a trespasser**. He has no grounds whatsoever to be in the boutique room which is the subject matter of this case. It is trite law in our legal system that even a co-owner has every right to eject the trespassers without making other co-owners parties to the suit. I hold that the Plaintiff has a legal right to evict the 2<sup>nd</sup> Defendant Respondent Respondent from the boutique room which he is occupying. **Neither the learned Civil Appellate High Court Judges nor the learned District Judge had given any thought to the 2<sup>nd</sup> Defendant Respondent Respondent's unlawful occupation of the boutique room** and had not made any order regarding that position. The High Court and the District Court **have erred** in the judgments delivered in that regard.

When any immovable property is co-owned according to the title deeds of the parties who own them, each party gets rights against outsiders on behalf of all the co-owners. If the parties find it difficult to occupy the land as co-owners in peace, then any party can file a Partition Action and get relief to own each one's shares according to a plan drawn by the court commissioner surveyor according to the law on partition. Many co-owners divide the land by themselves amicably and possess them, having got an amicable survey plan done with the consent of the parties. The main objective is to get each co-owner to have separate allotments so that they can do whatever with that allotment of land which they possess separately.

In the case in hand the two brothers in law had bought the building which had two boutique rooms which were equal in extent and therefore they possessed each boutique separately and peacefully from the year 1978. In the mind of each person who were the two co-owners according to the original deed of ownership, there was a particular boutique room which each one owned. Each person, i.e. Seinul Abdeen and his brother in law Adam Kandu possessed 4.25 Perches each: they owned each boutique room separately: they gave each boutique room on rent/lease separately to outsiders and enjoyed the proceeds without any problem separately and thus it was until the death of Seinul Abdeen.

It can be concluded that they owned and possessed the co-owned property having divided the same in equal shares distinctly and separately in peace without any problem whatsoever from 1978 up to 1991, i.e. 13 years continuously. There had not existed any need for them to partition by way of a partition action or to write separate deeds declaring that they are possessing their portion in a peaceful way simply due to the reason that they were holding on to the right share, in a right way, without any problems whatsoever. Each one was owning and occupying their share of the property in a peaceful way as there had not been any problem in possessing their already separated extent of 4.25 Perches with only a boutique room on each separated extent of land with a single boutique on it.

Since they had been holding on to each boutique for over 10 years, each one of the co-owners had prescribed to each boutique room as well, against any rights of outsiders other than the co-owners. They had held the separate properties by themselves in their minds as separate property of each one single handedly without ever thinking that the property is co-owned. If any person recognizes that it was a co-owned land, it is a misconception according to the way each party had dealt with each boutique room after the day they bought the land of 8.5 Perches together. On the deed of purchase it is a co-owned land but each purchaser held each boutique as his singly owned property in all aspects for 13 years.

It is interesting to note that in the **Answer of the 1<sup>st</sup> Defendant**, he had **not taken up the position that the land was co-owned land** and therefore the **Plaintiff is not entitled to the relief prayed for**. There was no issue raised regarding co-ownership.

Only 21 issues were raised as seen at pages 77 to 80 of the brief in hand before the Supreme Court. During the course of the examination in chief, issue number 22 was raised. Thereafter again the Plaintiff was cross examined on the basis that a co-owner cannot be evicted. It is only then that the learned District Judge decided to try issue No. 22 as a preliminary issue. After calling for written submissions, the District Judge made order dismissing the said preliminary issue and decided that the case could be proceeded with , as a re- vindicatio action and an action to evict the Defendants.

When the preliminary issue was decided upon by the Judge who heard the case at that time, that order is final on that issue because neither party appealed from the said Order. The third Judge who wrote the final judgment has wrongfully adjudicated on that issue once again and held the contrary view. The trial judge had dismissed the plaint on the basis that the property is co-owned and therefore the Plaintiff who bought the boutique room cannot evict the other co-owner from the property.

I hold that the Trial Judge as well as the Civil Appellate High Court Judges have wrongly identified the land as co-owned and totally had not paid any attention to the 2<sup>nd</sup> Defendant who is a trespasser and not made any order with regard to him being in possession wrongfully and unjustifiably of the corpus, the subject matter of the case. In **Rockland Distilleries Vs Azeez 52 NLR 490**, it was held that one co-owner can institute action for damages caused to the common property without joining the other co-owners either as plaintiff or defendants.

The learned Judges have turned a blind eye to the fact that this third party who is the 2<sup>nd</sup> Defendant can be evicted from the boutique room as he is a trespasser on the land.

I answer the questions of law enumerated above in the affirmative in favour of the Plaintiff Appellant Appellant and against the Defendant Respondent Respondents.

I set aside the judgment of the Civil Appellate High Court dated 20.10.2009 as well as the judgment of the District Court of Anuradhapura dated 18.05.2004. The Plaintiff Appellant Appellant is entitled to the reliefs prayed for in the Plaint.

The Appeal is allowed with costs of suit in all the courts.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.  
I agree.

Judge of the Supreme Court

Murdu Fernando PCJ.  
I agree.

Judge of the Supreme Court