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

Ilangakoon Mudiyanselage Thilakarathne,

Pohorambe,

Dewalegama.

Plaintiff

CA Case No. 520 / 2000 F

DC Kegalle Case No. 24195 / P

-Vs-

1. **Ilangakoon Mudiyanselage Somapala**
2. **Dahanayake Railage Darmarathna**
3. **Dahanayake Railage Premasiri**
4. **Mudiyanselage Dayarathna**

   All are Pohorambe,

   Dewalegama.

5. **Mudiyanselage Priyantha**

   of Imbulgasdeniya.

6. **Ilangakoon Mudiyanselage Karunapala**

   of Pohorambe.

Defendants

And Between

Ilangakoon Mudiyanselage Somapala

Pohorambe,

Dewalegama.

1st Defendant - Appellant

-Vs-

Ilangakoon Mudiyanselage Thilakarathne,

Pohorambe,

Dewalegama.

Plaintiff - Respondent

2. **Dahanayake Railage Darmarathna**
3. **Dahanayake Railage Premasiri**
4. **Mudiyanselage Dayarathna**

   All of Pohorambe,

   Dewalegama.
5. **Mudiyanselage Priyantha**

   of Imbulgasdeniya

6. **Ilangakoon Mudiyanselage Karunapala**
   of Pohorambe.

Defendants - Respondents

And Now Between

Ilangakoon Mudiyanselage Somapala

Pohorambe,

Dewalegama.

1st Defendant - Appellant

-Vs-

Ilangakoon Mudiyanselage Thilakarathne,

Pohorambe,

Dewalegama.

Plaintiff - Respondent

2. **Dahanayake Railage Darmarathna**
3. **Dahanayake Railage Premasiri**

4. **Mudiyanselage Dayarathna**

All of Pohorambe,

Dewalegama.

4A.

Ilangakoon Mudiyanselage Premawathie Menike

4B.

Ilangakoon Mudiyanselage Chndralatha Menike

4C.

Ilangakoon Mudiyanselage Ghanawathie Menike

4D.

Ilangakoon Mudiyanselage Subasinghe

Substituted as 4A, 4B, 4C and 4D - Defendants -Respondents

7. **Mudiyanselage Priyantha**

of Imbulgasdeniya

8. **Ilangakoon Mudiyanselage Karunapala**

of Pohorambe.

Defendants - Respondents

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL	:	K.G. Jinasena for the 1st Defendant-Appellant.
		Respondents absent and unrepresented.
Argued on	:	14.08.2015
Decided on	:	02.11.2015

A.H.M.D. NAWAZ, J,

When this matter came up on 18th August 2015 the Counsel for the 1st Defendant-Appellant invited court to dispense with his oral submissions and dispose of this matter on his written submissions.

The Respondents inclusive of the Plaintiff-Respondent have been absent and unrepresented notwithstanding the fact that several notices have been issued to them on a number of occasions. The Plaintiff-Respondent filed this action on 1st March, 1985 to partition a land called *Daluggale Henawatta* which is more fully described in the schedule to the plaint. In paragraph 8 of the plaint the Plaintiff's allotment of shares to the respective Defendants are specified. A commission had been issued to one M.H.Padmanatha Siriwardene, the Licensed Surveyor, who had surveyed this land on 8th November 1985, and whose Plan No.877 and Report bear the marking 'X' and 'X1' respectively. The corpus to be partitioned is composed of paddy land and high land and depicted as Lots 1 – 4 in the said Plan.

On 24th July 1991 when this case was taken up for trial, no admissions or points of contest had been recorded. The Plaintiff-Respondent gave evidence and in paragraph 6 of the written submissions tendered before this Court, there is this statement – "since all the parties had agreed *for* a partition as prayed for by the Plaintiff, no point

of contest or cross examination was done by the parties." Though I do not see any such agreement in the proceedings dated 24th July 1991, the fact remains that the Plaintiff gave evidence on 24th July 1991 and he was not cross-examined by any of the parties least of all by the 1st Defendant-Appellant who was present in Court and represented by counsel on that day. So it appears that there was no contest among the parties as to the shares to be allotted as proposed by the Plaintiff-Respondent. After the conclusion of the Plaintiff's testimony the Court fixed the matter for judgment and on 5th September 1991 the Court entered judgment and in accordance with the said judgment an interlocutory decree followed. According to the judgment, the Plaintiff and 1st to the 6th Defendants were allotted prescribed portions of the high land but the paddy land was allotted only to the Plaintiff, 1st and 6th Defendants- vide pages 108 and 110 of the appeal brief.

