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

C. A. APPEAL No. 664/1997 (F)

D. C., GAMPAHA CASE No. 29841/P

Adhikari Appuhamillage
Maggiehamine of Wilimbula,
Henegama.

4th DEFENDANT-APPELLANT

VS.

Adhikari Appuhamillage Don
Yohanis Appuhamy *alias*
Yohanis Adhikari of
Lunugama.

PLAINTIFF-RESPONDENT

1. Ratha Arachchige Don
   Leelasena Abeywickrama
   Jayatillaka of Henegama.

And 9 others.

DEFENDANT-RESPONDENTS

Before : **M. M. A. Gaffoor, J.**

Counsel : S. A. D. S. Suraweera for the 4th Defendant-Appellant

Rasika Dissanayake for the Plaintiff-Respondent

Written Submission tendered on : 30.11.2018 (by the 4th Defendant-Appellants)
05.11.2018 (by the Plaintiff-Respondents)

Argued on : 13.10.2017

Decided on : **13.03.2019**

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M. M. A. Gaffoor, J.

The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) instituted the above styled action in the District Court of Gampaha seeking *inter alia* to have partitioned the land more fully described in the schedule to the plaint.

After summons being received on the Defendants, the 1st, 2nd, 4th, 10th and 11th Defendants filed their respective statements of claim seeking undivided shares from the corpus. Accordingly, completion of the respective pleadings, the case was fixed for trial. When this matter was taken up for trial on 25.09.1995, both parties agreed to struck-off the previous proceedings and to start a fresh trial *without framing issues.*

It is perceived from the (District Court) case record that the Plaintiff had not submitted a pedigree and given evidence in the lines of the 2nd and 4th Defendants' pedigree. However, at the conclusion of the trial, the parties were directed by the learned Trial Judge to tender a common schedule of shares for which the matter mentioned on

01.10.1996. Thereafter this matter was mentioned on 02.04.1997 to consider as to the list of shares to accept since several parties had tendered separate list of shares. On the said date the 4th Defendant-Appellant made an application to lead her evidence to prove her title. However, the learned District Judge refused the said application and delivered the Judgment on 26.06.1997.

By the said judgment the 4th Defendant-Appellant has not been allocated any share from the subject matter. Thus, the Appellant had preferred the instant appeal to set aside the judgment dated 26.06.1997 and remit the case back for a fresh trial.

Counsel for the Appellant stated that in this appeal 4th Defendant together with late 2nd Defendant who is her husband had filed a joint statement of claim and claimed a greater share of the corpus, although, both 2nd and 4th Defendants have not been assigned any rights in the plaint. However, on the date of the trial parties had proceeded to trial without a contest and the learned District judge had entered judgment without a proper investigation of the title in his brief judgment dated 20.06.1997. Furthermore, the learned District Judge had adopted the schedule of shares which had been tendered by the Plaintiff and which had been objected by the 2nd and 4th Defendants.

It is in these circumstances, counsel for the Appellant submitted that the learned District Judge had failed to investigate the title as well as calculating the share entitlement of each and every part to the case.

Whilst, Counsel for the Plaintiff submitted that the learned District Judge having considered the documents and the schedule of shares

submitted by the parties and have finally delivered the judgment on the interlocutory decree relying upon the schedule of shares submitted by the parties for which, most of them agreed upon.

Having heard both parties, I observed that, the gravamen of the argument of the learned Counsel for the Appellant before this Court is that the District Judge was in grave error delegating his judicial function to the parties to prepare and tender schedule of shares and on that ground alone the Judgment is rendered a nullity.

It is settled law that a judgment in the strict sense of the law cannot be regarded as a proper judgment in view of only a direction given by a Judge that the schedule of shares directed to be tendered by the plaintiff/parties should be accepted as part and parcel of his judgment. Further, it is an accustomed procedure that in a partition action a Trial Judge must decide the nature and extent of the interest each party is entitled to upon an examination of the title in terms of Section 25 of the Partition Law, No. 21 of 1997 (*Vide, Salam, J. in* ***Ariyasena and Another vs Alen*** [2014 1 SLR 44]).

Thus, Section 25(1) of the Partition Law is noteworthy:

> *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.

The failure of the District Judge to indicate the undivided interest of each party in the interlocutory decree is a fatal irregularity which gives rights to the judgment and interlocutory decree having to be set aside. It is appropriate at this stage to refer to the decision of Basnayake, C. J. with H. N. G. Fernando, J. in ***Memanis vs. Eide*** (59 CLW at p. 46). Their lordships laid down the proposition that it is imperative to include the undivided interest of each party in the interlocutory decree. The relevant passage of the said judgment is quoted below.

"In his judgment the learned district judge says; "plaintiff's proctor will file a schedule of shares which when filed will form part and parcel of this judgment" and there is a schedule of shares filed which he has adopted in entering the interlocutory decree. Section 25 of the Partition Act, provides that the judge 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 that action relates, and shall consider and decide which of the orders mentioned in Section 26 should be made. In the instant case there has been no determination of the shares of the parties as required by the Partition Act. It is the shares so determined by the judge that the court is

required to enter in the interlocutory decree. The course taken by the learned district judge is contrary to the provisions of Section 28 of the Partition Act."

Therefore, my views are fortified as I gather more supports from the above mentioned cases namely, ***Memanis vs. Eide*** (*supra*) and ***Ariyasena and Another vs. Alen*** (*supra*).

Further, I wish to recall the following words of Hutchinson, C. J. in ***Thayalanayagam vs. Kathiresapillai*** [(1910) 5 B.L.R 10]

*"In a partition action such as this is, **I think that the judge has power, and that in some cases it may be his duty**, even after the parties have closed their case, to call for further evidence. (But if he does, he must do it in a regular manner)…"*

Thus, I am of the view that the impugned judgment cannot be allowed to stand as it is inconsistent with the provisions of the Partition Law.

In the circumstance, the impugned judgment is set aside and the case is sent back for re-trial.

Appeal allowed.
Case sent back for re-trail.

JUDGE OF THE COURT OF APPEAL