

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

**C.A.No.239-240/95 (F)
D.C.Mt.Lavinia No.1640/F**

1. Gamage Wilbert Perera
No.111 Cheengahakotunna
Road, Depanama.
Pannipitiya.
9. Gamage Magi Nona Perera (Deceased)
- 9a. D.Nandasoma Kasthuriarachchi
No.765, Station Road,
Pannipitiya.

1st & 9th Defendant-Appellants

Vs.

Gamage Abeysena Perera
“Pawana” Depanama.
Pannipitiya.

Plaintiff-Respondent

2. Malmbage Sedera Sigera
“Sriyananda Apana Shalawa”
Kumbukwewa, Kudukgete
Kurunegala.
- 3 Malambage Vinie Sigera
No.1/39, Cheengahakotunna
Road, Depanama.
Pannipitiya.
- 4 Mambage Cyril Sigers (Decided)
- 4a. Gamage Dona Dayawathie
No.139, Cheengahakotunna
Road, Depanama.

Pannipitiya.

5. Ramanayakage Nancy Nona
No.137. Cheengahakotunna
Road, Depanama.
Pannipitiya.
6. Kariyawasam Majuwana Gamage
Dayapala,
No.137, Cheengahakotunna
Road, Depanama.
Pannipitiya.
7. Kamalawathie Fonseka
Cheenagahakotunna Road,
Depanama, Pannipitiya
8. Vanniarachchige Chandrasa
Fonseka,
No.135, Cheenagahakotunna
Road, Depanama, Pannipitiya
10. Gamage Magi Nona Perera (Dead)
11. Kodipplige Milinona
Cheenagahakotunna Road, Depanama,
Pannipitiya.
12. Kariyawasam Majuwana Ganmage
Thilakaratne
Cheenagahakotunna Road,
Depanama, Pannipitiya.
13. Kariyawasam majuwana Gamage
Gunapala
No.137, Meegahakotunna Road,
Depanama, Pannipitiya.

Defendant-Respondents.

Before : A.W.A.Salam,J.
Counsel : Nihal Jayammanne P.C. with Nurani
Amarasinghe for the Appellant in C.A.No.240/95 (F)
and 1st Defendant-Appellant in C.A.No.239/95 (F).
H.Withanachi for the 7th Defendant-Appellant in
C.A.No.239/95 (F) and 7th Defendant-Respondent in C.A.
No 240/95 (F). N.R.M.Daluwatte, P.C., with Athula
Walisundara for the Plaintiff-Respondent in both appeals.
Argued on : 25.06.2012.
Written Submissions tendered on : 20.09.2011.
Decided on : 29.08.2012

A W Abdus Salam, J

This being a partition action after investigation of title the learned district judge entered interlocutory decree to partition the land among the parties whom he declared as the co-owners of the corpus. The extent of the undivided share each party is entitled to was not decided by the learned district judge instead he made order that a schedule of shares indicating the undivided rights of each co-owner be filed by the plaintiff and thereafter such schedule if not inconsistent with his findings be regarded as part and parcel of the judgment and I.D.

Of the two separate appeals preferred against the said judgement and interlocutory decree, one such appeal deals directly with the failure of the district judge to

properly investigate title as required by law, in that the learned trial judge has failed to decide the exact share/shares each party is entitled to as required by law. In the other appeal even though the same point of law has not been urged, in the written submissions the learned counsel has taken up the position that the judgement cannot be regarded as a proper judgement in view of the direction given by the learned district judge that a schedule of shares to be tendered by the plaintiff to be accepted as part and parcel of the judgment if not inconsistent with the findings. The course adopted by the learned district judge to determine the rights of the parties, the appellants complain, is obnoxious to the provisions of the Partition Law as the learned district judge has failed to discharge the elementary duty of deciding the most important aspect of the case, namely the extent of the soil rights each party is entitled to.

It is settle law that in a partition action the trial judge is obliged to decide the nature and the extent of interest each party is entitled to from and out of the corpus. Section 25 of the Partition Law requires the court to examine the title of each party and try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.

The learned district judge in discharging this fundamental obligation has failed to give effect to the mandatory provisions of the Partition Law. It is common knowledge that the schedule of shares indicating the undivided soil rights of each party and other claims regarding improvements should be embodied in the interlocutory decree. The main reason for this is to facilitate an appeal within the prescribed period against the judgment including the undivided share allocation by the trial judge, in the event a party dissatisfied with such an allocation of rights. In CA 1166 & 1167/96F it was held that the failure of the district judge to indicate the undivided interest of each party in the interlocutory decree is a fatal irregularity which gives rise to the judgement and interlocutory decree being set aside.

In the case of Memanis Vs Eide 59 Ceylon Law Weekly page 46 His Lordship Basnayaka CJ with His Lordship H.N.G. Fernando J, concurring laid down the propositions that it is imperative to include the extent of interest each party in the interlocutory decree. For purpose of ready reference the relevant passage from the said judgement is reproduced below.

“In his judgement the learned that district judge says; "plaintiff's proctor will file a schedule of

shares which when filed will form part and parcel of this judgement" and there is a schedule of shares filed which he has adopted in entering the interlocutory decree. Section 25 of the Partition Act, provides that the judge shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made. In the instant case there has been no determination of the shares of the parties as required by the Partition Act. It is the shares so determined by the judge that the court is required to enter in the interlocutory decree. The course taken by the learned district judge is contrary to the provisions of section 26 of the Partition Act."

Based on the two decisions quoted above, it is my opinion that the judgement and interlocutory decree cannot be allowed to stand by reason of its manifest illegality. Hence, the impugned judgement and interlocutory decree are set aside and the case sent back for retrial. The learned district judge is directed to give priority to this case over all other business of

court as the parties have undergone tremendous hardship and inconvenience by reason of the non-compliance of the mandatory provisions of the Partition Law by the learned district Judge.

There shall be no costs of this appeal.

Judge of the Court of Appeal

Wc/-