Thereafter a commission had been issued to K.Wijeratne, Licensed Surveyor to make a final partition of the corpus. The final partition Plan No.68 has been filed of record. It appears that the 2nd, 3rd, 4th, 5th and 6th Defendants have, on 24th February 1997, filed objections to this final Plan No.68. They have stated in their objections that the Plaintiff's evidence, the judgment and the interlocutory decree entered in this case are defective and as such they do not accept the final plan No.68. In other words the tenor of the objections on the part of these Defendants to the final scheme of partition No.68 had been on the premise that since the Plaintiff's evidence does not reflect the true nature of the settlement reached between all the parties, the final partition scheme No.68 that was the end product is also defective.

On a perusal of the journal entries, it reveals that the 2nd to 6th Defendants had asked for an alternate scheme of plan and upon this request a commission was issued by

Court to surveyor K.S.Panditharathne, whose Plan No.4262 was filed of record on 26th May 1999. Thereafter the matter had been fixed for inquiry regarding the Plan No.4262.

The rival position taken by the 2nd to 6th Defendants that the final plan No.68 as suggested by surveyor Wijeratne cannot be accepted and their contention that the judgment and the interlocutory decree need to be amended has been opposed by the Plaintiff and the 1st Defendant-Appellant.

The Plaintiff and the 1st Defendant filed objections to the position taken by the 2nd to 6th Defendants reiterating that since the final partition scheme as shown in Plan No.68 is in accordance with the evidence, judgment and interlocutory decree, the objection of the 2nd to 6th Defendants must be rejected.

So the nitty gritty of the issue before the District Court boils down to the following. There was clearly a disagreement between the parties over the final partition scheme suggested by Surveyor Wijeratne in his Plan No.68, and the alternate Plan No.4262 of surveyor Panditharatne. In order to resolve this issue the Court had asked the parties to file their written submissions, but the 2nd to 6th Defendants, in the meantime on 16th February 2000, made an application by way of a motion for an order to correct the evidence and the judgment.

Impugned Order dated 29th August 2000

After the written submissions were filed the Court made order on 29th August 2000 that the judgment and the interlocutory decree are defective and must be amended. The Court has also decided that the final partition Plan No.68 is defective and ordered adduction of evidence-vide p 115-116 of the appeal brief.

Being aggrieved with this order dated 29th August 2000, the 1st Defendant has preferred this appeal to this Court,

The 1st Defendant-Appellant has prayed for among other things in his Petition of Appeal that-

(a) the order made by the District Court on 29.08.2000 be set aside;

(b) the final partition in terms of Plan No. 68 of surveyor Wijerathna be allowed.

Since the lodgment of this appeal neither the Plaintiff-Respondent nor other Defendants-Respondents have made appearances or filed any written submissions before this Court though notices were issued on them. This has resulted in the argument in this case being postponed for several dates. Upon a perusal of the journal entries in this Court, it is apparent that after the conclusion of oral submissions by counsel for the 1st Defendant-Appellant on 05th March 2014 before a different bench of this Court, judgment had been reserved. Since it was subsequently discovered that the 3rd Defendant had passed away, a substitution was effected thereafter and the matter came up before me for argument on 14th August 2015. On this date the counsel for the 1st Defendant-Appellant stated that since he had already filed a comprehensive written submission and the Respondents had absented themselves from Court on a number of occasions despite several notices, the matter could be decided on the written submission that has already been filed.

The main question that has to be answered by this Court is whether the relief prayed for in paragraphs (a) and (b) of the petition, to wit

> the order of the learned District Judge dated 29th August 2000 calling for evidence for the purpose of amending the judgment and the interlocutory

decree be set aside and to permit the final partition scheme suggested by surveyor Wijerathna in his Plan No.68

could be allowed.

