

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

17. M.R. Lalitha,
No. 67/3,
Rubber Estate Road,
Gangodawila,
Nugegoda.
27. Rajapaksha Minimuthu
Pathirannehelage Siriyalatha,
No. 4/35,
Kesbewa Road,
Gangodavila,
Nugegoda.
28. Herath Mudiyanseelage Heen Banda,
No. 5/35,
Kesbewa Road,
Gangodavila,
Nugegoda.
29. Gunadasa Ranasinghe,
No. 7/35,
Kesbewa Road,
Gangodavila,
Nugegoda.
30. Herath Mudiyanseelage Kumari
Hamy,

No. 5/35,
Rubber Estate Road,
Gangodavila,
Nugegoda.

31. Ranasinghe Arachchilage
Nandawathie,
No. 6/67,
Rubber Estate Road,
Gangodavila,
Nugegoda.

Defendant-Petitioners

CASE NO: CA/REV/1/2002

DC MT. LAVINIA CASE NO: 6/91/P

Vs.

Maharage Don Selestina,
No. 30, 3rd Lane,
Wanatha Road,
Gangodawila,
Nugegoda.

Substituted Plaintiff-Respondent
and Several Other Defendant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: W. Dayaratne, P.C., with Nadeeka Arachchi for
the Petitioners.
Samantha Vithana for the 1st-3rd, 7th-10th
Defendant-Respondents.
S.N. Wijithsingh for the 23rd Defendant-
Respondent.

Decided on: 18.10.2019

Mahinda Samayawardhena, J.

The Petitioners to this revision application are the 17th, 27th, 28th, 29th, 30th and 31st Defendants in a partition case pending in the District Court of Mt. Lavinia. They filed this application seeking to set aside the Judgment and the Interlocutory Decree entered in that case.

The Plaintiff filed the action by plaint dated 25.03.1991 to partition the land among the Plaintiff and the 1st-10th Defendants in the manner stated in paragraph 25 to the plaint, and leave the remaining portion of the land unallotted as he was unaware of the entitlements to the said portion of the land.

There is no dispute that the 17th, 27th, 28th, 29th, 30th and 31st Defendants were served with summons. According to the Journal Entry No. 7 dated 27.04.1992, the summonses have been served and the Notice on the land has been affixed by the Fiscal. The same

Journal Entry also points to the fact that the 17th, 27th, 28th, 29th and 30th Defendants were present in Court on that summons returnable date. The Journal Entry No. 10 dated 10.08.1992 confirms the filing of the proxy of the 31st Defendant.

The original petition of the 17th, 27th, 28th, 29th, 30th and 31st Defendants is dated 31.12.2001. This has later been amended by the amended petition dated 20.01.2002. However, no documents have been annexed to the amended petition to substantiate their case. Nevertheless, when I have a look at the original petition, in paragraph 13 thereof, the said Defendants have given a full description of the supporting documents tendered with the petition. According to that paragraph, out of the 17th, 27th, 28th, 29th, 30th and 31st Defendants, only the 28th and 30th Defendants have filed statements of claim, and others have not. But I find that, according to paragraph 7 of the statement of objections of the Plaintiff dated 01.07.2002, the 29th Defendant has also filed a statement of objection.

According to P3, on 20.05.1997, the case has been taken up for trial, and the Plaintiff, the 32nd Defendant and the 34th Defendant have given evidence. Page 1 of P3 reveals that, out of the 17th, 27th, 28th, 29th, 30th and 31st Defendants, except the 17th, 27th and 31st Defendants, other Defendants had been represented by an Attorney at Law. Trial has been concluded on the same day, without contest, in that, disputed matters have been sorted out or settled during the course of evidence.

As seen from Journal Entries 50-56, after the conclusion of the trial, the case had been called in open Court for 5 times for corrections, tendering documents etc., and at last, the Judgment had been delivered on 08.12.1997.

By that Judgment, undivided rights have been given to the Plaintiff, the 1st-3rd, 7th-10th, 18th-23rd, 33rd-35th Defendants; and out of 35348 shares, 6419 shares have been left unallotted. That means, the 17th, 27th, 28th, 29th, 30th and 31st Defendants have not been given any shares.

