

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

**C.A.No. 778/97(F)**

**1. A. Dharmaratne,**

**No. 212, Pusselvinna, Mahawaragama**

**Dehiattakandiya**

**D.C.Kegalle 23404/P**

**2 A. Rajapakse**

**Danpalgoda**

**7<sup>th</sup> & 8<sup>th</sup> Defendant-Appellants**

**Ranhoti Pedige Ponna( decd)**

**Bosella**

**Ranhoti Pedige Piyatissa**

**Bossella**

**Plaintiff Respondent**

**1. G.D. Laisa**

**2. R.P. Anulawathie**

**3. R.P. Swarnalatha**

**4. R.P.Piyatissa**

**5. R.P. Chandrika Rupasinghe**

**6. R. P. Babi**

**All of Dampalgoda, Bossella**

**Defendant-Respondents**

**BEFORE Deepali Wijesundera , J.,**

**M.M.A.Gaffoor J.,**

**COUNSEL D.D.P. Dasanayake for the 7<sup>th</sup> and 8<sup>th</sup> Defendant Appellants**  
**P.M.G. Dissanayake with B.C. Balasuriya for the Respondent**

**ARGUED ON: 14.01.2016**

**DECIDED ON 29.04.2016**

**M.M.A.Gaffoor J.,**

This appeal has been made by the 7<sup>th</sup> and 8<sup>th</sup> Defendant-Appellants against an Order of the learned District Judge of Kegalle, made on 13.12.1997 dismissing their application to set aside the awarding of the unallotted 1/3 share of the corpus to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.

The Plaintiff Respondent (hereinafter referred to as “the Plaintiff”) has filed this action bearing No. 23404/P in the District Court of Kegalle on 16<sup>th</sup> February 1982, to partition the land called “Butahgamayawatte” depicted in Plan No. 5129 date 24.01.1986 made by L.K Baddewela, Licensed Surveyor, which is marked as “X” and its Report as “X1” and filed of record in the case.

On 07.09.1992, when the trial commenced, the substituted Plaintiff has given evidence and thereafter judgment had been entered on the same day and interlocutory decree was entered accordingly. According to the Judgment the 5<sup>th</sup> and 6<sup>th</sup> Defendants were not allotted their respective shares 9/36 (12/36 i.e. 1/3) share were left unallotted and left in common in the said judgment.

According to the Plaintiff's evidence, the 5<sup>th</sup> and 6<sup>th</sup> Defendants are entitled to an undivided 9/36 and 3/36 shares, but the 5<sup>th</sup> and 6<sup>th</sup> Defendants, neither filed their statement of claim nor did they give evidence to prove that they are entitled to the said shares. In terms of Section 26(2)(g) of the Partition Law, the learned District Judge had not allotted this undivided 1/3 share to the 5<sup>th</sup> and 6<sup>th</sup> Defendants. Interlocutory decree was entered excluding this 1/3 share as unallotted to anyone.

On 3.6.1993 the 5<sup>th</sup> Defendant had made an application to allot this 1/3 share to 5<sup>th</sup> and 6<sup>th</sup> Defendants. On this application, on 20.10.1993, the Plaintiff had been called to give evidence. Although the 5<sup>th</sup> Defendant was present in Court on this date, she was not called to give evidence, but the Plaintiff had given evidence in support of the 5<sup>th</sup> and 6<sup>th</sup> Defendants' right to the unallotted 1/3<sup>rd</sup> share. Nor their parties were present in court. No reason was given why the Plaintiff's evidence was called for to prove 1/3 share which was allotted 5<sup>th</sup> and 6<sup>th</sup> Defendants. 5 V1 and 5V2 were produced on behalf of the 5<sup>th</sup> Defendant by the Plaintiff.

After the Plaintiff gave evidence, and upon this evidence only the court made an order granting this 1/3<sup>rd</sup> share to the 5<sup>th</sup> and 6<sup>th</sup> Defendants and to amend the interlocutory decree accordingly. Interlocutory Decree was mended and final partition is effected as shown in Plan No. 5927 dated 19.08.1996 made by L. B. Baddewela, Licensed Surveyor.

