

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

16. Thotage Ariyasena
78. Pritman Dias Gunawardana
Both of
Bombuwala.

C.A. Appeal No. 1104/96(F)

Defendant-Appellants

D.C. Kalutara Case No. 4259/P

Vs.

Maddumadevage Alen
Bombuwala.

Plaintiff-Respondent.

And

77 Defendant-Respondents.

Before : **A.W.A. Salam, J (P/CA)**

Counsel : Asoka Fernando with Ms. A.R.R. Siriwardane for
the Defendant-Appellants 1st, 4th and 16th and 78th
Defendant-Appellants.
Champaka Ladduwahetty for the Respondent.

Argued on : 24.07.2014.

Judgment decided

on : 06.08.2014.

A.W.A. Salam, J. (P/CA)

This is a partition action. The judgment and the interlocutory decree impugned in this appeal are dated 21.06.1996. The learned District Judge having decided that the parties should be allotted undivided shares failed to give exactly the shares each party will entitled to in the judgment. The learned District Judge in that judgment states without specifying the undivided rights of the parties that the plaintiff should tender a schedule of shares and if the schedule of

shares so tendered is consistent with the judgment it should be accepted as part and parcel of his judgment.

This judgment of the learned District Judge is totally violative of the provisions of the partition law. The judgment in the strict sense of the law cannot be regarded as a proper judgment in view of the direction given by the learned District Judge that the schedule of shares directed to be tendered by the plaintiff should be accepted as part and parcel of his judgment. This being plainly obnoxious to the provisions of the partition law I have no alternative but to hold that the learned District Judge has failed to discharge the elementary duty of discharging the most important aspect in the case. It is settled law that in a partition action the trial judge must decide the nature and extent of the interest each party is entitled to upon an examination of the title in terms of Section 25 of the Partition Law.

In C. A..116 and 1167/96(F) 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 rights to the judgment and interlocutory decree having to be set aside. It is appropriate

at this stage to refer to the decision in Memanis Vs Eide 59 Ceylon Law at page 46. H/L Basnayake, C.J. with H.N.G. Fernando concurring laid down the proposition that it is imperative to include the undivided interest of each party in the interlocutory decree. The relevant passage of the said judgment is quoted 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 above two decision I am of the view that the impugned judgement cannot be allowed to stand as it is totally inconsistent with the provisions of the partition law.

In the circumstances the impugned judgment is set aside and the case send back for re-trial.

PRESIDENT OF THE COURT OF APPEAL

AKN