

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

Dhammika Kodagoda,  
26/2, Dharmaraja Mawatha,  
Wackwella Road,  
Galle.  
Petitioner

**CASE NO: CA/1423/1999/F**  
**DC GALLE CASE NO: 6719/P**

Vs.

Kariyawasam Katukolihe Gamage  
Dyanesius (deceased)  
247/7, Richmand Hill Road,  
Kumbanwella,  
Galle.  
Plaintff-Respondent-Respondent  
& Several Other  
Defendants

Before: Mahinda Samayawardhena, J.  
Counsel: Danushka Rahubadda for the Petitioner.  
Buddika Gamage for the Plaintiff-Respondent.

Decided on: 16.11.2018

Samayawardhena, J.

The 2B defendant filed an appeal against the Judgment of the District Court of Galle entered in the Partition Case No.6719/P. As the appellant did not prosecute the appeal with due diligence, this Court, by order dated 28.02.2014 abated the appeal.

Thereafter, the 2B defendant made an application seeking to relist the appeal. That application was dismissed by this Court by order dated 24.06.2016.

Then the petitioner to this application sought Special Leave to Appeal from the Supreme Court against the said order of this Court mainly on two grounds:

- (a) The order of this Court dated 24.06.2016 is a nullity as the 2B defendant was dead at the time the order was delivered without making any substitution.
- (b) The fundamental objective of the Partition Law is to investigate title to land, and refusal to relist the appeal will defeat that objective.

The reliefs sought were:

- (a) to substitute the petitioner as the legal representative in place of the deceased 2B defendant;
- (b) to set aside the order of this Court dated 24.06.2016 dismissing the relisting application of the 2B defendant;
- (c) To direct the Court of Appeal to consider the appeal of the 2B defendant on merits.

After hearing both parties, the Supreme Court, by order dated 11.07.2017, has refused Leave to Appeal.

It is thereafter, the petitioner has filed this second Relisting Application dated 16.10.2017 before this Court seeking:

- (d) to substitute the petitioner as the legal representative in place of the deceased 2B defendant;
- (e) to set aside the order of abatement dated 24.02.2014 made by this Court;
- (f) to set aside the order of this Court dated 24.06.2016 dismissing the relisting application of the 2B defendant;
- (g) to relist the appeal.

There is no ambiguity that the same petitioner went before the Supreme Court on the same grounds and seeking the same reliefs.

However, it is the submission of the learned counsel for the petitioner that the Supreme Court refused Leave on a technical ground and therefore there is no bar for this Court to consider the petitioner's Application afresh.

The learned counsel for the respondent (who was also the counsel in the Supreme Court case) disputes that Leave was refused by the Supreme Court on a technical ground.

I think that there is no room for argument or conjectures as the Supreme Court has refused Leave stating "*We see no basis to*

*grant Special Leave to Appeal in this matter*” when the petitioner placed the same facts before the Supreme Court.

The petitioner has not withdrawn the Application filed before the Supreme Court reserving the right to file a fresh Application before this Court, nor has the Supreme Court dismissed that Application subject to such condition. The matter, in my view, is *res judicata*.

*“There must be finality in litigation, even if incorrect orders have to go unreversed.”*<sup>1</sup>

Application dismissed. No costs.

Judge of the Court of Appeal

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<sup>1</sup> *Cassim v. Government Agent, Batticaloa (1966) 69 NLR 403 at 404 per Sansoni CJ*