

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

In the matter of an application for leave to appeal.

Wickremasinghe Arachchilage Mudiyanse, Jeewana, Dewalegama.

10th Defendant-Petitioner-Petitioner

C.A.L.A./441/05

D.C. Kegalle Case No.22450/P.

Vs.

W.A. Jayasooriya Wickramasinghe Jeewana, Dewalegama.

Plaintiff-Respondent-Respondent

And

1. W.A. Premawathie Wickramasinghe
2. W.A. Daya Sawarnalatha Wickramasinghe
3. W.A. Chandrsena Wickramasinghe
4. W.A. Nalani Wickramasinghe

5. W.A. Padmaraja Wickramasinghe

6. W.A. Jayasena Wickramasinghe
7. W.A. Thilaka Ranika Kumari Wickramasinghe
8. Kaluarachchige Dingiri Mahattaya

All of Jeewana, Dewalegama.

9A. Mudiyansele Kamalasiri Rathnaweera, Nawagamuwa,
Dewalegama.

11A. Mudiyansele Kamalasiri Rathmaweela.

11B. Mudiyansele Wijayasiri Rathnaweera,

Both of Nawagamuwa, Dewalegama.

Defendant-Respondent-Respondents

BEFORE: **PRASANTHA DE SILVA, J.**
K.K.A.V. SWARNADHIPATHI, J.

COUNSEL: S.N. Wijithsing
For the Petitioner-Appellant

Ashan Nanayakkara
For the 1st to 7th, 9th(A), 11th(A) and 13th(B) Defendant-
Respondents.

Date of argument: 17.06.2022

Date of Judgment: 16.11.2022

K.K.A.V. SWARNADHIPATHI, J.

JUDGMENT

On 03.02.2022, leave was granted to the 10th Defendant-Petitioner-Petitioner to proceed in this case. After that, the case was argued by the parties.

According to the 10th Defendant-Appellant, he was the 10th Defendant in the District Court of Kegalle partition action case No.22450/P.

On 11.05.2000, parties of the District Court case entered a settlement and led evidence in court on the terms of that settlement. On the same day, the learned District Judge pronounced the order. Due to an unfortunate incident, the 10th Defendant was not present when the settlement was entered without his participation. He filled papers at the district court to set aside the judgment. Since his attempt failed, he moved to this court for relief.

Respondent-Respondents argued that the revision application under case No.CA/2172/RA was filed by the 10th Defendant-Appellant on the same ground and was dismissed. Even though the Respondent-Respondent, in their written submissions, stated that they had annexed the dismissal order marked as "R", however, such a document was not annexed for reference. They argued that the Appellant sought to active this leave to appeal application because he failed in the revision application. Since leave is granted, the issue need not be discussed.

When perusing the Plaintiff's application before the District Court of Kegalle on 15.05.1979, the 10th Defendant, in that case, was named W.A. Mudianse of Jeewane Dewalagama.

According to the pedigree 11th paragraph of the Plaint, the Plaintiff had given 9th and 10th Defendants each 27/216 shares of the land. The 8th paragraph states that when Appuhamy died, his shares devolved into Dingirihamy. She died Without issues. Her rights devolve at her demise on Punchirala and Dingiri Appuhamy. Punchrala's rights later devolved on the 9th Defendant when Dingiri Appuhamy died; his share devolved onto his descendants (children) to Kiribanda and the 10th Defendant Mudianse.

A partition action is different to any other action. It demands a Section 12 Certificate stipulated in the Partition Act No. 21 of 1977.

The attorney-at-Law should give the certificate and include that he had personally checked all notes. He had gone through all the deeds and carefully through the folios at the Land Registry.

The 10th Defendant filed his statement of claim to court. In his claim, he contested the position of the Plaintiff.

The judgment entered in a partition action is in Rem. There will be no other opportunity to canvass the judgment later. Every Judge who hears a partition action is called upon to consider all documents and carefully evaluate the evidence. Every word in the Deeds should be given consideration. He can verify through further evidence or call for submissions if in doubt. In the present case, the Judge had been in haste. He had entered judgment merely on evidence led in court. Since the Judge pronounced the order on the same day, there was no time for him to go through the documents. Had he gone through the documents, he should have commented on the 10th Defendant's claim.

When Plaintiff, in Plaintiff, had allocated shares to the 10th Defendant, it is a reasonable question as to how the 10th Defendant did not get any shares at the settlement.

Perusing the evidence of Wickramasinghe Arachchilage Jayasuriya Wickremasinghe on 11.05.2000 under oath, he gave evidence and stated according to deeds marked as "P2", and "P3" shares were devolved on Kiribanda and the 10th Defendant Mudianse.

In conclusion of his evidence, he had stated that the 10th Defendant is entitled to an undivided 27/216 share. The learned Judge gave this share to the 10th Defendant in his judgment dated 11.05.2000. However, he had failed to consider the fact that the 10th Defendant was not in court and he was unrepresented. If a contesting party was not present in court and was not represented, a settlement cannot be entered, or evidence should not be led in the settlement without obtaining his consent. Therefore, a judgment entered without the consent of the 10th Defendant cannot be entertained as a judgment without flows.

The Respondents argued that there was no proxy and no address given by the 10th Respondent. This argument cannot be entertained as the 10th Respondent was introduced to the case by the Plaintiff himself.

The 10th Defendant was present at the Survey according to the surveyor's report dated 05.02.1984. He had filed his statement of claim. That shows that he had been actively participating in the case. Suppose there was no proxy; that is a good reason that no evidence should be led in the absence of an actively participating litigant. It was the Judge's duty to consider the statement of claim and the fact of his absence before entertaining the evidence.

It is worth noting that all the precautions taken in a partition action to secure the rights of parties to enter a judgment on a settlement without a party will make him a victim of a miscarriage of justice. Therefore, he should be able to invoke the power of revision and restitution in the intergrum.

In *Rosalin Vs. Maryhamy*¹ held that a settlement could only be entered if all parties consent.

"When an agreement is entered into court has to be satisfied whether the agreement is between all parties who have an interest in the land sought to be partitioned."

It further says, "Revision will lie to set right a miscarriage of justice in the event of there being in the proceeding a fundamental vice which transcends the bounds of procedural error".

Speaking of procedural error, it is worth considering the words of Sarath De Abrew J. in *Padiwela Vs. Asoka and others*²

"The partition law is a specialized law seeking to award rights, title and interest in the land in suit to the parties concerned against all other suitors and against the world at large. The very finality of the interlocutory decree and the final decree envisaged in section 48(4) demands that the

¹ (1994) (3) SLR 262

² (2008) (2) SLR 312.

mandatory statutory procedure laid down by the legislature in all its wisdom should be followed to the very letter."

Since the judgment will go against the rules of natural justice, this judgment should be set aside. Natural justice requires hearing all parties. This test is essential where the order will be in Rem.

For the reasons above, we set aside the judgment dated 11.05.2000 by the learned Additional District Judge of Kegalle in case No.22450/P.

We further order the learned District Judge of Kegalle to give priority and hear and determine this partition action.

Appeal is allowed

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal