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

Gamage Don Karunadasa,

No. 7/110, Pahala Kaluaggala,

Hanwella.

**Case No. 600/99(F)** **3A DEFENDANT-APPELLANT**

**D.C. Avissawella Case No. 15164/P** **Vs.**

Chalosingho alias Charles Pathmaperuma of Kaluaggala.

**PLAINTIFF-RESPONDENT**

1. Don Wijesena Padmaperuma of Kaluaggala, Hanwella.
2. Yasawardena Padmaperuma, "Priyanka", Kaluaggala, Hanwella.

4A. A.D.D. Priyangani Padmaperuma, "Priyanka", Kaluaggala, Hanwella.

5A. Don Jayawardhana Padmaperuma, Mainkoluwa, Weragala.

6A. T.L. Rohini Pathmalatha, No. 6/6, Gurgalla Road, Thalduwa, Avissawella.

7. T.M. Jerry Anthony Silva of Kaluaggala.
8. T.M. Henry Lawrence Silva of Kaluaggala.

9. G.D. Premarathne of Kaluaggala.
10. Charlie Seram of Enderamulla, Wattala.
11A. Gnanadasa Padmaperuma
of Kaluaggala.
12. Abhaya Priyadarshana of Nakalanda, Eheliyagoda.
13A. Manel Kusum Gunathilake of
Kaluaggala.
14. Jayakody Arachchilage Gunarathne
of Kaluaggala.

**DEFENDANTS-RESPONDENTS**

**Before:** M.M.A. Gaffoor J.

Janak De Silva J.

**Counsel:** P.P. Gunasena for 3A Defendant-Appellant

Pasan Malinda with Yajish Thennakoon for 4th and 6th Defendants-Respondents

Rohan Sahabandu P.C. with Hasitha Amerasinghe for 5A Defendant-Respondent

Dr. Sunil Cooray with Kenneth Perera for 7th, 8th and 9th Defendants-Respondents

S. Premaratne for 14th Defendant-Respondent

**Written Submissions tendered on:** 3A Defendant-Appellant on 2nd November 2017

5A Defendant-Respondent on 2nd November 2017

7th, 8th and 9th Defendants-Respondents on 25th October 2017

11A Defendant-Respondent on 29th November 2017

14th Defendant-Respondent on 6th December 2017

**Argued on:** 12th September 2017

**Decided on:** 14th December 2017

**Janak De Silva J.**

The Plaintiff-Respondent (hereinafter referred to as the "plaintiff") filed the above action in the District Court of Avissawella seeking to partition the land known as Walauwewatte alias Benewatte situated at Kaluaggala in the District of Colombo.

On 17th of August 1988 the plaintiff, 4th, 5th, 6th and 11th defendants were present and represented by counsel. They informed court that parties had agreed on a settlement and sought permission to lead evidence of it. The plaintiff gave evidence and during his evidence several documents were marked and led in evidence at the close of the case of the plaintiff. The learned District Judge of Avissawella on the same day delivered judgment. Interlocutory decree was entered.

On or about 2nd September 1988 the 3rd and 9th defendants as well as the heirs of the 7th defendant filed papers in the District Court to set aside the judgment dated 17th of August 1988. On 11th October 1988 these applications were considered by the learned Additional District Judge. The plaintiff and 11th defendant objected to these applications. The learned Additional District Judge upheld the objections and stated that the applications are premature in view of the provisions in section 48(4)(a) of the Partition Act and declined to make a final order on these applications and stated that the parties can make the application again at the appropriate time.

On 17th February 1999, nearly 10 years after the first judgment and interlocutory decree was entered, the matter came up before the then Additional District Judge of Avissawella. The record indicates that the plaintiff, 4th,5th, 6th, 7A, 8th ,10A, 11th, 12th ,13th and 14th defendants were represented. It further indicates that the parties informed court that they agree to set aside the judgment and decree entered previously and for trial to commence *de novo*. Accordingly, the learned Additional District Judge commenced trial *de novo*. Plaintiff gave evidence and several documents were marked in evidence. On 17th September 1999 the learned Additional District Judge delivered judgment by which he held that the parties were entitled to the following shares of the corpus:

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| Plaintiff | undivided 40/192 |
| 3rd defendant | 11/192 |
| 4th to 6th Defendants | 48/192 (It should be divided between them as 4th defendant 10.4 p., 5th defendant 25.3 p., and 6th defendant 10 p.) |
| 7th defendant | 28/192 minus 30 p. |
| 8th defendant | 10p. |
| 9th defendant | 20p. |
| 10th defendant | 3/192 |
| 11th Defendant | 14/192 |
| 2nd and 12th defendants | 24/192 minus 40 p. |
| 13th defendant | 40p. |
| 14th defendant | 24/192 |

The 3rd defendant-appellant (hereinafter referred to as "3rd defendant") filed this appeal against the said judgment of the learned District Judge of Avissawella dated 17th September 1999.

The question is whether the learned Additional District Judge had the power to set aside the judgment and interlocutory decree dated 17th of August 1988 entered by his predecessor.

The District Court is a statutory creation and its powers are essentially statutory. The District Court has no jurisdiction conferred by law to re-hear, review, alter or vary its judgments in the absence of express statutory provisions. Power to amend its own decree must be expressly conferred on a subordinate Court as has been done in sections 84, 86, 87 and 707 of the Code.[1] For example, section 86(2) of the Civil Procedure Code gives power to the District Court to set aside a judgment and decree granted after ex parte trial upon been satisfied that the defendant had reasonable grounds for such default. Section 189(1) of the Civil Procedure Code grants power to the District Court to correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.

The reason is that once a judge delivers a judgment he is *functus officio*. In *Ramasamy Pulle v. De Silva*[2] it was held that the District Court has no jurisdiction, except as provided by section 189 of the Civil Procedure Code, to vacate or alter an order after it has been passed. In *Dionis Appu v. Arlis et al*[3] it was held that it is not competent to a Judge to reconsider or vary his judgment after delivering it in open Court, except as provided by section 189 of the Civil Procedure Code. In *Paulusz v. Perera*[4] it was held that a District Court did not have the power to set aside the order of dismissing a partition action upon a misconception regarding the documents filed in the case.

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[1] Basnayake C.J. in *Odiris Appuhamy v. Caroline Nona* 66 N.L.R. 241 at 244
[2] 12 N.L.R. 298
[3] 23 N.L.R. 346
[4] 34 N.L.R. 438

The Privy Council in *Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al*[5] was called upon to consider whether a District Judge had the power to amend a decree entered by his predecessor on the basis of an alleged variance between the judgment of the court and the decree based upon it. It was held that:

> "The general rule is clear that once an Order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the Order is functus officio and cannot set aside or alter the Order however wrong it may appear to be. That can only be done on appeal. Section 189 of the Civil Procedure Code of Ceylon, which embodies the provisions of Order XXVIII, Rule 11 of the English Rules of the Supreme Court and the inherent jurisdiction vested in every court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass."[6]

A divisional bench of the present Supreme Court has restated the same principle. Amerasinghe J. in *Jeyaraj Fernandopulle v. Premachandra De Silva and Others*[7] explained the principle and the rationale for it as follows:

> "An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion, exercised judicially and not capriciously. (*See Moosajees Ltd. v. P.O. Fernando and Others.*(8)) However, **as a general rule, no court has power to rehear, review, alter or vary any judgment or order made by it after it has been entered** (cf. *Marambe Kumarihamy v. Perera,*(16)) **either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. If it is suggested that a Court has come to an erroneous decision either in regard to fact or law, then amendment of the judgement or order cannot be sought, but recourse must be had to an appeal to the extent to which the appeal is available.** (See *per Morris, LJ in Thynne (Marchioness of Bath) v. Thynne (Marquess of Bath).*(17) A Court has no power to amend

[5] 51 N.L.R. 313
[6] Ibid. page 316
[7] (1996) 1 Sri.L.R. 70

or set aside its judgment or order where it has come to light or if it transpires that the judgment or order has been obtained by fraud or false evidence. In such cases relief must be sought by way of appeal or where appropriate, by separate action, to set aside the judgment or order. (Halsbury, paragraph 556). **The object of the rule is to bring litigation to finality.**"[8] (emphasis added)

Section 48(1) of the Partition Act states that, subject to any appeal which may be preferred therefrom or subject to subsections (4) and (5) therein, an interlocutory decree entered under section 26 shall be "final and conclusive" for all purposes against all persons. In my view the phrase "final and conclusive" therein signifies that once interlocutory decree has been entered it cannot be changed by the District Court except in the situations coming within subsections (4) and (5) therein. This "final and conclusive" effect is given to an interlocutory decree notwithstanding any omission or defect of procedure or in the proof of title adduced before the court.

