

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

1. Jawarange Shoroma Priyadarshani
2. Jawarange Susantha Padmasiri
3. Jawarange Nishantha Samaraweera

All of Nelawa, Kohilagedara.

CA Case No. 731-731A / 1997 (F)

Defendant - Appellants

DC Kurunegala Case No. 31000/P

-Vs-

1. Jawarange Siyadoris (deceased)
of Kohilagedara.

Plaintiff - Respondent

- 1A. Jawarange Sitha Mallika,
3rd Mile Post, Kohilagedara,
Kurunegala.

Substituted Plaintiff - Respondent

2. Jawarange Ruwina (deceased)
of Kohilagedara.
3. Jawarange Baby of Kowana.
4. Jawarange Podina *alias* Podinona (deceased)
of Dewahera, Algama.

5. Jawarange Leelawathie

of Haltota, Kohilagedara.

6. Jawarange Piyadasa (deceased)

of Ihalawatta, Nelawa,
Kohilagedara.

7. Jawarange Siriwardena (deceased)

No.89, Anuradhapura Road,
Puttalam.

8. Jawarange Kamala

9. Jawarange Gunawardena

10. Jawarange Jenita

11. Jawarange Keerthiratne

12. Jawarange Jennet Mallika

13. Jawarange Dushil Hemachandra

14. Jawarange Shimanthi Indrani

15. Jawarange Nimal Rajaratne

16. Jawarange Kanthi Kusumalatha

17. Jawarange Srimathi Pushpa Mangalika

18. Jawarange Ranjani Asoka Pushpakumari

19. Jawarange Meragalge Vitharbina

20. Jawarange Anura Ananda

21. Jawarange Udayakantha

All of Kohilagedara

Defendant - Respondents

**In the matter of an application for
Substitution in the room of deceased
Jawarange Podina *alias* Podinona the 3rd
Defendant-Respondent**

Jawarange Sitha Mallika,

3rd Mile Post, Kohilagedara,

Kurunegala.

Substituted Plaintiff - Respondent -

Petitioner

-Vs-

1. Dewatha Pendige Sunethra Mallika,

No. 217A, Batalawatta,

Radawadunna.

2. Dewatha Pendige Nisantha Premasiri,

No. 181/03, Debahera,

Nittambuwa.

Respondents

1. Jawarange Shoroma Priyadarshani

2. Jawarange Susantha Padmasiri

3. Jawarange Nishantha Samaraweera

All of Nelawa, Kohilagedara.

Defendant - Appellant - Respondents

And

1st to 20th Defendant - Respondent -

Respondents

BEFORE : **A.H.M.D. Nawaz, J.**

COUNSEL : W. Dayaratne, PC with R. Jayawardhena for
the Defendant-Appellant-Respondents.

C. De Silva with Sarath Walgamage for the
Substituted Plaintiff-Respondent.

Written Submissions on : 26.09.2014 (for the 21st, 22nd and 23rd
Defendant-Appellant-Respondents)

09.29.2014 (For the Substituted Plaintiff-
Respondent)

Argued on : 08.07.2016

Decided on : 22.11.2016

A.H.M.D. NAWAZ, J,

The question for determination in this appeal is whether the failure to file a pedigree along with a statement of claim is fatal to the prosecution of the claim in a partition action. Under the part of Partition Law No. 2 of 1977 as amended titled "Procedure

after Service of Summons", one finds Section 19(1) which emphasizes the requirement to file a pedigree along with a statement of claim. The relevant provision of the Law goes as follows:

"On or before the day specified in the summons issued in a partition action or on or before such later date as the court may fix for the purpose-

*(a) any defendant in the action may file or cause to be filed in court a statement of claim setting out the nature and extent of his right, share or interest in, of or in the land to which the action relates and **shall, if he disputes any averment in the plaint relating to the devolution of title file or course to be filed in court, together with the statement of claim, a pedigree showing the devolution of title;**"*

The main thrust of the appeal before me raises the consequences of a failure to file a pedigree along with the statement of claim. The appeal of the 5th Defendant bears the number CA 731/97 (F), whilst the 21st to 23rd Defendants appeals in CA 731A/97 (F). It is the contention of the 21st to 23rd Defendants that their failure to comply with Section 19(1) of Partition Law as amended would not render their statement of claim liable to be rejected and such a course of action would result in non-investigation of title.

Let me set out the factual template that forms the basis of this appeal.