Although the Court made order on 29th August 2000 that the judgment and the interlocutory decree are defective and they be amended, it has to be noted that no such amendment or modification of the interlocutory decree has so far not been effected by Court. On a careful scrutiny of the order made on 29th August 2000. I observe that there is no final scheme of partition confirmed by the Court. Neither is there any amendment of the interlocutory decree nor is there a final scheme of partition *in esse*. The Court has by the impugned order dated 29th August 2000 has only decided to have evidence led.

When a final scheme of partition is returned to court, the legal position is crystal clear.

Section 35 of the Partition Law No.21 of 1977, as amended by Act No.17 of 1997 sets out the following-

> "After the surveyor makes a return to the commission, the Court shall call the case in open Court and shall fix a date, for the consideration of the scheme of partition proposed by the surveyor"

Section 36 (1) (a) of the Partition Law states,

> "On the date fixed under Section 35, or on any later date which the Court may fix for the purpose, the Court may, ***after summary inquiry***:-

(a) confirm with or without modification the scheme of partition proposed by the surveyor and enter **final decree of partition** accordingly".

When there are two schemes of partition before Court, prepared and filed by two different surveyors, it is the duty of the Court to go into the matter carefully and find out which of the two schemes can be accepted and confirmed. For this purpose it is the duty of the Court to examine the surveyors and if necessary to call for other evidence to ascertain the correct scheme of partition which is acceptable by the parties in the case.

In my view it is towards the achievement of this purpose that the Court has taken the step of fixing the matter for inquiry by its order dated 29th August 2000. Since the Court has not so far affirmed any final scheme of partition, no prejudice has been caused to any party at this stage. No interlocutory decree has been yet amended. The propriety of such an exercise could be taken up at the inquiry. Whether the interlocutory decree could be amended as asserted by the 2nd to 6th Defendant and whether there is a legal foundation for doing so are matters that have to be taken up at the summary inquiry as contemplated in Section 36 (1) (a) of the Partition Law. The learned District Judge has only stated that the evidence has to be led for this purpose. This statement about amendment of the interlocutory decree, albeit with a broad brush, does not prejudice the 1stDefendant-Appellantat this stage as it is open to him to impugn such a course of action and raise all other issues at the inquiry.

One cannot slay phantom dragons at this stage since the inquiry has yet not begun. The parties are at liberty to adduce sufficient evidence at the inquiry to the satisfaction of the Court to come to a conclusion as to the confirmation of the final scheme of partition. I am therefore of the opinion that this appeal is premature.

Section 36A of the Partition Law No.21 of 1977 as amended by Act No.17 of 1997 makes provisions for any party who is dissatisfied with an order of the Court made under Section 36 of the said law. That is to say, after the scheme inquiry under Section 36 of the Partition Law has terminated, an aggrieved party is granted the right by virtue of Section 36A to prefer an appeal with the leave of the appellate court first had and obtained.

The order of the learned District Judge dated 29th August 2000 has only fixed the matter for inquiry because there are two schemes of partition before Court. I do not hold the view that the stage stipulated in Section 36 of the Partition Law (the scheme inquiry) has been reached because as I said earlier there is no confirmed final scheme of partition as yet in the case. It is only after that stage has been traversed that a party is vested with a right of appeal but of course such party has to seek and obtain leave in the first instance.

I have to observe that the 1st Defendant was ill advised to prefer an appeal from the order of the learned District Judge dated 29th August 2000 when there was no right of appeal available to him and this matter has gone on in this court since the year 2000 under the misnomer *final appeal* without any end in sight to this litigation and this displays the sorry state of how a misconception of remedies can result in inordinate delays and procrastination.

Hence this appeal has no merit and should be dismissed. Furthermore, I would hold that the order made on 29th August 2000 is not a final order which has determined the rights of parties. It is an interim order fixing a date for inquiry but an error made in that inquiry will give rise to a leave to appeal in terms of Section 36A of the Partition Law.

This stage has yet not arisen but the 1st Defendant ill-advisedly misconceived his remedy. But for this *appeal,* the District Court could have gone on with the inquiry under section 36(1)(a) as stated above, and entered a final decree of partition after an inquiry. This final decree would determine the rights of parties.

In the circumstances, this *appeal* is dismissed with costs and the record is sent back to the District Court with the direction to the current District Judge that he should proceed with the inquiry as ordered by that Court on 29th August 2000 and dispose of this matter as expeditiously as possible.

JUDGE OF THE COURT OF APPEAL