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

CA CASE NOS: CALA/507/2006
CALA/512/2006
CA/REV/1639/2002
DC PANADURA CASE NO: 457/P

19. Haburugama Arachchige
Seelawathie,
No. 305/3,
Janatha Mawatha,
Werahera,
Boralesgamuwa.

21. Manimeldura Kapila De Zoysa,
No. 305/9,
Janatha Mawatha,
Werahera,
Boralesgamuwa.

Defendant-Petitioners
in CALA/507/2006

18. Lankapura Premalatha,
No. 303,
Werahera,
Boralesgamuwa.

24. Jacob John,
(deceased)
No. 305/4,

Janatha Mawatha,
Werahera,
Boralesgamuwa.

24A. Wickramasinghe Arachchige Lalitha,
No. 305/4,
Janatha Mawatha,
Werahera,
Boralesgamuwa.

28. Charlotte Lankapura,
(deceased)
"Chandra Stores",
No. 156,
Karagampitiya,
Dehiwala.

28A. Lankapura Premalatha,
No. 303,
Werahera,
Boralesgamuwa.

Defendant-Petitioners
in CALA/512/2006

Kalaha Arachchige Dona Anne
Kamel Perera,
C1, Maddumage Watta,
Nugegoda.

Petitioner
in CA/REV/1639/2002

Vs.

K.A. Piyaratne,
No. 234,
Werahera Junction,
Boralesgamuwa.
Plaintiff-Respondent
And Several Other Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Dr. Jayatissa de Costa, P.C., with Chanuka Ekanayake for the 19th and 21st Defendant-Petitioners in CALA/507/2006.
Nihal Jayamanna, P.C., with Mokshini Jayamanna for the 18th, 24A, 28A Defendant-Respondents in CALA/512/2006.
W. Dayaratne, P.C., with R. Jayawardena for the Petitioner in CA/REV/1639/2002.

Decided on: 08.02.2019

Samayawardhena, J.

The plaintiff filed this action in the District Court of Panadura naming 17 defendants seeking to partition the land described in the schedule to the plaint among the plaintiff and the said 17 defendants. At the preliminary survey, a number of parties have presented themselves before the court commissioner as claimants.

After the preliminary survey, the defendants have shot up to 34. It is significant to note that, according to the Preliminary Plan and the Report, out of the 1st-17th defendants and the plaintiff, only the 17th defendant is living on the land, and all the others living on the land having permanent buildings with definite boundaries are claimants.

Section 5 of the Partition Law, No. 21 of 1977, as amended, so far as relevant for the present purposes reads as follows:

> *5. The plaintiff in a partition action **shall** include in his plaint as parties to the action all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled—*
> *(a) to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, (and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise) or*
> *(b) to any improvements made or effected on or to the land*

According this section, a person does not need to have a *prima facie* right or interest in the land to make him a party. Broadly speaking, every person who claims to be entitled to have some interest in the land (not necessarily of soil rights) shall be made a party. Forgetting everything else, even by having a cursory look at the Preliminary Plan and the Report, one would wonder the audacity of the plaintiff to refuse to make in the plaint a number of people who are living on the land as parties to the case in blatant violation of the above section.

In *Jane Nona v. Dingirimahatmaya (1968) 74 NLR 105* it was held:

> *It is the duty of a plaintiff in a partition action to set out to the best of his knowledge and ability a full and comprehensive pedigree showing the devolution of title with reference to all the deeds of sale on which title is alleged to have passed. In view of the very far reaching consequences of a decree under the Partition Act, a Court should not assist a plaintiff who either through carelessness or indifference does not place before the Court evidence which should be available to him.*

Be that as it may, several parties who were later added as defendants filed their statements of claim based on Deeds, Plans etc. to contest the plaintiff's case. They basically sought exclusion of separate Lots depicted in the Preliminary Plan.

When matters remained as such, on the date of the trial, i.e. 20.03.2001, miraculously, all the contesting defendants were absent and the registered Attorney for most of the contesting defendants who was present in Court stated to Court that he had no instructions!

As seen from the proceedings dated 20.03.2001, on the date of the trial, out of 34 defendants and the plaintiff, only the plaintiff and the 9th and 34th defendants had been present; and only the plaintiff, the 1st, 17th and 34th defendants have been represented by two Attorneys—one for the plaintiff and the other for the other three defendants.

Then three admissions have been recorded.

The 1st admission is that the parties agree that the land depicted in the Preliminary Plan is the land to be partitioned. This in my view

is a misleading admission because it shall be qualified to read as the plaintiff, the 1st, 17th and 34th defendants (not all) agree that the land depicted in the Preliminary Plan is the land to be partitioned.

The 2nd admission, if I understand correctly, is that the improvements and plantation shall go according to the Report to the Preliminary Plan (and that is the evidence of the plaintiff as well).

The 3rd admission, if I understand correctly, is that improvements marked A, B, C in Lot 1 of the Preliminary Plan (i.e. foundation, house and well), shall go to the 1st and 3rd defendants.

In the first place, once the 2nd admission (to say that improvements shall go according to the Report of the Preliminary Plan) is recorded, it is redundant to have the 3rd admission.

However, it appears to me that the 2nd and 3rd admissions are contradictory because it is the 17th defendant (not the 1st and 3rd defendants) who has claimed the improvements marked A, B, C in Lot 1 before the court commissioner.

After recording admissions, the plaintiff's evidence has been led without any contest, and trial has been concluded. Not a single question has been asked from the plaintiff either by a defendant or by Court. Thereafter the Judgment has been pronounced on 03.05.2001.

The first paragraph of the Judgment is revealing. It, translated into English, reads as follows:

> *This case is regarding partition of a land. Notwithstanding there was a contest among the parties, at the date of the trial, the contesting parties were not before Court, and the parties who were before Court had arrived at a settlement.*

Then it is clear that the learned District Judge knew when the plaintiff's evidence was led: (a) the contesting parties were not before Court for some reason; (b) the registered Attorney for some of the contesting parties in spite of being present says he has no instructions; and (c) the plaintiff and the three defendants present in Court have settled the matter.

In that backdrop, can a District Judge trying a partition case maintain pin drop silence at the trial and enter a partition decree as prayed for in the plaint without asking a single question from the plaintiff about the contest raised by the contesting defendants in their statements of claim? He cannot. Regrettably, that is what has been done in this case.

I must pause for a while to say that inasmuch as justice delayed is justice denied, justice hurried is justice buried. Justice must be speedy, but not hasty.

Judges shall, especially in partition cases, without unnecessarily encroaching upon the arena preserved for pleaders, actively engage in the trial without being mere passive observers.

If the learned District Judge in the instant action had merely glanced at least at the Preliminary Plan whilst the evidence of the plaintiff was being led, he would have, with great respect,

immediately realized that Hamlet was being performed without the Prince of Denmark!

If I may make a general observation, there are some lawyers who are anxiously waiting to grab the opportunity to have a hassle-free *ex parte* judgment. Their clients are elated to see that they got the judgment without undue delay. But that happiness in my experience is short-lived, and more often than not counterproductive when the defaulting party makes an application to have the *ex parte* judgment vacated. That is what has happened in this case as well. With respect, if the Attorney for the plaintiff was more patient and the Attorney on record for the contesting parties was more responsible, by this time, the litigation must have come to a finality.

Even though this is not the occasion to pen down of the responsibilities of the registered Attorneys, I cannot resist mentioning a few words on that matter. A registered Attorney cannot appear in Court on the trial date only to inform the Court that he has no instructions. He cannot refuse to appear merely because his professional fees for that day have not been paid. If he has no instructions, he should have, as a responsible registered Attorney, known it beforehand and revoked the proxy. Whether on the trial date or otherwise, when there is a proxy on record, the party need not be physically present in Court unless his presence is necessary such as to give evidence. Even if he is present in Court, he has no right of audience unless through his Attorney. He must tell whatever he has to tell through his Attorney—vide the Judgment of Justice Amarasinghe in the Supreme Court case of *Fernando v. Sybil Fernando [1997] 3 Sri LR 1.*

In *Daniel v. Chandradeva [1994] 2 Sri LR 1 at 8-9* on behalf of the Supreme Court Justice Amarasinghe observed:

