

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

CA 1172/96 (F)

D.C. Matara Case No. 15435/P

1. Anura Samarawickrama Lokuhetty,  
"Lokuhetty Niwasa", No. 100/5, Wellakka,  
Weligama.

2. Chinthaka Samarawickrama Lokuhetty,  
"Lokuhetty Niwasa", No. 100/5, Wellakka,  
Weligama.

3. Thanuja Samarawickrama Lokuhetty,  
"Lokuhetty Niwasa",  
No. 100/5, Wellakka, Weligama.

4. Chandima Samarawickrama Lokuhetty,  
"Lokuhetty Niwasa", No. 100/5, Wellakka,  
Weligama.

Plaintiffs

Vs.

1. P.P.D. Yapa, Wellakka, Weligama.

2. D.P.D. Yapa, Wellakka, Weligama.

3. D.G.C. Yapa, Wellakka, Weligama.

4. D.P.F. Yapa, Wellakka, Weligama.

5. Micheal Dharmawardhana Samarawirama  
Lokuhetty, "Samara Sewana", Wellakka, Wel-  
igama.

6. Chandra Helana Samarawickrama  
Lokuhetty, "Samara Sewana", Wellakka,  
Weligama.

7. Wijaya Lakshmi Samarawickrama Lokuhetty, No.100/1, Wellakka, Weligama.
8. Rathna Samarawickrama Lokuhetty, "Samara Sewana", Wellakka, Weligama.
9. Athula Kumara Weerasinghe Dahanayake, "Kusala" Galpamuna Palatuwa.
10. Maddhihe Arachchige Nandawathie Samarawickrama, No. 100/1, Wellakka, Weligama.
11. Wijayananda Abegunawardane, Temple Road, Mount Lavinia.
12. Vajira Pradeep Samarawickrama, No.03, Samagi Mawatha, Wellakka, Weligama.
13. Mahendra Samarawickrama Lokuhetty, Samagi Mawatha, Wellakka, Weligama.

Defendants

AND NOW BETWEEN

- 1 Anura Samarawickrama Lokuhetty, "Lokuhetty Niwasa", No. 100/5, Wellakka, Weligama.
- 2 Chinthaka Samarawickrama Lokuhetty, "Lokuhetty Niwasa", No. 100/5, Wellakka, Weligama.
- 3 Thanuja Samarawickrama Lokuhetty, "Lokuhetty Niwasa", No. 100/5, Wellakka, Weligama.
- 4 Chandima Samarawickrama Lokuhetty, "Lokuhetty Niwasa", No. 100/5, Wellakka, Weligama.

Plaintiff-Appellants.

Vs.

1 P.P.D. Yapa, Wellakka, Weligama.

2 D.P.D. Yapa, Wellakka, Weligama.

3 D.C.G. Yapa, Wellakka, Weligama.

4 D.P.F. Yapa, Wellakka, Weligama.

5 Micheal Dharmawardhana  
Samarawickrama Lokuhetty, "Samara  
Sewana", Wellakka, Weligama.

(Deceased)

5A. Rathna Samarawickrama Lokuhetty,  
"Samara Sewana", Wellakka, Weligama.

Substituted 5<sup>th</sup> Defendant-

Respondent.

6. Chandra Helana Samarawickrama  
Lokuhetty, "Samara Sewana", Wellakka,  
Weligama.

(Deceased)

6A. A.P.N. Wickramasinghe, No.466, Nelum  
Padesa, Jalthara, Ranala.

6B.P.D. Wickramasinghe, Chathurika Uyana,  
Magamma, Diyagama, Homagama.

6C.A.I. Wickramasinghe, Wella Gedara,  
Warakapitiya, Ulapane.

6D.T.N. Wickramasinghe, Gangoda Niwasa,  
Urulawatte, Wattappola.

6E. R.A. Wickramasinghe, No. 69,

Sadasiripura, Oruwala, Athurugiriya.

Substituted 6<sup>th</sup> Defendant-Respondents.

7. Wijaya Lakshmi Samarawickrama  
Lokuhetty, No.100/1, Wellakka, Weligama.

8. Rathna Samarawickrama Lokuhetty,  
“Samara Sewana”, Wellakka, Weligama.
9. Athula Kumara Weerasinghe Dahanayake,  
“Kusala” Galpamuna Palatuwa.
10. Maddhihe Arachchige Nandawathie  
Samarawickrama, No. 100/1, Wellakka,  
Weligama.  
(Deceased)
- 10A. Wijaya Lakshmi Samarawickrama  
Lokuhetty, No.100/1, Wellakka, Weligama.  
Substituted 10<sup>th</sup> Defendant-Respondent.
- 11 Wijayananda Abegunawardane, Temple  
Road, Mount Lavinia.  
(Deceased)
- 11A. Mohotti Malwattage Don Rusiru  
Nandana Abeygunawardana, “Abey Siri” No.  
105/1, Temple’s Road, Mount Lavinia.
- 11B. Mohotti Malwattage Don Nayana  
Nandana Abeygunawardana , “Abey Siri” No.  
105/1, Temple’s Road, Mount Lavinia.
- 11C. Mohotti Malwattage Don Chandrika  
Abeygunawardana “Abey Siri” No. 105/1,  
Temple’s Road, Mount Lavinia.  
Substituted 11<sup>th</sup> Defendant-Responents.
12. Vajira Pradeep Samarawickrama, No.03,  
Samagi Mawatha, Wellakka, Weligama.
13. Mahendra Samarawickrama Lokuhetty,  
Samagi Mawatha, Wellakka, Weligama.  
Defendants-Respondents

