

**IN THE COURT OF APPEAL OF THE DEMOCRATIC**

**SOCIALIST REPUBLIC OF SRI LANKA**

In application for leave to Appeal made  
under Sce. 754 (2) of the Civil Procedure  
Code.

Daniel Samarawickrema

"Smara", Thudawa,

Marata.

**PLAINTIFF**

**D.C Matara Case No. 18282/p**

**Court of Appeal Leave to Appeal**

**Application No. CALA 314/06**

**Vs**

1. Samuel Wilbert Samarawickrema  
Thudawa, Matara.
2. Maduwila Gamacharige  
Senehelatha Malinie De Silva  
Thotagahawatte, Thudawa  
Matara.
3. - do - Disni Indika Niranjali  
Samarawickrema
4. - do- Kalum Nalaka  
Samarawickrema
5. - do - Nilum Wathsala  
Samarawickrema
6. - do - Dharshi Nishanka  
Samarawickrema
7. Duncun Smararawickrema

Thotakumbura, Matara.

8. Theja Gajanayakage Sujith

Thatakumbura, Matara.

11. Edward Samarawickrema

Thudawa, Matara.

11a. Gunawathie Palliyaguru

Samarawickrema

Thudawa, Matara.

12. Jayamanne Samarawickrema

Thudawa, Matara.

**DEFENDANTS**

**AND NOW BETWEEN**

11a Gunawathie Palliyaguru

Samarawickrema

Thudawa, Matara.

**11a SUBSTITUTED DEFENDANT**

**PETITIONER**

**Vs**

Daniel Samarawickrema

"Samara"

Thudawa, Matara.

**PLAINTIFF RESPONDENT**

1. Samuel Wilbert Samarawickrema

Thudawa, Matara.

2. Maduwila Gamacharige

Senehelatha Malinie De Silva

Thotagahawatte, Thudawa

Matara.

3. – do – Disni Indika Niranjali  
Samarawickrema
4. – do- Kalum Nalaka  
Samarawickrema
5. – do – Nilum Wathsala  
Samarawickrema
6. – do – Dharshi Nishanka  
Samarawickrema
7. Duncun Smararawickrema  
Thotakumbura, Matara.
8. Theja Gajanayakage Sujith  
Thatakumbura, Matara.

**1<sup>st</sup>-8<sup>th</sup> and 12<sup>th</sup> DEFENDANT  
RESPONDENTS**

**BEFORE**

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

**COUNSEL**

: Ranjan Suwandaradne for the  
Substituted Defendant Petitioner  
Razik Zarook PC with Rohana  
Deshapriya for the Plaintiff  
Respondent and 1<sup>st</sup> to 7<sup>th</sup>  
Defendant Respondents.

**ARGUED ON**

: 13<sup>th</sup> February, 2015

**DECIDED ON**

: 10<sup>th</sup> July, 2015

**Deepali Wijesundera J.**

The plaintiff respondent has filed a partition case in the District Court of Matara to partition a land called "Kotakumbura". When the preliminary survey was done the eleventh defendant petitioner and the twelfth defendant respondent have claimed shares and they were added as parties to the action. The trial had been concluded and interlocutory decree had been entered allocating shares to parties including the eleventh and twelfth defendants. Thereafter the final scheme of partition was also prepared and submitted to court for consideration. Thereafter the eleventh defendant has died and 11a defendant had been substituted. At the inquiry on the final partition scheme 11a substituted defendant petitioner has objected to the final scheme of partition on the grounds that a major part of the carpus had been acquired by the state. The plaintiff and first and second defendant have objected to this application on the basis that all parties have admitted the carpus of the partition case and that court has no jurisdiction to exclude a part of the carpus at the final partition stage and also stated that there was no evidence to prove acquisition by the state.

The 11a defendant petitioner stated that as per Gazette notification dated 10/03/1981 marked as X the said lots are already

acquired by the state therefore the division of the final partition should be restricted to the lots which are not acquired.

Upon consideration of the application of the 11a defendant the learned District Judge has overruled the objection of the 11a defendant. The learned District Judge has stated in his order that all parties admitted Lot 1 of plan marked X as the corpus of the case and that the 11a defendant objected to the final partition stating that, a part of the corpus has been acquired by the state and moved that interlocutory Decree be amended which can not be done since it is not a chronological or typographical error. He has also stated that the application was not made before the interlocutory Decree was entered and that the eleventh defendant had participated in the trial and was given shares from the corpus, therefore he has no right to object to the final partition scheme. The District Judge has overruled the eleventh defendant's objection and entered the final decree.