> *The relationship of attorney and client is much more than an ordinary contractual relationship. It does not terminate automatically upon the non-payment of fees. Nor can it be abruptly terminated. An attorney is ordinarily justified in withdrawing if the client fails or refuses to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so, provided his right of withdrawal is not exercised at a moment at which the client may be unable to find other legal assistance in time to prevent damage being done. An Attorney is obliged to protect his client's interests as far as possible and should not desert the client at a critical stage of a matter when the withdrawal would put the client in a position of disadvantage or peril. An attorney should not summarily withdraw from a case or matter he has undertaken. He must not suddenly decide to cease to act for the client and jettison him. The attorney must give his client reasonable warning that he will withdraw unless the client fulfils his obligations. The respondent gave no warning of her inability to continue as the Registered Attorney on account of the client's failure to pay her fees. If she was unwilling to continue the professional account of the failure of the complainant to pay her fees, she should have taken steps to have her proxy revoked after warning the client and giving him a reasonable time to appoint another Registered Attorney.*

Section 27(2) of the Civil Procedure Code enacts that when a proxy is filed, it shall be in force until revoked with the leave of the Court and after notice to the registered Attorney by a writing signed by

the client and filed in Court, or until the client dies, or until the registered Attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.

Section 28 of the Civil Procedure Code says that if the registered Attorney shall die, or be removed or suspended, or otherwise become incapable to act as aforesaid, at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared until thirty days after notice to appoint another registered Attorney has been given to that party.

Coming back to the substantive matter under consideration, the learned District Judge in the Judgment has as a matter of routine summarized the evidence of the plaintiff in one page and then ordered the land to be partitioned as set out in the plaint among the plaintiff and the 1st-17th defendants without mentioning a word about the cases of the contesting defendants. The learned Judge has also stated that improvements marked A, B, C in Lot 1 shall go to the 1st and 3rd defendants, and the rest according to the Report of the Preliminary Plan.

That means, all the buildings including dwelling houses claimed before the court commissioner and shown in the Preliminary Plan shall go to those parties who were absent at the trial date, but they are not entitled to a grain of sand from the land!

After entering the Interlocutory Decree in terms of the Judgement, a commission has been issued to prepare the final scheme of partition. Then the commissioner has written to the learned District Judge by letter dated 07.06.2002 seeking further

instructions to prepare the final scheme of partition as the 17th-22nd, 24th, 27th, 28th-33rd defendants who have Deeds but not got any soil rights from the Judgment are living on the land. He has further stated that notwithstanding notices were sent, 1st-16th defendants did not participate at the final survey. It may be recalled that out of the 1st-17th defendants and the plaintiff, only the 17th defendant is living on the land, and all others living on the land are contesting defendants who were absent at the trial date. The court commissioner has not carried out the commission obviously because it is not practically possible.

Thereafter several defendants including the 18th, 19th, 21st, 24th, 28th and also some third parties have filed applications under section 48(4) of the Partition Law, No. 21 of 1977, as amended, seeking special leave to establish their title to the land. This has been rejected by the learned District Judge by order dated 06.12.2006. It is against this order the 19th and 21st defendants filed Leave to Appeal Application CALA/507/2006; and the 18th, 24th and 28th defendants CALA/512/2006. In addition, one Kalaha Arachchige Dona Anne Kamel Perera has also filed a Revision Application CA/REV/1639/2002 seeking to set aside the Judgment. Learned President's Counsel appearing for the petitioners in those three matters and the learned counsel appearing for the respondents agreed to amalgamate all three cases and abide by a single Judgment as all three applications stem out of the same Judgment of the District Court.

It was the submission of the learned President's Counsel for the petitioners in CALA/507/2006 and CALA/512/2006 that notwithstanding this matter has come before this Court as Leave to

Appeal Applications filed against the order of the learned District Judge made on 06.12.2006, this is eminently a fit and proper case for this Court to invoke the revisionary jurisdiction of this Court even *ex mero motu* and set aside the Judgment and order retrial. In view of that, the learned President's Counsel for the petitioners did not canvass the order dated 06.12.2006. There is much substance in that submission.

Section 25(1) of the Partition Law reads as follows:

> *On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.*

This section mandates the District Judge trying a partition action to examine the title claimed by each party in relation to the land to be partitioned. This he is expected to do quite independently of what the parties may or may not tell him. That is because partition actions are not actions in *personam*, where only the parties to the action are bound by the Judgment, but actions in *rem*, where not only the parties to the action, but also those who are not parties to the action are also bound by the Judgment.

