

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

Wickramasinghe Arachchige Ran Banda  
No.173, Devalagama.

**Substituted 10<sup>th</sup> Defendant-Petitioner-Petitioner**

**Vs.**

**CA /LTA/ 441/ 2005**

D.C. Kegalle Case No.22450/P

1A. Iroshan Eranga Prasad Wickramasinghe  
Jeewane, Dewalagama.

**Plaintiff-Respondent-Respondent**

Before: **PRESANTHA DE SILVA J. &**  
**K.K.A.V. SWARNADHIPATHI, J.**

Counsel: S.N. Vijithsingh (A.A.L.)  
(For the 10<sup>th</sup> Defendant-Petitioner-Petitioner)

Ashan Nanayakkara (A.A.L.) with Dharshika Perera (A.A.L.)  
(For the Plaintiff-Respondent-Respondent and 1-6<sup>th</sup>, 9<sup>th</sup> (A), 11<sup>th</sup> (A) and  
11<sup>th</sup> (B) Defendant-Respondent-Respondents.

Argument: By written submissions

Decided on: 03.02.2022

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

**ORDER**

A partition case was instituted at the District Court of Kegalle by Plaintiff and had named several parties as Respondents. At the trial, Plaintiff raised points of contest No.01 to 05 No.06 -13 were raised on behalf of 11<sup>th</sup> Defendant, points of contest No.14 -32 on behalf of the 10<sup>th</sup> Respondent. When perusing the 10<sup>th</sup> Respondent's points of the contest, it is evident that he had challenged the identification of the corpus.

The contention of the 10<sup>th</sup> Defendant-Petitioner that on the date fixed for further trial, he was sick and unable to attend court. In his absence, the remaining parties had settled the matter, and evidence was led on the settlement. The learned District Judge had delivered his judgment on the same day in accordance with the evidence. After that, the 10<sup>th</sup> Defendant-Petitioner moved Court under Section 48(4) of the Partition Act to vacate the settlement and the judgment. Further, to set aside the interlocutory decree entered and to start the trial afresh. Since Plaintiff-Respondent objected, the matter was fixed for inquiry, and on the 12<sup>th</sup> of October 2005, the order was delivered.

Being aggrieved by the said order 10<sup>th</sup>. Respondent-Petitioner has moved to invoke this court's jurisdiction and seek leave for Appeal. This order is in respect to deciding "whether leave should be given"?

The Petitioner states that he was the only party that contested the Plaintiff. He had also challenged the corpus. At the inquiry, which was by written submissions, the opposing party had taken many objections and given reasons as to why leave should be rejected. A revision application filed by the 10<sup>th</sup> Defendant-Petitioner on the same subject matter was dismissed by this court. Only after that, this application was re-activated, which is an abuse of appellate procedure. Therefore, this application should be rejected as it is possessed with laches.

The reasons why the revision application was dismissed were not forthcoming in written submissions. However, the 10<sup>th</sup> Defendant-Petitioner had in his written submissions mentioned

that C.A. Revision application No.212/2005 was in respect of the judgment dated 12.05.2005, whereas this application is under Section 48(4) of the Partition Act.

Another objection of the Plaintiff-Respondent and the contesting Respondent-Respondents is that there was no proxy of the 10<sup>th</sup> Defendant.

Section 48(4) of the Partition Act No.21 of 1977 as amended by Act No.17 of 1997 reads as follows:-

- (i) *Whenever a party to a partition action;*
- (ii) *Has not been served with summons, or*
- (iii) *Being a minor or a person of unsound mind, had not been duly represented by a guardian ad litem or*
- (iv) *Being a party who had duly filed his statement of claim and registered his address, fails to appear at the trial,*

*and in consequence thereof the right, title or interest of such party to or in the land which forms the subject matter of the interlocutory decree entered in action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian ad litem of such party may on or before the date fix for the consideration of the scheme of partition under section 35 or at any time not less than thirty days after the return of the person responsible for the sale under Section 42 is received by court, or the heirs or the executor or administer of such deceased party or any person duly appointed to represent the estate of the deceased party, may at any time, not later than thirty days after the return of the survey under Section 32 or the return of person responsible for the sale under Section 42, as the case may be, is received by the court, apply to court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered."*

*And*

*Section 48(4)(c ) reads as follows:-*

*(C) If upon inquiry .....court is satisfied –*

- (i) *that the party ..... having duly filed his statement of claim and registered his address, fail to appear at the trial owing to an accident, misfortune or other unavoidable cause, and*
- (ii) *that party had prima facie right, title, or interest to or in the said land and*
- (iii) *that such right, title or interest has been extinguished or such party has been other prejudicially affected by the said interlocutory decree."*

A study of this Section, among other things, provides that a party or the registered Attorney should be heard and decides what misfortune held the party from participating in the trial. An argument was formed that the Petitioner had not filed on record address for his Attorney or his address. When perusing the case record, a lawyer had appeared on many occasions. An Attorney formed even the points of the contest on behalf of the 10<sup>th</sup> Defendant. In any case, his address though not filed of record, appears in the Plaint and his statement of claim. In a partition case where the decree binds the entire world, the judges should be cautious. Justice should not only be done but also seem to have been done.

A judge hearing a partition case must be satisfied one measure above the expected standard that the case pending before him is a case where all steps have been taken before trial. To ensure all steps have been complied with, some District Court call a report from the registrar before fixing for trial. There is a question about whether the party was heard regarding his address not being registered. As he was contesting the portion from the inception, this would have been more prudent.

In his judgment dated 10<sup>th</sup> of October 2005, the learned District Judge observed the breach of the provision. In the order, the learned District Judge had observed that there was no Attorney on record for the 10<sup>th</sup> Defendant. However, when perusing the District Court case record, there is an entry on the 8<sup>th</sup> of June 1998 accepting contest points by the Additional District Judge. An Attorney-at-Law recorded the points on which the contest should be built up on behalf of the 10<sup>th</sup> Defendant. The observation of the learned District Judge when entering the order dated 12<sup>th</sup> of October 2005 should have given serious thought that an Attorney-at-Law had appeared on behalf

of the 10<sup>th</sup> Defendant on many occasions. On the date the evidence on the settlement was recorded, the same Attorney had informed the court that she had not received instruction from his client.

This is a serious matter which should be considered. The only opposing party who has informed the court that the corpus to be a partition does not belong to the Plaintiff or the other Defendants was not in court. A lawyer appeared without a proxy and informed the court that he had no instruction, which gave way to enter evidence followed by the judgment on a settlement among the parties excluding the contesting party.

When considering that Partition Law is a special law where the judgment is in rem, a Judge should be very cautious. The issue regarding a proxy is not an essential point on which a case should be set aside. The requirement of a proxy is not mandatory but a directory. This defect can be clarified at any point.

The order being canvassed should be carefully considered because the final decree and the judgment in a partition action are in rem. The court must investigate and be satisfied regarding the title of the land to turn all possible stones to uncover the admissibility of evidence about deeds and other documents filed before the court. To evaluate evidence and compare with documents produced in the trial.

For reasons discussed above, I hold that leave should be granted in terms of prayers (a) and (d) of the petition of Appeal dated the 31<sup>st</sup> day of October 2005.

**Judge of the Court of Appeal**

**PRESANTHA DE SILVA, J.**

I agree.

**Judge of the Court of Appeal**