On 23.09.2996, the 7<sup>th</sup> and 8<sup>th</sup> Defendants filed their Petition and Affidavit in the District Court stating that they are in possession of the unallotted 1/3rd share which has now been allotted to 5<sup>th</sup> and 6<sup>th</sup> Defendants, and this allotment had been done without notice to them and therefore to vacate the Order and they may be heard. After both parties filed their written submissions, the learned District Judge dismissed their application on the ground that the court has no jurisdiction to grant the relief prayed for. This position is wrong in terms of the law.

The 7<sup>th</sup> and the 8<sup>th</sup> Defendants have now filed this appeal before this court seeking the following relief:

- i) That the awarding of the unallotted share to the 5<sup>th</sup> and 6<sup>th</sup> Defendants be set aside;
- ii) To order the 5th Respondent to issue notice on all the parties on his application to obtain the unallotted share;
- iii) That a de novo inquiry be held to ascertain which party is entitled to the unallotted share ;

The question before this court is whether the order made by the learned District Judge on 20.10.1993 granting the unallotted 1/3 share to the 5<sup>th</sup> and 6th Defendants is a correct order in terms of the law.

Section 26(2)(g) permit the court to unallot certain shares if no evidence is given, to allot it to anyone. Once, the portion of the land is unallotted, it remains as a portion in common use, for example a roadway .

In Yoosoof vs Mustapha 13 Ceylon Law Recorder p. 171, a land had been partitioned, but certain portion consisting of a road and two latrines had been left unallotted, the decree containing no reference to them. A party who was the successor in title to one of the persons in whose favour the partition decree had been entered, claimed the right to user of the unallotted portion as being a right appurtenant to the allotted portions. It was held that "the claim was not admissible and that the unallotted portion continued to remain the common property of the original owners, the use of which was referable to the unextinguished common ownership and to that alone."

In the instant case, the unallotted 1/3<sup>rd</sup> share was not claimed by any one other than the 7<sup>th</sup> and 8<sup>th</sup> Defendants, when the unallotted 1/3<sup>rd</sup> share is claimed by same party (the 5<sup>th</sup> Defendant in this case), it is the duty of the court to notice all the parties to the case and hold an inquiry into the claim. A fair opportunity must be given to any party who objects to the claim.

The procedure adopted by the lower court in holding the trial and subsequent inquiry is utterly wrong and unsatisfactory. According to Section 25 of the Partition Law it is the bounden duty of the court to investigate the title of the parties. Even if a party is in default to participate at the trial, the Court must allow such party to file a statement of claim to prove his rights.

In this case, only the Plaintiff have given evidence and that evidence also was not cross examined. An examination-in-chief, lose much of their credibility

and weight unless they are put into the crucible of cross examination emerge unscathed from the test. The testimony of a witness is not legal evidence unless it is subject to cross examination. In this case, immediately after the examination in chief of the Plaintiff, though the Plaintiff's case was not closed, the learned Judge had entered judgment on the same day without calling for any other evidence. This clearly shows that the court has not gone into an investigation of the title of the parties. Subsequently, when the 7<sup>th</sup> and 8<sup>th</sup> defendants had filed an application, they were not granted an opportunity to establish their right to possession or to prove their title to the unallotted 1/3<sup>rd</sup> share.

In Tissera and another vs Leelawathie and others 2005 (2) Sri L.R 127, it was held inter alia, that the language of Section 25 is wide enough to provide court with wide powers to examine the right, title and interest of each party and hear evidence in support thereof. The court may permit, under section 25(3), a party in default to file a statement of claim and if that party establishes the bonafide of his claim, upon such terms as to costs or otherwise as the court shall seem fit.

In these circumstances, I am of the view that the learned Judge should have allowed the 7<sup>th</sup> and 8<sup>th</sup> Defendants to file their statement of claim to establish their right, title and interest in the corpus and to establish their prescriptive right to the unallotted 1/3<sup>rd</sup> share.

For the reasons stated above, I set aside the order of the learned District Judge dated 20.10.1993 awarding the unallotted share to the 5<sup>th</sup> and 6<sup>th</sup> Defendants and to issue notice of the 5<sup>th</sup> Defendant's application to all the

parties and to hold a de novo inquiry. The 7<sup>th</sup> and 8<sup>th</sup> Defendants are permitted to file their statement of claim.

**Appeal allowed.**

**JUDGE OF THE COURT OF APPEAL**

**Wijesundera J.,**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**