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

COUNSEL : Ranil Samarasooriya with Madhawa Wijesiriwardane for  
the Plaintiff-Appellants and Chathura Galhena with Manoja  
Goonawardane for the 5A, 8<sup>th</sup> and 12 Defendant-Respondents.

ARGUED ON: 03.12.2012.

WRITTEN SUBMISSIONS TENDERED ON : 24.01.2013.

DECIDED ON: 13.02.2013.

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A W A Salam, J

The plaintiff-appellants (herein after referred to as the “plaintiffs”) has preferred the present appeal against the order of the learned district judge dated 13 February 1996 dismissing the plaintiffs’ action. The background to order of the dismissal was made by the learned district judge needs to be set out in detail.

The plaintiffs filed action to have the corpus partitioned by plaint dated 23<sup>rd</sup> of April 1991. After the steps necessary for the prosecution of the partition action were taken the trial was fixed for 13 February 1996. On the very first date of trial, namely on 13.02.1996 the plaintiffs were absent but represented by a lawyer. As the plaintiffs were absent the Counsel representing the plaintiffs moved for an adjournment of the trial but the application was objected to by some of the defendants. Upon the said application having been objected to, the learned district judge made order forthwith dismissing the plaintiffs’ action.

For purpose of ready reference the relevant application made by the plaintiffs', the objection raised and the order made by the learned district judge are copied hereunder.

අද දින පැමිණිලිකරු පැමිණ නැති බැවින් නඩු විභාගය සඳහා දිනයක් දෙනමෙන් නීතිඥ වන්දීම මුතුකුමාරණ මහතා ඉල්ලා සිටී.

අද දින නඩුවට සුදානම් නොවීමට වලංගු හේතුවක් ඉදිරිපත් නොකිරීම සම්බන්ධයෙන් මෙම නඩුව නිෂ්ප්‍රභා කරන මෙන් නීතිඥ මෙත්‍රිපාල මහතා ඉල්ලා සිටී. 12වෙනි විත්තිකරු වෙනුවෙන් නීතිඥ සමරසේකර මහතාද, මෙත්‍රිපාල මහතා සැලකල කරුණු අනුගමනය කරන බව කියා සිටී.

පැමිණිල්ලේ නීතිඥ වන්දීම මුතුකුමාරණ මහතා කියාසිටින්නේ, අද දින පැමිණිලිකරු පැමිණ නොසිටී බැවින් දිනයක් ඉල්ලන ලෙස නීතිඥ ජයසේකර මහතා තමාට උපදෙස් දුන් බවත්, ප්‍රථම විභාග දිනය නිසා වෙනත් දිනයක් දෙන ලෙසත්ය.

නියෝගය:-

පැමිණිලිකරු පෙනී නොසිටීම සම්බන්ධයෙන් වලංගු හේතුවක් ඉදිරිපත් කර නැත. එබැවින් ගාස්තු රහිතව පැමිණිල්ල නිෂ්ප්‍රභා කරමි. ඒ අනුව නිෂ්ප්‍රභා කිරීමේ තීන්දු ප්‍රකාශයක් ඇතුළත් කරන්න.

එස්.යූ.බී. කරලියද්ද,

අති/දිසා විනිසුරු

මාතර.

1996.02.13

It is to be observed that the application made by the plaintiffs was for an adjournment of the trial and the learned District Judge has not made any order either refusing or allowing the application. Without refusing the application the learned district judge had no

power to dismiss the plaintiffs' action.

Since there was an appearance for the plaintiffs, what the learned district judge ought to have done was, if he was not inclined to grant an adjournment, to refuse the application for postponement and thereafter to call upon the plaintiffs' to adduce evidence. If the plaintiffs failed to adduce any evidence the learned district judge could have thereafter embarked upon making any order which he thought was appropriate in the circumstances.

As such, I am of the view that the order of dismissal of the partition action based on the application for an adjournment that was objected to is not consistent with the Law. In the circumstances, the order of the learned district judge dismissing the partition action is set aside and he is now called upon to make a proper order either allowing or refusing the said application for postponement. Subject to the above direction the appeal preferred by the plaintiffs is allowed and the impugned order is set aside. There shall be no costs.

Judge of the Court of Appeal.

NR/-