

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

Jayasuriya Arachchilage
Chandralatha,
148/D, Wilimbula,
Henegama (WP).
11th Defendant-Appellant

CASE NO: CA/1211/2000/F

DC PUGODA CASE NO: 204/P

Vs.

Gurusinghe Arachchige
Emalinona,
150, Wilimbula,
Henegama (WP).

1. Jayasuriya Arachchilage Padmini,
Wilimbula,
Henegama (WP).
2. Jayasuriya Arachchilage Sirisena,
Wilimbula,
Henegama (WP).
3. Mayadunnage Julis Singho,
Wilimbula,
Henegama (WP).
- 3A. Mayadunnage Alfred
Gunathilaka,
2, Miriswatte, Mudungoda,
Gampaha.

3B. Mayadunnage Dasi Olivia,
146/1, Wilimbula,
Henegama (WP).
And Several Others.
Defendant-Respondents

Before: Mahinda Samayawardhena, J.
Counsel: Daya Guruge for the 11th Defendant-Appellant.
Gamini Hettiarachchi for the 3A Defendant-
Respondent.
Decided on: 23.10.2018

Samayawardhena, J.

This is a partition action. The 11th defendant-appellant has filed this appeal against the Judgment of the learned Additional District Judge of Pugoda dated 27.10.2000.

The 11th defendant has filed a joint statement of claim together with the 1st and 2nd defendants claiming her undivided rights to the land to be partitioned.¹

There is one plaintiff and 13 defendants in the case. The case has been taken up for trial on 22.03.2000. According to the proceedings on that day, except the 2nd and 3rd defendants, all the other parties including the plaintiff had been absent; and only the registered Attorneys for the plaintiff and the 3rd

¹ Page 97-98 of the Appeal Brief.

defendant had been present. Thereafter, the Court has recorded that: *“It is informed that there is a settlement among the plaintiff, and the 2nd and 3rd defendants. Hence necessity does not arise to raise issues. The 2nd defendant is called to give evidence.”*²

The evidence of the 2nd defendant has then been led and closed the case for the plaintiff reading in evidence documents marked P1-P3 only.³ It is clear from the last page of the proceedings on that day⁴ that the evidence of the 2nd defendant had been led by the registered Attorney of the plaintiff (as the registered Attorney for the 3rd defendant has purportedly cross examined the 2nd defendant).

This in my view is unwarranted. It is significant to note that the 2nd defendant appeared in person on that day without his registered Attorney. The registered Attorney for the plaintiff ought not to have done it without the permission of the registered Attorney for the 2nd defendant. It is trite law that until the proxy is revoked with the leave of Court, a party cannot appear in person and make applications to Court. All the acts relating to the case shall necessarily be done through the registered Attorney or a counsel on the instructions of the registered Attorney.

It is perplexing to note that at the end of the evidence in chief of the 2nd defendant (led by the registered Attorney of the plaintiff), the 2nd defendant has stated that *“the shares shall be allocated*

² Page 131 of the Brief.

³ Page 140 of the Brief.

⁴ *ibid.*

not in accordance with the plaint, but in accordance with the List of Shares to be tendered in future.” That is a clear indication that the purported settlement was undecided at the time of leading evidence. Even if it was decided, this course of action is not permitted in law.

It is the duty of the learned District Judge to calculate the shares according to the evidence led before him. He cannot delegate that duty, which is judicial, to a party or his Attorney. If an Attorney tenders a List of Shares to assist Court, he shall do so with notice to the other parties and then the learned District Judge can consider it when calculating shares on his own. Such a List of Shares shall be a part of the Judgement and not something which shall be prepared after the pronouncement of the Judgment. (*Thomas Singho v. Cornelis*⁵, *Ariyasena v. Alen*⁶)

Thereafter, on 08.06.2000, the registered Attorney for the plaintiff has tendered a List of Shares only with notice to the registered Attorney for the 3rd defendant.⁷ No copy of this List of Shares had been sent to the registered Attorney for the 2nd defendant or at least to the 2nd defendant who undertook in his evidence to tender the List of Shares.

⁵ (1967) 74 NLR 109

⁶ [2014] 1 Sri LR 44

⁷ JE No.62 and pages 267-268 of the Brief.

It may be recalled that the plaintiff's case was closed reading in evidence only P1-P3. Thereafter, from time to time, several Deeds have been tendered to Court.⁸

The Court has pronounced the Judgment on 27.10.2000.⁹ In that Judgment the 11th defendant-appellant has not been given any shares.

In the Judgment the learned Additional District Judge has specifically stated that the 2nd defendant did not give clear evidence as to how the parties become entitled to undivided shares in the land on Deeds and by inheritance.¹⁰

The 11th defendant has filed a Notice of Appeal against the said Judgment on 09.11.2000.¹¹

Thereafter, having revoked the earlier proxy, the new proxy of the 2nd defendant has been tendered by the registered Attorney for the 3rd defendant.

The new registered Attorney for the 2nd defendant by way of a petition and affidavit dated 29.11.2000 has made an application *inter alia* to mark the Deeds which the 2nd defendant relies on to claim undivided rights in the corpus.¹²

⁸ JE Nos. 63, 64, 67.

⁹ Pages 144-158 of the Brief.