Being dissatisfied with the said order the 11a defendant has filed the instant application seeking leave to appeal stating that the partition decree is null and void since it has been entered in respect of a state land and that irreparable loss will be caused if of the acquired lots are including in the final partition.

The learned counsel for the 11a respondent petitioner stated that it was brought to the notice of the Trial Judge about the acquisition of a portion of the property by the state by virtue of Gazette notification marked **M** and under those circumstances he should have considered the grave injustice caused to the party in the event of confirming the final decree. He further stated that the District Judge should have left the acquired area from the final scheme and in the circumstances the order of the District Judge is *per se* erroneous. The learned counsel for the 11a defendant petitioner cited the judgments in **Ranesinhe Vs Henry 1 NLR 303**, **Athukorala Vs Swaminathan 41 NLR 165**, **Silva Vs Silva 44 NLR 494**, **Perera Vs Agidahamy 48 NLR 87**, **Sinnathangam Vs Meera Mohaideen 60 NLR 397** and submitted that this court had the power to set aside a decree to ensure that the decision given in an appeal is not rendered nugatory.

The above mentioned judgments deal with revision applications made to the appellate court and not in the circumstances where the instant application is made.

The learned counsel for the respondents argued that all the parties to the partition action admitted the corpus and that the eleventh defendant participated at the trial until the final decree stage and only

then he objected to the partition scheme stating that a part of the carpus has to be excluded as it has been acquired by the state.

The learned counsel stated that the Interlocutory Decree can only be amended if there are typographical errors or mistakes and that this application was not made before the interlocutory decree was entered. The counsel submitted that the District Judge has no jurisdiction to entertain the objection raised by the petitioner to the final scheme of partition at that stage.

The counsel for the respondent stated that the Gazette notification was published on 10/03/1986 and the partition case was filed in 1996 ten years after the said Gazette notice, which only indicates the intention of acquisition which was neither proceeded nor concluded.

The respondent's counsel further submitted that under *Sec. 26 (1) of the Partition Act* part of the carpus can be excluded only at the Interlocutory decree stage. And under *Sec. 48* of the said Act the Interlocutory decree can be amended in limited circumstances and therefore the petitioner's application does not come within the powers

vested in court under Sec. 48 of the Partition Act, at the final partition stage.

The learned counsel for the respondent cited the judgments in **Hamid et al Vs Special Officer and C.N. Hevavitharana Vs Themis Silva and others 63 NLR 68** and stated that a decree in a partition case to which the Crown is not a party does not bind the Crown. These two judgments are not relevant to the instant application.

**Sec. 26 of the Partition Act states thus;**

- (1). At the conclusion of the trial of a partition action, or on such later date as the court may fix, the court shall pronounce judgment in open court, and the judgment shall be dated and signed by the judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the court shall enter an interlocutory decree in accordance with the findings in the judgment, and such decree shall be signed by the judge.*
- (2). The interlocutory decree may include one or more of the following orders, so however that the orders are not inconsistent with one another:-*

*(a). order for a partition of the land;*

- (b). order for a sale of the land in whole or in lots;*
- (c). order for a sale of a share or portion of the land and a partition of the remainder;*
- (d). order that any portion of the land representing the share of any particular party only shall be demarcated and separated from the remainder of the land;*
- (e). order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties;*
- (f). order that any specified portion of the land sought to be partitioned or surveyed be excluded from the scope of the action.*

In Sec. 26 (2) (f) it is stated that if a portion of the land is to be excluded it has to be done at the interlocutory decree stage. The 11a respondent petitioner has been a party to the partition action and he has

not said anything about exclusion at the interlocutory stage and only at the final partition he has objected to the land being so partitioned.

**Sec. 48 (3) of the said Act states;**

***(3). The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.***

***(a). whenever a party to a partition action***

***(i). has not been served with summons, or***

***(ii). Being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or***

***(iii). Being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial,***

Therefore under both Sec. 26 and 48 the petitioner can not object to the final partition decree. He has admitted the corpus at the commencement of the trial in the District Court.

The said Gazette notice had been published long before the partition action was filed and the parties were aware of the said notice when they admitted the corpus at the commencement of the trial.

For the afore stated reasons I see no valid reason to allow the application of the 11a respondent petitioner. Petitioner's application is dismissed with costs fixed at Rs. 10,000/=

**JUDGE OF THE COURT OF APPEAL**

**M.M.A. Gaffoor J.**

I agree

**JUDGE OF ~~THE~~ COURT OF APPEAL**