Therefore, a District Judge trying a partition action cannot be found fault with for being too cautious, circumspectous and

jealous in investigating title to the land and looking beyond what has been presented before the Court by way of pleadings, evidence or otherwise to be absolutely satisfied *inter alia* that all the necessary parties are before Court and there is no collusion among the parties.

This paramount duty of thorough investigation of title cast upon the District Judge in partition actions has been repeatedly stressed by the Superior Courts from time immemorial.

In *Peris v. Perera* decided 123 years ago, and reported in (1896) 1 NLR 362, the Full Bench of the Supreme Court led by Chief Justice Bonser held that:

> *The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.*

The Full Bench of the Supreme Court headed by Chief Justice Layard in the case of *Mather v. Tamotharam Pillai 6 NLR 246,* decided as far back as in 1908, had this to say:

> *A partition suit is not a mere proceeding inter partes to be settled of consent, or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. It is a matter in which the Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed.*

> *In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge*.

In *Juliana Hamine v. Don Thomas (1957) 59 NLR 546 at 549* L.W de Silva A.J. Held:

> *A partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest inter se and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with* ***quite independently of what parties may or may not do***.

This has consistently been followed up to now. (*Vide for instance: 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, Abeysinghe v. Kumarasinghe [2008] BALR 300*)

In *Sopinona v. Pitipanaarachchi [2010] 1 Sri LR 87* Marsoof J. on behalf of the Supreme Court held that:

> *A basic principle in all the enactments on Partition Law is that where there has been no investigation of title, any resulting partition decree necessarily has to be set aside.*

In *Cynthia de Alwis v. Marjorie D'Alwis [1997] 3 Sri LR 113* Justice F.N.D. Jayasuriya remarked:

> *A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title a trial Judge cannot be found fault with for being too careful in his investigation.* ***He has every right even to call for evidence after the parties have closed their cases****.*

The absence of a party shall make no difference in the discharge of this statutory duty by the District Judge in a partition action. That is why in the more recent case of *Godagampala v. Peter Fernando [2016] BLR 139 at 140* Chithrasiri J. on behalf of the Supreme Court held that:

> *It is trite law that the examination of such title of the parties in a partition action is the duty of the trial judge though we follow the adversarial system in this jurisdiction.*

In *Wijesundera v. Herath Appuhamy (1964) 67 CLW 63 at 64* T.S. Fernando J. stated that:

> *Presence or absence of Counsel makes no difference to the duty of the learned trial judge to examine both oral and documentary evidence in a partition case to satisfy himself on the question of title.*

Whether or not a party is represented by an Attorney is also beside the point. In *Sirimalie v. Pinchi Ukku (1958) 60 NLR 448*, the 9th defendant who was present in Court at the trial date was unrepresented. She had not even filed a statement of claim. At the trial a new position was taken up by the plaintiff who had pleaded differently. In the result, the said defendant lost any shares in the land. In revision, the Supreme Court set aside the Judgment. Sansoni J. remarked:

> *The Supreme Court has sufficient powers under the Courts Ordinance and under section 753 of the Civil Procedure Code to examine, by way of revision, the legality and propriety of the interlocutory decree which has been entered in a partition action and the regularity of the proceedings at the trial.*
>
> *It was the duty of the Court to have asked the 9th defendant whether she wished to give evidence or to cross-examine the plaintiff whose evidence was directly against her interests. Section 35 of the Partition Act requires the Court to examine, and hear and receive evidence of, the title and interest of each party.*

The learned District Judge, with respect, in the instant case has failed to discharge his peremptory duty of investigation of title to the land independently, but, instead, mechanically adopted the uncontested evidence of the plaintiff in the absence of the contesting parties to enter Judgment which is practically unenforceable. If that Judgment is allowed to stand, except the 17th defendant, all the other defendants who are living on the land with their families will have to leave the land. Whether or not they are entitled to the soil rights has to be particularly addressed and

decided by the District Judge before entering the Judgment. That matter has never been addressed at the trial or in the Judgment, which in my view is a fundamental flaw in the Judgment.