That been the general principle, the question is whether the learned Additional District Judge had inherent power to set aside the earlier judgment and interlocutory dated 17th of August 1988. Section 839 of the Civil Procedure Code states that nothing in therein shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. There are two reasons why inherent powers cannot apply in this case. There is no inherent power in a Court of subordinate jurisdiction to set aside its own decree even though it be wrong.[9] Inherent powers of the District Court cannot apply where there are specific statutory provisions.[10]

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[8] Ibid. page 88

[9] Basnayake C.J. in *Odiris Appuhamy v. Caroline Nona* 66 N.L.R. 241 at 244

[10] Silva v. Perera (55 N.L.R. 378); *Leechman & Co. Ltd. V. Rangalla Consolidated Ltd.* [(1981) 2 Sri.L.R. 373]; *Abeygunasekera v. Wijesekera and Others* [(2002) 2 Sri.L.R. 269]

Sub-sections (4) and (5) of Section 48 of the Partition Act are such provisions. Any challenge before the District Court to the interlocutory decree dated 17th of August 1988 should have been within the ambit of these sub-sections. The learned Additional District Judge of Avissawella did not act under either of the above sub-sections. In fact, he overlooked the earlier order made by his predecessor on 11th October 1988 on the application made by the 3rd and 9th defendants as well as the heirs of the 7th defendants to set aside the judgment dated 17th of August 1988. He would not have fallen into error if he had considered it.

For the reasons set out above, I am of the opinion that the learned Additional District Judge did not have the power to set aside the earlier judgment and interlocutory decree dated 17th of August 1988.

It was argued that trial *de novo* was conducted with the consent of all the parties and therefore the District Court had jurisdiction. The record does not indicate that the 3rd defendant was present or represented on 17th February 1999 when the learned Additional District Judge decided to commence trial *de novo* on the application of the parties. The 14th defendant-respondent argues that the registered attorney-at-law for the 3rd defendant, Mr. Piyasena Ranasinghe was present in Court and that in view of the judgment in *Andiappa Chettiar v. Sanmugam Chettiar*[11] that constitutes an appearance on behalf of the 3rd defendant. Accordingly, it is submitted that the 3rd defendant had consented to the procedure that was followed and he cannot now complain. I do not agree. The facts of this case differ from that in *Andiappa Chettiar v. Sanmugam Chettiar.*[12] There the proctor appeared when the case was called and informed court that he had "no instructions " and "no material on which to proceed with the case". That is not so in this case. Although Mr. Piyasena Ranasinghe was present in court on 17th February 1999, he had marked his appearance only for the 4th, 5th, 6th 7A, 10A, 12th, 13th and 14th defendants. According to the record he did not mark his appearance for the 3rd defendant. Neither did he inform court that he had no instructions or no material to proceed with the case for the 3rd defendant.

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[11] 33 N.L.R. 217
[12] Ibid.

In any event, I am of the view that consent of the parties cannot bestow jurisdiction upon the District Court to act outside the specific procedures laid down in Section 48 of the Partition Act as the interlocutory decree entered in terms of section 26 of the Partition Act is, subject to the limitations specified in Section 48 therein, given final and conclusive effect against the whole world. It is not open to a person to confer jurisdiction by consent and no amount of acquiescence would confer jurisdiction upon a tribunal or Court where such jurisdiction did not exist.[13] There are other reasons as well. It is an established principle that parties cannot, by consent or otherwise, vary the judgments or orders of any other Court.[14] It is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem*.[15]

For the foregoing reasons, I allow the appeal and set aside the judgment of the learned Additional District Judge of Avissawella dated 17th September 1999. I make no order as to costs.

The learned District Judge of Avissawella is directed to expeditiously conclude the matter by taking further steps according to law.

Judge of the Court of Appeal

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

I agree.

Judge of the Court of Appeal

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[13] Sansoni J. in *Kandy Omnibus Co. Ltd. V. Roberts* (56 N.L.R. 293 at 304); *Thambipillai et al v. Thambumuttu* (77 N.L.R. 97); *Wickremasinghe v. Sri Lanka State Trading Corporation added in place of Consolidated Exports Ltd.* (1990) 1 Sri.L.R. 328]

[14] Jameel J. in *Dayawathie and Peiris v. Dr. S.D.M. Fernando and Others* (1988) 2 Sri.L.R. 314 at 354

[15] *Gnanapandithen and another v. Balanayagam and another* (1998) 1 Sri.L.R. 391