¹⁰ Page 4 of the Judgment and page 147 of the Brief.

¹¹ JE No. 70.

¹² Pages 112-120 of the Brief.

Thereafter the 2nd defendant's evidence has again been led to mark his (the 2nd defendant's) Deeds and to introduce some new evidence regarding devolution of title of others.¹³

This itself goes to show that the 2nd defendant has been misguided to give evidence at the trial (in the absence of his Attorney-at-Law). If he knew what he was doing, he would have marked his Deeds first before marking others' Deeds.

As I stated earlier, the 1st, 2nd and 11th defendants have filed a joint statement of claim. Three Deeds including the 11th defendant-appellant's Deed have specifically been pleaded in the said statement of claim. The 2nd defendant did not mark any of those three Deeds which he has referred to in his statement of claim. If the 2nd defendant knew what he was doing, there was no reason for him not to refer to the 11th defendant's Deed and mark it in evidence.

It is also relevant to note that, in his evidence given for the second time, referring to the evidence given earlier, the 2nd defendant has stated that "*On that occasion, there was a lawyer appeared on my behalf*"¹⁴, which is wrong.

After leading the evidence of the 2nd defendant for the second time, an amended Judgment has been pronounced on 11.12.2000.¹⁵

¹³ Pages 141-143 of the Brief.

¹⁴ Page 142 of the Brief.

¹⁵ Pages 159-160 of the Brief.

It is abundantly clear that no proper investigation of title has been made by the learned Additional District Judge before pronouncing the Judgment(s). Evidence has not been led in a manner that should have been led in a partition action.

The paramount duty of the District Judge trying a partition action is to investigate the title of each party quite independently of what the parties may or may not tell the Court.¹⁶ It is important to understand that this is different from the role a Judge plays in an adversarial system where he has no power to go beyond what has been placed before him by the two adverse parties and decide the matter on what he thinks is right or righteous. But a partition action is an action in *rem* (as opposed to an action in *personam*), the Judgment of which is bound not only by the parties to the case, but also by others who are not parties to the case.

The learned Additional District Judge, in my view, should not have allowed the evidence of the 2nd defendant to be led in the absence of his Attorney on the purported basis that there was a settlement among the plaintiff and the 2nd and 3rd defendants. On the other hand, even if the Attorney of the 2nd defendant was there, unless all the other parties were present or represented by

¹⁶ Vide section 25 of the Partition Law, No. 21 of 1977 as amended. *Peris v. Perera* (1986) 1 NLR 362, *Mather v. Thamotharam Pillai* (1903) 6 NLR 246, *Juliana Hamine v. Don Thomas* (1957) 59 NLR 546, *Gnanapandithen v. Balanayagam* [1998] 1 Sri LR 391, *Sumanawathie v. Andreas* [2003] 3 Sri LR 324, *Basnayake v. Peter* [2005] 3 Sri LR 197, *Karunaratne Banda v. Dassanayake* [2006] 2 Sri LR 87, *Silva v. Dayaratne* [2008] BALR 284, *Abeyasinghe v. Kumarasinghe* [2008] BALR 300, *Sopinona v. Pitipanaarachchi* [2010] 1 Sri LR 87.

their Attorneys and consented to the settlement, it is elementary that the learned Additional District Judge could not have proceeded to record the evidence of the 2nd defendant as if it was an overall settlement bound by all the parties to the case. Such a settlement is obnoxious to section 408 of the Civil Procedure Code and liable to be quashed as a nullity for the Court has no jurisdiction to do so.

I must state that there is no blanket prohibition against entering settlements in partition action. Nevertheless, that can only be allowed by Court after investigating the title and having satisfied that the parties before it alone have interests in the land to be partitioned. (*Kumarihamy v. Weeragama*¹⁷, *Faleel v. Argeen*¹⁸, *Caroline Perera v. Martin Perera*¹⁹) There cannot be any dispute that the learned Additional District Judge in the instant case failed to address any of those matters.

At the argument before this Court, except the 11th defendant-appellant, only the 3rd defendant-respondent was represented by a counsel. The learned counsel for the 3rd defendant-respondent in his written submissions admits the claim of the 11th defendant-appellant but says that the said portion shall be taken or deducted from the portion given to the 4th defendant as the 4th defendant has been given more than what was due by Deeds and inheritance. The 4th defendant is the mother of the plaintiff and upon the death of the former, which happened well

¹⁷ (1942) 43 NLR 265

¹⁸ [2004] 1 Sri LR 48

¹⁹ [2002] 2 Sri LR 1

before the purported settlement, the plaintiff has been substituted in the place of the 4th defendant.²⁰

It may be recalled that the settlement was in fact between the plaintiff and the 3rd defendant (even though the 2nd defendant was used as a cat's paw). Now the 3rd defendant himself (indirectly) admits that the settlement was a hoax!

I set aside all the proceedings after the 22.03.2000, including the Judgment and the Amended Judgment, and direct the learned District Judge to conduct the trial afresh and take follow up steps according to law.

The 3rd defendant shall pay a sum of Rs. 50,000/= as costs of the appeal to the 11th defendant-appellant.

Appeal allowed. Retrial ordered.

Judge of the Court of Appeal

²⁰ JE No.55