In the celebrated case of *Somawathie v. Madawala (1983) 2 Sri LR 15 at* 23 Justice Soza held that:

> *Although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the Supreme Court continued in the exercise of its powers of revision and restitutio in integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice.*

This point has been emphatically emphasized in an array of cases including *Jayaratna v. Premadasa [2004] 1 Sri LR 340 at 345, Maduluwawe Sobitha Thero v. Joslin [2005] 3 Sri LR 25, Velun Singho v. Suppiah [2007] 1 Sri LR 370.*

This right of the Court of Appeal is statutorily protected by section 48(3) of the present Partition Law, which says that notwithstanding "*the interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect*", "*the powers of the Court of Appeal by way of revision and restitutio in integrum shall not be affected by the provisions of this subsection.*"

This leads me to consider the final question that, when this is a Leave to Appeal Application filed against an order made by the learned District Judge (and not against the Judgment *per se*), can

the petitioners through this application ask this Court to set aside the Judgment acting in revision? They can. If they cannot, the Court, *ex mero motu*, can, depending on the severity of the miscarriage of justice.

Ranesinge v. Henry (1896) 1 NLR 303 Bonser C.J. stated:

> *This appeal should be dismissed, on the ground that no appeal lies from a claim order. But Mr. De Saram, who appeared for the creditor appellant, has asked us to take up the case in revision, following the precedent of a case recently decided by this Court (DC, Jaffna, No. 24,021, Civil Min. S.C., Oct. 10, 1895). The ground on which he asks us to exercise our revisionary power is, that the District Judge has made an order condemning him in costs, which order, he urges, is, on the face of the proceedings, wrong.*

The Supreme Court found the submission to be correct, and held that:

> *Therefore, in the exercise of our revisionary power, we quash the order.*

In *Marian Beebee v. Seyed Mohamed (1965) 69 CLW 34* Sansoni C.J. stated:

> *The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice.*

In *Rasheed Ali v. Mohamed Ali [1981] 1 Sri LR 262* the Supreme Court—Weeraratne J., Sharvananda J. (later C.J.) and Wanasundara J.—held that:

> *The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies.*

In *Sinnathangam v. Meeramohideen (1958) 60 NLR 394* T.S. Fernando J. held that:

> *The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security.*

In *Saheeda Umma v. Haniffa [1999] 1 Sri LR 150* the application for *restitutio in integrum* filed by the plaintiff-petitioner could not be successful as it was prescribed. Nevertheless, as there was a serious injustice caused to the petitioner, Asoka de Silva J. (later C.J.) with Weerasuriya J. agreeing *ex mero motu* granted the relief invoking the revisionary jurisdiction of the Court:

> *Powers of Revision of this Court are wide enough to embrace a case of this nature. <u>Even though the plaintiff-petitioners have not invoked the revisionary jurisdiction we propose to exercise the Revisionary powers in favour of the 2nd plaintiff-petitioner</u>.*

Vide also Potman v. The Inspector of Police, Dodangoda (1971) 74 NLR 115, Andiappa Chettiar v. Sanmugan Chettiar (1932) 33 NLR 217 at 221-222, Piyadasa v. The Queen (1962) 64 NLR 473 at 474, Bengamuwa Dhammaloka Thero v. Dr. Cyril Anton Balasuriya [2010] 1 Sri LR 193 at 205, Rustom v. Hapangama and Co. [1978/79] 2 Sri LR 225, Ranasinghe v. L.B. Finance Ltd [2005] 2 Sri LR 393, Mrs. Sirimavo Bandaranayake v. Times of Ceylon Ltd [1995] 1 Sri LR 22, Finance and Land Sales Ltd v. Perera [2005] 2 Sri LR 79.

Where a miscarriage of justice has occurred, as in this case, the Court of Appeal can, under Article 138 of the Constitution read with section 753 of the Civil Procedure Code, either *ex mero motu* or upon an application made by any aggrieved party—not necessarily a party to the action—exercise revisionary powers of the Court to undo the injustice.

For the aforesaid reasons, in the exercise of the revisionary powers of this Court, I set aside the Judgment and the Interlocutory Decree entered by the District Court, and direct the District Judge to hold the trial *de novo*. The District Judge shall allow any other parties to intervene, if they so desire. That does not mean that they all ultimately be entitled to soil rights.

Substantive relief of the petitioners in CALA/507/2006, CALA/512/2006 and CA/REV/1639/2002 granted.

Let the parties bear their own costs of appeal.

Judge of the Court of Appeal