

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

Abdul Hamid Sitti Umma alias
Abdul Hamid Sitti Bibishiya of
Navinna, Uluvitike.
8A Defendant-Petitioner

CASE NO: CA/REV/1927/2005

DC NO: DC GALLE 9691/P

Vs.

Usubu Sitti Marshana alias
Usubu Sittu Umma,
(now deceased)
Mohomad Ibrahim Fathuma
Fareena,
Both of
Navinna, Uluvitike.
Plaintiff-Respondents
& Several Others

Before: Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu, P.C., for the 8A Defendant-
Petitioner.

Respondents are absent and unrepresented.

Argued &

Decided on: 07.11.2018

Samayawardhena, J.

The 8A defendant-petitioner has filed this application dated 11.11.2005 for revision and/or *restitutio in integrum* seeking to (a) set aside the Judgment and the Interlocutory Decree of the District Court of Galle dated 26.10.2004, (b) if the Final Decree is entered to set aside the Final Decree, (c) set aside the order dated 07.09.2005, (d) order trial *de novo*, (e) allow the 8A defendant to tender a fresh statement of claim.

It is clear that the 8A defendant has decided to file this application not after the pronouncement of the Judgment dated 26.10.2004, but after the delivery of the order dated 07.09.2005 whereby the application of the 8A defendant dated 30.11.2004 was dismissed by the learned District Judge. By that application the 8A defendant has sought to set aside (a) the Judgment of the District Court dated 26.10.2004, (b) to allow her to tender a fresh statement of claim and (c) to conduct a trial *de novo*.

The refusal of that application is manifestly flawless. If the 8A defendant was dissatisfied with the Judgment, she should have preferred an appeal against the Judgment.

After the pronouncement of the Judgment, the 8A defendant cannot be allowed to file a fresh statement of claim replacing the statement of claim of the deceased 8th defendant (her father) to have a fresh trial.

The reason given by the 8A defendant in the said application seeking a fresh trial is that she was abroad during the trial.

This has not been established by any documentary evidence either before the District Court or before this Court. Even if it is true, it is clear from the proceedings that the 8/8A defendant has been represented by her Attorney-at-Law throughout the trial.

In this application, the 8A defendant *inter alia* states that the original 8th defendant died on 17.09.1999 and the substitution in place of the deceased original 8th defendant had not taken place until the Journal Entry 131 dated 19.09.2005 and therefore Attorney-at-Law Mrs. Muguntenna could not have appeared on behalf of the original 8th defendant after 17.09.1999.

This kind of a standpoint was never taken up by the 8A defendant in his application made to the District Court dated 30.11.2004 (referred to earlier). The 8A defendant has not tendered a copy of the full case record of the District Court for this Court to ascertain the correctness of that assertion. The 8A defendant has tendered the Journal Entry 131 dated 19.09.2005 separately to say that substitution was done on that day. That is a misleading statement. According to that Journal Entry dated 19.09.2005, the application of the Attorney-at-Law of the 8A defendant was to add the 8A defendant's name to the amended caption and not to substitute the 8A defendant in place of the 8th defendant. There is no mention in that Journal Entry that the substitution was done on that day. When the proxy was tendered and on what basis it was tendered and by whom it was tendered and when the substitution was in fact effected etc. have not been explained.

The 8A defendant drawing the attention of this Court to Deed marked Z2 states that the learned District Judge has not considered that Deed. Firstly it has not been produced at the trial. Secondly it has been executed after the *lis pendens* was registered.

Another major complaint of the 8A defendant is that preferential rights over the foundation marked No.5 of the Preliminary Plan, which was constructed pending partition action, was not given to the 8th defendant in the Judgment. The learned District Judge in the Judgment has stated that, as the said foundation has been laid under protest and whilst the interim injunction was in operation, the 8th defendant is not entitled to preferential rights over it. There is nothing wrong in that finding.

This is not a fit and proper case to exercise the extraordinary jurisdiction by way of revision to grant reliefs for the 8A defendant.

Application refused. No costs.

Judge of the Court of Appeal