

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



K. P. Vijayananda  
Liyanagoda, Habaraduwa.

**PLAINTIFF**

C.A 898-2002  
D.C. Galle P/12033

Vs.

1. I. G. A. Nandawathi Sisila,  
Habaraduwa.

**And 26 others of  
Habaraduwa.**

**DEFENDANTS**

**AND**

S. Gunathilake nee Pathirana  
Heenatigala, Thalpe.

**PETITIONER**

Vs.

K. P. Vijayananda  
Liyanagoda, Habaraduwa.

**PLAINTIFF-RESPONDENT**

1. I. G. A. Nandawathi Sisila,  
Habaraduwa.

**And 26 others of**  
Habaraduwa.

**DEFENDANT-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Ananda Kasturiarachchi for the Petitioner  
Plaintiff-Respondents are absent and unrepresented

**ARGUED ON:** 22.02.2012

**DECIDED ON:** 01.06.2012

**GOONERATNE J.**

This is a revision application to set aside the judgment in a partition case dated 11.2.1999 and the interlocutory decree. The land sought to be partitioned is called 'Malapalawatta in extent of 4 acres and 2 roods. This application before this court has a long history. At least on forty

occasions this application seems to have been listed in this court without finality as regards the revision application is concerned. At a certain stage the application was dismissed for want of appearance. Again re-listed and at a certain point this court refused to re-list this application for hearing and the petitioner having moved the Supreme Court obtained an order (15.10.2010) to rehear the case. Then on the other hand on all dates the case was listed in this court the several Respondents other than the 13<sup>th</sup> Respondent was absent and unrepresented. However on the last few occasion when the application was listed in the Court of Appeal all the Respondents were absent and unrepresented. As such this judgment is delivered on written submissions filed of record and the material gathered from the available proceedings.

The position of the Petitioner inter alia as pleaded in the petition and affidavit filed in this court seems to be that she was the only heir of late Edwin Pathirana referred to in paragraph 4 B iii of the petition and pleaded in the plaint by Plaintiff that the Plaintiff is unaware or heirs of Edwin Pathirana is unknown and therefore no dispute. The learned District Judge did not allocate any shares to heirs of Edwin Pathirana (paragraph 7 of amended plaint P1). The Petitioner's position as pleaded is that being the only child of Edwin Pathirana she become entitled to 3/32 share together with an undivided part of the plantation of the entire land. There is reference

to documents A, B & C annexed to petition being deed on which Edwin Pathirana became entitled to the above share of the corpus, Death Certificate and Birth Certificate (Petitioner) respectively.

On a perusal of proceedings 'x' and more particularly P4 & P5 of same indicates that the trial and settlement of the case itself is reflected in same. Admissions and points of contest had been recorded. At the trial which was more or less settled, evidence of Plaintiff and 16<sup>th</sup> Defendant had been led and recorded and such evidence had not been contradicted. The judgment at P6 of 'x' allot shares to parties, in the manner indicated in paragraph 1.7 of the petitioner's written submissions. No shares allocated to the heirs of Edwin Pathirana, though as above, disclosed in the plaint.

I have noted the following as contained in the written submissions of Petitioner.

- (a) The said judgment is entirely based on the purported settlement. The learned District Judge having recorded issues failed to answer any of them in the judgment. There is no analysis or investigation on title of each party. According to the plaintiff's own pedigree all the owners of the land were not before the court and not made parties. The rights of those parties should have left un-allotted.

Although the Plaintiff-Respondent pleaded in his plaint that the heirs of Edwin Pathirana is unknown, the learned District Judge failed to allocate any shares to the heirs of the said Edwin Pathirana

- (b) On 28.08.2000 the 13<sup>th</sup> Defendant had filed a Petition and Affidavit claiming that his share was not all allotted and the case has been fixed for inquiry. The inquiry has taken up at several times but not concluded.
- (c) On 02.01.2011 the interlocutory Decree has being filed of record but the learned District Judge had not signed the same.
- (d) The Petitioner respectfully submits that the said Edwin Pathirana referred to paragraph 4B (iii) hereof was unconsciousness for 10 years and died on 03.03.1975 leaving the Petitioner, his only child, as the only heir. The Petitioner thereupon became the owner of the said 3/32 share together with an undivided part of the plantation standing thereon of the said entire land. A certified copy of the deed of Edwin Pathirana bearing No. 899 attested on 24.6.1942 by C.M. Hussain, Notary Public, the true copy of Death Certificate of Edwin Pathirana and the true copy of my Birth Certificate.
- (e) On the other hand, one Francis Jagoda originally looked after the interests in the property in question on the instructions of the Petitioner died and upon the death of Francis Jagoda on 05.04.1992, one Pathiranawasam who is related to the Plaintiff was appointed to look after the petitioners interest on the said land. Later a daughter of the said Pathiranawasam married the Plaintiff's brother, 5<sup>th</sup> Defendant. Both the Plaintiff and the 5<sup>th</sup> Defendant are well aware that the Petitioner is the only heir of to Edwin Pathirana and that the said Pathiranawasam was looking after the said land under Petitioner's supervision. In the circumstances, the Plaintiff should have been taken steps to make the Petitioner a party and/or at least disclose the Petitioner's rights at trial.
- (f) Further, the Petitioner submits that when Petitioner's husband was an officer attached in Bank of Ceylon at Koggala Branch, the Plaintiff was casual employee from 1973 – 1978 of the Agricultural Services Branch which is part of the Bank Ceylon, Koggola Branch and the Petitioner's husband is well known to the

Plaintiff. In addition, in appreciation of the services rendered by the said caretaker Pathiranawasam and Petitioner has donated a land to his brother.

In a partition suit, however irksome the task is, there is a duty on the trial Judge to investigate title. When the court is made known that there are others not before court who need to be allotted shares from the final partition, Original Court need to be very cautious and take all reasonable and possible steps to bring them before court. No party legally entitled to a share should be denied that right to the soil. I have also noted with interest the following authorities pertaining to the role of the trial Judge in a partition case and of the revisionary powers.

Somawathie v. Medawala 1983(2) SLR 15 ... It is the only remedy available for owner who had lost his share in a partition proceedings. This power can be exercised on the application of an aggrieved person not a party to the record. 23 NLR 46

Kularatne v. Ariyasena (2001) BLR 6 CA.. It has been held that Court should not entered a decree in a partition action unless it is perfectly satisfied that the persons on whose favour it makes, the decree are entitled to the property. Investigation of title by the court is a necessary pre-requisite to every partition decree 40NLR 92, 32 NLR 337

Richard et.al Vs. Seibel Nona 2001 (2) SLR 1 A partition decree cannot be entered by settlement even after some evidence and that in partition suits, it is the duty of the Judge to fully investigate into the title to the land and shares 1945 31 CLW 4.

In all the circumstances of this case aggrieved persons or parties who are entitled to a share in the corpus should have been made parties.

There is an apparent failure to make the necessary persons parties to the case. As such the trial Judge has not properly investigated title. Prior to permitting and allowing any settlement to be put in operation trial Judge must satisfy himself whether title could be properly investigated in the absence of a party and what should be done to the share disclosed by Plaintiff as stated above. Disposal of cases at any cost should never be the rule but court should be ready to work according to rules of natural justice and ensure justice. As such I set aside the Judgment dated 11.2.1999, and the interlocutory decree. Petitioner's application for revision allowed in terms of sub paragraphs 'b', 'c' & 'd' of the prayer to the petition.

Application allowed.

JUDGE OF THE COURT OF APPEAL