

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

CA No: 1151/98(F)

Avissawella D.C. No.16699/P

Mewella Arachchilage Ratnatilaka
Meewella.

5th Defendant-Appellant

Vs.

Mewella Arachchilage Saranelis
Meewella.

Plaintiff-Respondent

Meewala Arachchilage Abbraham Singno
Amitirigala.

Meewala Arachchilage Steewan
Amitirigala.

And 12 others.

Defendant-Respondents

C.A. No.1151/98(F)

D.C. Awissawella Case No: 16699/P

BEFORE : **K.T. CHITRASIRI,J.**

COUNSEL : A.M.L. Amerasinghe and K.P. Fernando with Nandana Malkumara
for the 5th Defendant-Appellant.

D.D.P. Dassanayke for the Substituted 3rd Defendant-Respondent.

**ARGUED &
DECIDED ON** : 03.06.2013

K.T. CHITRASIRI,J.

When this matter was mentioned on 06.03.2013, an order had been made to substitute S. A. Lakshman Udaya Kumara as the 4A Defendant-Respondent. However the party who is dead is not the 4th defendant but is the 3rd Defendant namely, M.A. Jepin Nona. Therefore S.A. Lakshman Udaya Kumara should be substituted not as the 4A substituted Defendant-Respondent but as the 3A substituted defendant-respondent. The evidence upon which the substitution had been effected also relates to the deceased 3rd Defendant-Respondent and to her heirs. Therefore the order made on 06.03.2013 is amended to read as “ Court substitutes S.A. Lakshman Udaya Kumar as the 3A substituted Defendant-Respondent in the room of the deceased 3rd Defendant-Respondent.” Both Counsel have no objection to the aforesaid amendment being made to the order made in relation to the substitution effected on 06.03.2013.

Counsel for the appellant is directed to amend the caption accordingly.

This is an appeal seeking to set aside the order dated 10.11.1998. In that order learned District Judge of Avissawella refused to make an order on the application made in the petition dated 06.11.1998, stating that there is no provision in the Partition Act to do so. The said petition is found at page 275 of the brief and it had been filed to have an amendment to the allocation of shares, to fall in line with the evidence, particularly on the unchallenged evidence recorded on the 21.06.1994. Therefore, it is clear that the said application made in the petition dated 05.11.1998, is an application that falls within the ambit of Section 189 of the Civil Procedure Code. Therefore the learned District Judge herself should have corrected the allocation of shares acting upon Section 189 of the Civil Procedure Code since it is not an issue of law or an issue in respect of any fact. Therefore refusal to make a decision on the application made in the petition dated 5.11.1998 is erroneous. At this stage both Counsel concede that the learned District Judge should have made an order correcting the allocation of shares acting under Section 189 of the Civil Procedure Code. Accordingly, the order made on 10.11.1998 is set aside.

At this stage both counsel move that this matter be sent back to the District Court enabling the District Judge to make an order on the petition dated 05.11.1998 acting under Section 189 of the Civil Procedure Code correcting the share allocation found in the judgment dated 15.07.1994 (page 99 of the brief) . Both Counsel also agree to adopt the evidence as the evidence recorded before the present Judge sitting at the District Court of Awissawella for the purpose mentioned above. Accordingly, the learned District Judge of Awissawella is directed to to amend the allocation of shares found in the judgment having adopted the evidence relevant thereto.

Subject to the above variations appeal is allowed. Parties are to ~~bear~~ their own expenses.

Appeal allowed.

Jmr/-

JUDGE OF THE COURT OF APEPAL