Factual Matrix

The original Plaintiff-Respondent (hereinafter referred to as "the Plaintiff") instituted this action in the District Court of Kurunegala on 21.08.1988 seeking a partition of the land described in the schedule to the plaint. The 5th Defendant filed a statement of claim dated 25.03.1992 disputing the title pleaded in the plaint. The 21st, 22nd and 23rd Defendant-Appellants (hereinafter referred to as "the 21st, 22nd and 23rd Defendants") filed a joint statement of claim dated 05.04.1995 disputing the title

pleaded in the plaint and claiming title to shares in the said land by virtue of deeds bearing Nos. 5994, 5995 and 5993. This was the statement of claim that did not carry with it a pedigree. A brief look at the proceedings that commenced on 20.11.1995 and thereafter, leading to the issue that has come up in this appeal, becomes apposite now. Since the Plaintiff was unable to have his issues raised due to a defect in the devolution of title pleaded in the plaint, he made an application to amend the plaint and the learned District Judge allowed the application-vide the proceedings dated 20.11.1995 at p.127 of the appeal brief. The amended plaint dated 24.02.1996 was thereafter filed and the 7th, 8th, 9th and 10th Defendants too followed suit by filing an amended statement of claim dated 10.17.1996 claiming an undivided 1/36th share of the said land.

The trial proper on the amended plaint commenced on 25.04.1997 with the parties recording their admissions and issues.

The pivotal issue No.14 raised by the Plaintiff engaged the question of failure on the part of the 5th and 21st, 22nd, and 23rd Defendants to file a pedigree along with their statements of claims.

පැමිණිල්ලේ අතිරේක විකඳිය යුතු ප්‍රශ්න

පස්වන විත්තිකරු හා 21st 22 හා 23 විත්තිකරුවන්ගේ නිමකම් ප්‍රකාශ බෙදුම් පනතේ 19(1) (අ) වගන්තියේ ප්‍රතිපාදනයන්ට අනුකූලව ඉදිරිපත් කර නැද්ද?

The learned District Judge took the view that the failure to annex a pedigree, disclosed in the statement of claim of the 21st to 23rd Defendant-Appellants, is a fatal irregularity and therefore decided issue No.14 in favour of the Plaintiff-Respondent and rejected the statement of claim of the 21st to 23rd Defendant-Appellants.

In terms of Section 7 of the Partition Act states that if the Plaintiff in a partition action fails to comply with Section 4, 5, or 6 the court may;

- a) return the plaint so that the Plaintiff may, then and there or within such time as may be fixed by the Court, comply with those requirements; or
- b) reject the plaint

The learned District Judge having answered issue No.14 in the affirmative stated that in view of his answer to issue No.14, the 21st to 23rd Defendants could not proceed with their statement of claim and hence they cannot proceed with their statement of claim to get a judgment according to issues No.10 to 13 raised by them at the trial. In other words, the learned District Judge has rejected the statement of claim filed by the 21st -23rd Defendant-Appellants on the basis that a pedigree relating to their title has not been attached to the statement of claim. The issue No 14 which had been raised by the Plaintiff was treated as a preliminary question of law.

Thereafter the Plaintiff commenced his evidence narrating all that had been averred in the Plaint and concluded the evidence marking the preliminary plan and the report of the surveyor.

It has to be noted though that issues No.1 to 9 raised by the Plaintiff-Respondent were not answered by the learned District Judge and the judgment is premised entirely only on the oral testimony of the Plaintiff-Respondent.

Furthermore the statement of claim filed by the 21st to 23rd Defendant-Appellants is not for a larger land, but for the same land described in the schedule of the plaint and the preliminary plan and as such there is not even a requirement to have a fresh *lis pendens*.

The judgment dated 09.05.1997 has just allotted the shares as prayed for in the plaint.

Thus it would appear that there has not been a proper investigation of title by the learned District Judge of Kurunegala.

In the circumstances it was argued by the learned President's Counsel that the judgment is liable to be impeached as due process has not been observed in the case of the Defendant-Appellants.

Non Compliance with Section 7 and 19 of the Partition Law

Section 19(1) of the Partition Act no doubt refers to the necessity to file a pedigree in the event that a Defendant disputes any averment in the plaint relating to the devolution of title but that section does not prescribe the sanction of striking down the statement of claim when it does not comply with the requirement to file a pedigree. The Section does not specifically say that the Defendant who discloses a different pedigree shall suffer the sanction of his statement of claim being struck down merely because he does not annex a pedigree. Nowhere in the law is such a sanction predicated.

So the learned District Judge fell into an error by treating this failure as warranting a rejection of the statement of claim. Though the Learned District Judge transposed the failure to comply with Section 19 (1) vis a vis a non compliance specified in Section 7, it has to be remembered that even Section 7 does not predicate a dismissal of the Plaint. It does contain an alternative of giving an opportunity to file an amended plaint, which was accorded to the Plaintiff in the case.

There has to be parity of status for the parties and the question before the Court was whether the obligation to file a pedigree was mandatory or directory. I must observe that all the rules of procedure are the handmaid of justice. The language employed by the draftsman of procedural law may be liberal (*may*) or stringent (*shall*), but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of the CPC, or any

other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. On this basis, I take the view that the provision is not mandatory but directory, and the Court could condone the non filing of pedigree and even grant time to rectify the error in the event of an application.

In any event a partition action is *sui generis* as the Court has to determine the rights of parties having regard to the rights of all parties and the rights of the 21st to 23rd Defendant-Appellants could not have been shut out along with those of their father the 5th Defendant. In regard to Civil Procedure Code, Sarkar in his "Code of Civil Procedure" (Vol. 1, at p. 842) states:

"Where a contingency happens which has not been anticipated by the framer of the Civil Procedure Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation."

These comments are equally applicable to Partition Law which also contains a *casus omissus* in Section 79 to bring in the procedure laid down in the Civil Procedure Code in a like matter or question if such procedure is not inconsistent with the provisions of the Partition Law.

What strikes me as far more fundamental is the absence of an investigation of title in this case as it is trite that a partition decree binds the entire world.

Thus trial judges cannot abdicate such an important obligation in a case where they have to determine rights *in rem*.

In the case of **Peiris v. Perera** 1 N.L.R 362 the Supreme Court held that the court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly

satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.

This cardinal duty was again adverted to in ***Richard and Another v. Seibel Nona and Others*** (2001) 2 Sri L.R. 1 wherein it was held that it was the duty of the judge to fully investigate into title to the land and shares.

In the case of ***Gunathilake v. Murieal Silva*** 79 N.L.R 481, the Supreme Court held that it is the duty of court in a Partition Action to investigate the title of parties under Section 25 of Partition Act. Further the Court proceeded to hold that the original court had failed to pay attention to the claims of the parties disclosed as having claims or rights in the property. Therefore interlocutory decree was set aside.

In the case of ***Golagoda v. Mohideen*** 40 N.L.R page 92, it was held that the court should not enter a decree in a Partition Action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property.

Investigation of title by court is a necessary pre-requisite to every partition decree.

In the case of ***Sopaya Silva and Another v. Magilin Silva*** (1989)2 Sri.L.R 105, the learned District Judge dismissed the case holding that the *lis pendens* was wrongly registered. The Court of Appeal held that it was not open to the District Judge to dismiss the case on the point of wrong registration of *lis pendens*- a point on which there was no contest and no argument was heard. It is a violation of natural justice. Therefore the Court permitted any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey plan.

An argument was mounted by the Counsel of the Plaintiff-Respondent that the 21st to 23rd Defendant-Appellants had not challenged the order of the learned District Judge rejecting their statement of claim by way of an application for Leave to Appeal and therefore they were estopped from challenging the same before this Court in an appeal.

I am afraid I would disagree. A question of law could be taken up in an appeal even if it had not been brought to this Court by way of a leave to appeal. It is noteworthy that since the Learned District Judge treated the non filing of a pedigree as an issue of law it could be taken up in the main appeal-See Marsoof J in ***Jamaldeen Abdul Latheef v. Abdul Maajeed Mohamed Mansoor and Another*** (2010) 2 Sri.LR 333.

Another contention of the Counsel of the Plaintiff-Respondent was that the 21st - 23rd Defendant-Appellants must have sought leave of court to cross examine the Plaintiff. The learned District Judge had erroneously rejected the statement of claim and a Defendant whose statement of claim had been rejected no doubt could have utilized Section 25 (2) of the Partition Law but that failure does detract from the right of the Defendant to impugn an erroneous decision on a question of law.

The learned President's Counsel also invoked the maxim of "***Actus Curiae Neminem Grovabit***"-No Court shall injure a party and it is open to a Defendant to contend before this Court that an Act of the Court should cause no prejudice to him.

I take the view that for the reasons stated above I proceed to set aside the judgment of the learned District Judge dated 09.05.1997 and order a retrial directing the learned District Judge to conduct the retrial subject to the right of the appellants to file a statement of claim only to bring in a pedigree if they wish to file one.

JUDGE OF THE COURT OF APPEAL