Then the 17th, 27th, 28th, 29th, 30th and 31st Defendants have filed this application seeking to set aside the Judgment and the Interlocutory Decree, 4 years after the said Judgment. This delay is unreasonable, unexplained and unjustifiable. Needless to emphasize that a party seeking a discretionary relief such as revision shall come to Court with promptitude.

Out of the 17th, 27th, 28th, 29th, 30th and 31st Defendants, the 28th-30th Defendants cannot, in my view, complain anything as they were represented by an Attorney-at-Law at the trial.

The 17th, 27th, 28th, 29th, 30th and 31st Defendants, in their counter objections dated 10.08.2002 state that, the 17th, 27th and 31st Defendants were neither present nor represented at the trial date. So what? The Plaintiff correctly made them parties to the case, but stated that their entitlements to the land are not known to him. The 17th, 27th and 31st Defendants seem to have filed proxies, but

remained silent without filing statements of claim. If they did not file statements of claim, claiming their entitlements to the land, in terms of section 25(2) of the Partition Law, No. 21 of 1977, as amended, they become parties in default who cannot participate in the trial without the leave of Court. Section 25(2) of the Partition Law reads as follows:

If a defendant shall fail to file a statement of claim on the due date, the trial may proceed ex parte as against such party in default, who shall not be entitled, without the leave of court, to raise any contest or dispute the claim of any other party to the action at the trial.

That means, even if the 17th, 27th and 31st Defendants were present and represented on the trial date, there would not have been a material difference as they could not have, as of right, contest the case of the Plaintiff.

But the District Court can, upon a proper application under section 25(3) being made, allow a defaulting party to file a statement of claim and participate in the trial subject to conditions, until the Judgment is delivered. (vide section 48.)

Section 25(3) reads as follows:

The court may permit a party in default to participate in the trial after notice to the other parties to the action affected by the claim or dispute set up or raised by such party in default, on being satisfied of the bona fides of

such claim or dispute, and upon such terms as to costs and filing of a statement of claim or otherwise as the court shall deem fit.

Such an application has not been made to the District Court by the defaulting parties.

When the Plaintiff makes the 17th, 27th, 28th, 29th, 30th and 31st Defendants parties to the case and states that he is unaware of the entitlements of those Defendants; and the said Defendants fail to state Court on what basis they claim to have rights to the land to be partitioned; it cannot now lie in the mouth of the said Defendants to say that: this is a partition action, and the District Judge has failed to investigate title of the said Defendants to the land, and therefore the Judgment shall be set aside.

In *Thilagaratnam v. Athpunathan*¹, Anandacoomaraswamy J. stated:

*The Learned Counsel for the Appellant cited several authorities Goonaratne v. Bishop of Colombo*², *Peries v. Perera*³, *Neela Kutty v. Alvar*⁴, *Cooray v. Wijesuriya*⁵, *Juliana Hamine v. Don Thomas*⁶ and *Sheefa v. Colombo Municipal Council*⁷, and stated that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement in rem.

¹ [1996] 2 Sri LR 66 at 68

² 32 NLR 337

³ 1 NLR 362

⁴ 20 NLR 372

⁵ 62 NLR 158

⁶ 59 NLR 546 at 549

⁷ 36 NLR 38

We are not unmindful of these authorities and the proposition that it is the duty of the Court to investigate title in a partition action, but the Court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Court cannot go on a voyage of discovery tracing the title and finding the shares in the corpus for them, otherwise parties will tender their pleadings and expect the Court to do their work and their Attorney-at-Law's work for them to get title to those shares in the corpus.

If the said Defendants think fit, they can make an application to the District Court to secure their rights from the portion of the corpus left unallotted. (*Dantanarayana v. Nonahamy*⁸, *Sapin Singho v. Luwis Singho*⁹)

In the facts and circumstances of this case, I do not think that this is a fit and proper case for this Court to invoke the extraordinary jurisdiction of this Court to set aside the Judgment and the Interlocutory Decree entered thereon.

Application of the 17th, 27th, 28th, 29th, 30th and 31st Defendants is dismissed but without costs.

Judge of the Court of Appeal

⁸ 79(2) NLR 241

⁹ [2002] 3 Sri LR 271