

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

CA 05/97 (F)

D.C. Matara Case No:14099/P

Lendawa Lokuge Wilson,
Weligodella, Sulthanagoda.

Plaintiff

Vs.

1. Katumullage Gunasiri
 2. Ratnayake Liyanage Charlis (deceased)
 - 2A. Ariyawathi Samarawickrama
 3. Ratnayake Liyanage Podihami
- All of Dikgoda, Sulthanagoda.

Defendants

And now between

2A. Ariyawathi Samarawickrama of
Dikgoda, Sulthanagoda.

2A Defendant-Appellant

Vs.

Lendawa Lokuge Wilson,
Weligodella, Sulthanagoda.

Plaintiff-Respondent (now deceased)

Katumullege Leelawathi,
Weligodella, Sulthanagoda.

Substituted Plaintiff-Respondent

BEFORE : A.W.A. Salam, J.

COUNSEL : Razik Zarook PC with Rohan Deshapriya for the 2A
Defendant-Appellant.
Tharanath Palliyaguruge for the Respondent.

DECIDED ON : 27.06.2012.

A.W.A. Salam, J.

The sequence of the incidents leading to this appeal are as follows:-
The Plaintiff filed action seeking the partition of the land called

“Kajugahawatte” depicted in plan No. 8872 made by K.G.S. Yapa Licensed Surveyor. As disclosed in the plaint, the Plaintiff and the 1st Defendant were entitled to undivided shares in the corpus in the ratio of 1:15. The 2nd Defendant filed amended statement of claim dated 16.07.1990 through Mr. H.M. Bary Attorney-at-Law claiming *inter alia* prescriptive title to the whole land. As per journal entry dated 24.05.1991, the death of the 2nd Defendant had been brought to the notice of Court and thereafter 2A Defendant had been substituted in his place.

As per journal entry No. 16 dated 29.07.1991, the Fiscal had reported of the service of notice on 2A substituted Defendant. As it transpired from this journal entry 2A Substituted Defendant was absent on that day and the case was set down for trial on 18.02.1992. On that day when the matter came up for trial the Plaintiff having sought an adjournment, the trial was re-fixed for 03.09.1992. When the matter was taken up for trial on that day, parties suggested the points of contest and on that occasion Mr. Suraweera Attorney-at-Law appeared for 2A Defendant on the instructions of Mr. H.A. Bary. After the formulation of the points of contest the trial was then re-fixed for evidence to be led. Significantly, 18.01.1993, the date fixed for evidence to be led fell on a public holiday and the case was not mentioned but called on 11.01.1993 instead and then re-fixed for trial for 22.07.1993. Subsequently, the trial was fixed for 07.01.1994 on which day only the 1st Defendant and the Plaintiff were present in Court. They moved that the trial be taken *de novo* and the said application was allowed by Court. On the same day it was recorded that the 2A Defendant was not present and not represented by Counsel either.

Further, the Counsel for the Plaintiff made an application that although 2A Defendant was represented by Mr. Bary no proxy had been filed on his behalf and as there was no dispute between the Plaintiff and the 1st Defendant, the learned District Judge decided to take evidence on the matter and delivered judgment on the same day as prayed for by the Plaintiff and the 1st Defendant.

Subsequently the 2A Defendant made an application to Court to set-aside the said judgment. At the inquiry into this application 2A Defendant gave evidence and stated *inter alia* that her husband filed statement of claim through Mr. Hussain Bary Attorney-at-Law and points of contest also were raised on his behalf. She further testified that 08.01.1993 was a public holiday and in any event on 07.01.1994 she was suffering from a stomach ache. When she came to meet the registered Attorney-at-Law she had been informed that he had died and the case is fixed for trial on a later date. In the circumstance, she moved that the judgment delivered against her be vacated and she be granted an opportunity to participate at the trial to present the case as per statement of claim already tendered.

The learned District Judge delivered his order dismissing application of the 2A Substituted Defendant on the ground that it is not in conformity with section 48(4) (a) and (b) of the Partition Act. He further held that the Petitioner should have submitted the circumstances and the ground to amend the final decree.

It was urged by the President's Counsel who appeared for 2A Defendant-Appellant that the learned District Judge has totally disregarded Section 28 of the Civil Procedure Code which lays down that if any registered Attorney shall die or removed or suspended or otherwise become incapable to act for the client at any time before judgment, no further proceedings shall be taken in the action against the party for whom he appeared until 30 days after notice to appoint another registered Attorney has been given to that party either personally or any such other manner as the court directs.

Any question relating to the defects of a proxy is curable and not fatal and cannot be prejudicial to the person or the party affected by it. This principle has been reiterated in the case of Senarath Pathiranalage Goonethilake vs. S.P. Sunil Ekanayake SC Appeal No. 26/09.

On a perusal of the impugned order of the learned District Judge, it appears that he has misdirected himself with regard to the unavailability of the proxy in the record. Initially, appearance has been marked for the Appellant indicating that Mr. Suraweera had been instructed to appear for him. Subsequently even the points of contest have been raised by the Counsel on the instructions of Mr. Bary. This clearly shows that the parties and the Court proceeded on the basis that Mr. Bary had been given a valid proxy.

Even otherwise the death of Mr. Bary has not been notified to 2A Substituted Defendant in that the Court has failed in its duty imposed under section 28 of the Civil Procedure Code.

Taking all these matters into consideration it is my considered view that the learned District Judge has erred with regard to a vital point of law which has ended up in a miscarried justice. Hence the impugned judgment cannot be allowed to remain and should be set-aside. Accordingly the order dated 07.01.1997 is set-aside and the learned District Judge is directed to allow 2A Substituted Defendant to present her application and make an appropriate order.

There shall be no costs.

JUDGE OF THE COURT OF APPEAL.

NR/-