

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

In the matter of an application
under Section 839 of the Civil
Procedure Code

Case No. CA/784/1992/F

D.C. Matara Case No. 12969/P

Mohamed Haneefa Ishaththu
Nawma,
Godawatta, Godapitiya,
Akuressa.

Substituted 17A Defendant-
Appellant-Petitioner

1. Mohamed Abdull Sawahira
“Nim House”, Godapitiya,
Akuressa.
2. Abdul Wahab Mohamed Azhar,
“Nim House”, Godapitiya,
Akuressa.

Plaintiff-Respondent-Respondents

1. Abdul Wahab Mohamed Gouse,
Mahamaya Mawatha,
Kotuwegoda,
Matara
and 27 others

Defendant-Respondent-
Respondents

18. Mohamed Bakir,
Godawatta, Godapitiya,
Akuressa.
19. Mohamed Mowzoon,
Godawatta, Godapitiya,
Akuressa
Defendant-Appellant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: G.Wijemanne for the substituted 17A Defendant-Appellant-Petitioner.

P. Peramunagama for the Plaintiff-Respondent-Respondents.

Argued &

Decided on: 19.10.2018

Samayawardhena, J.

Learned counsel for the 17A defendant-appellant and plaintiff-respondent were heard.

The 17A defendant-appellant has filed this application seeking to vacate the order of this court dated 20.09.2010.

The 17, 18 and 19 defendants have appealed against the Judgment of the District Court. After the argument, the matter has been fixed for the Judgment.

As per the Journal Entry of this Court dated 20.09.2010, the matter has been settled.

According to the proceedings of that day, 17, 18 and 19 defendants have appeared in person, and none of the other parties including the plaintiff-respondents had been either present or represented. The proceedings read as follows:

17th, 18th and 19th Defendant-Appellants are present in Court and they informed Court that they have settled the matter out of Court and tender the settlement duly signed by the parties. Therefore, Court directs the Learned District Judge to incorporate the terms of settlement and enter interlocutory decree accordingly. However, the counsel for the Appellants are not present in Court today. Therefore, if there is any ambiguity in this terms of settlement, as this is a Partition Action the Appellant is permitted to file a Motion and inform for the Court to correct the ambiguity before this directive is sent to the District Court.

There are no written terms of settlement found in the case record. Nor such a copy is being tendered to this Court even at this stage of the case.

Admittedly, the 17th defendant was dead at that time.

From the above quoted proceedings, it is clear that no clear settlement has been recorded or tendered to Court.

Even assuming without conceding all three appellants were present in person, how can a settlement be entered without a single respondent being present?

In any event, when there is a Registered Attorney on record, a party cannot appear in person and tender a settlement (unknown to the Attorney on record). Until the proxy is revoked, with the leave of Court, every single act shall necessarily be done through the Registered Attorney.

Therefore, even if the purported written settlement is found in the case record, there is no validity in it.

This is a partition action, which cannot summarily be disposed of in that manner.

The purported order of this court dated 20.09.2010 is manifestly *per incuriam*.

In my view, even if there is no formal application, the Court of its own accord—*ex mero motu*—can put the record straight by invoking the inherent jurisdiction of the Court the moment it realizes that it has made a mistake. It is the duty of each and every Court to see that the parties shall not suffer by its own lapses—*Actus curiae neminem gravabit*. And also the party affected can in such circumstances apply to make restitution from what is due of right—*ex debito justitiae*.

I set aside the order of this Court dated 20.09.2010.

The appeal of the appellants has not been finally decided.

The Registrar is directed to call for the original case record from the District Court of Matara forthwith.

Once it is received, upon requests being made, issue certified copies of the record to the parties without delay on usual charges.

Argument is fixed for: 25.02.2019.

Judge of the Court of Appeal