

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

*In the matter of an appeal under Section 5C of the  
High Court of the Provinces (Special Provision)  
(Amendment) Act No. 54 of 2006 read with Article 128  
of the Constitution of the Republic of Sri Lanka.*

**SC/ Appeal/ 171/ 2016**

**SC/ HCCA/ LA/ 72/ 2016**

**WP/ HCCA/ COL/ LA/ 131/ 2013**

**DC (Colombo) 20353/P**

Sulpatul Kairia Abdul Carder

No. 70/2,

Green Lane,

Colombo 13.

**PLAINTIFF**

**Vs.**

1. Mohamed Haniffa Mohamed Iqbal

2. Mohamed Haniffa Mohamed Rauf

Both of No. 76/1/1,

Abdul Hameed Street,

Colombo 12.

**DEFENDANTS**

**AND THEN BETWEEN**

1. Mohamed Haniffa Mohamed Iqbal

2. Mohamed Haniffa Mohamed Rauf

Both of No. 76/1/1,

Abdul Hameed Street,

Colombo 12.

**DEFENDANTS-APPELLANTS**

**Vs.**

Sulpatul Kairia Abdul Carder  
No. 70/2,  
Green Lane,  
Colombo 13.

**PLAINTIFF-RESPONDENT**

**AND NOW BETWEEN**

1. Mohamed Haniffa Mohamed Iqbal
  2. Mohamed Haniffa Mohamed Rauf
- Both of No. 76/1/1,  
Abdul Hameed Street,  
Colombo 12.

**DEFENDANTS-APPELLANTS-APPELLANTS**

**Vs.**

Sulpatul Kairia Abdul Carder  
No. 70/2,  
Green Lane,  
Colombo 13.

**PLAINTIFF-RESPONDENT-RESPONDENT**

**BEFORE** : **P. PADMAN SURASENA, J.**  
**A. H. M. D. NAWAZ, J.**  
**ACHALA WENGAPPULI, J.**

**COUNSEL** : Kuvera de Zoysa, PC. with Kamran Aziz and Samadhi Mahagodage for the 1<sup>st</sup> & 2<sup>nd</sup> Defendant-Appellant-Appellants.

Gihan Liyanage instructed by Shanika Karunaratne for the Plaintiff-Respondent-Respondent.

**ARGUED &**

**DECIDED ON** : 13-05-2024

**P. PADMAN SURASENA, J.**

Court heard the submissions of the learned President's Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Appellant-Appellants (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) and also the submissions of the learned Counsel for the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) and concluded the argument of this case.

This is a partition action in which the learned Additional District Judge had entered the interlocutory decree in accordance with the findings in the judgment dated 15-06-2009. Although there had been several further litigations thereafter also in appellate Courts, no party has been successful in contesting the share allotments made by the District Court in the said judgment dated 15-06-2009. Accordingly, the interlocutory decree entered on 04-11-2009 has continued to remain in force to date.

After the Surveyor made his return to the commission issued by Court proposing a Scheme of Partition, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had filed their statement of objections to the said proposed Scheme of Partition. The said objection was raised on the basis that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should get an enhanced compensation as per the valuation report they had submitted marked 2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the said objections had claimed that they had made improvements to the upstairs portion of the building situated in Lot A3<sup>1</sup> which has been allotted by the proposed Scheme of Partition, to the Plaintiff. Thus, in view of the said allotment to the Plaintiff, it was the position of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that they should have been granted a compensation of Rs. 641,631.00 instead of Rs. 3000.00. We note that the sum of Rs. 3000.00 as compensation has been calculated on the basis that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled only for 790 square feet out of a total of 1600 square feet. The learned Additional District Judge after the inquiry conducted in that regard, by his order dated

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<sup>1</sup> Lot A3 of Plan No. 1047 dated 04-11-20210 prepared by K. G. Krishnapillai Licensed Surveyor.

27-09-2013, had rejected the claim for enhanced compensation put forward by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the afore-said improvements they have claimed.

Being aggrieved with the order dated 27-09-2013 pronounced by the learned Additional District Judge, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had filed a Leave to Appeal Petition in the Civil Appellate High Court. The Civil Appellate High Court had granted Leave to Appeal to that Petition. After the argument, the Civil Appellate High Court by its judgment dated 12-01-2016 had proceeded to dismiss that appeal. The said judgment dated 12-01-2016 is a one-page judgment and hence it would be convenient to reproduce its entirety for the purpose of adjudicating this appeal. The judgment states as follows:

*"The defendants have filed this appeal with leave obtained from the previous Bench against the order of the District Judge dated 27.09.2013 whereby the Final Partition Plan has been confirmed. This has been done after an inquiry upon the statement of objections filed by the defendants dated 31.03.2011 against the acceptance of the Final Plan. The only point raised in the said statement of objections by the defendants is the inadequacy of compensation awarded to them by the Court Commissioner to be paid by the plaintiff. At the inquiry the 2nd defendant has given evidence and in his evidence too he has stressed only on that point. Thereafter the further inquiry to call further witnesses by the defendants has been postponed. Nearly two years after the evidence of the 2nd defendant an altogether new objection has been made by the defendants **orally**<sup>2</sup> to the effect that in the circumstances of this case no partition is possible but land has to be sold and proceeds to be distributed among parties. This is clearly an afterthought, and it is this new objection which has basically been overruled by the District Judge in the impugned order.*

*A party to an action cannot present a case at the trial or inquiry materially different from what he has placed on record. (Ranasinghe v. Somawathie [2004] 2 Sri LR 154, Hildon v. Munaweera [1997] 3 Sri LR 220, Gnananathan v. Premawardane [1999] 3 Sri LR 301)*

*Appeal is dismissed with costs."*

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<sup>2</sup> Emphasize is added.

Being aggrieved with the said judgment dated 12-01-2016 pronounced by the Civil Appellate High Court, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have lodged the Leave to Appeal Petition relevant to the instant appeal in this Court. This Court after hearing the submissions of both parties by its order dated 19-09-2016, has granted Leave to Appeal on the following question of law.

*"Has the Civil Appellate High Court erred and/or misdirected itself in law by failing to appreciate and/or determine, that a legal objection can be raised at any time during the pendency of an action or appeal, and hence, the Petitioners were entitled to raise the objection pertaining to the fact that the partitioning of the land was impracticable and unenforceable, even though the same may not have specifically been pleaded in the said Statement of Objections of the Petitioners?"*

Perusal of the Petition of Appeal<sup>3</sup> dated 10-10-2013 produced marked **X 13** in this proceeding shows clearly that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had canvassed several matters pertaining to the claim for improvement they had agitated before the District Court. This is found in paragraph (8) of their Petition of Appeal filed in the Civil Appellate High Court. The grounds of appeal relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Civil Appellate High Court are found in paragraphs 9(a) - 9(f) of the said Petition. However, it is clear that the Provincial High Court of Civil Appeals has not considered any of the grievances of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in its judgment dated 12-01-2016.

The reference to the grievance set out in paragraph 9(c)<sup>4</sup> by the learned Judge of the Civil Appellate High Court in his judgment is simply to state that he was not prepared to consider that grievance as he had taken the view that it was raised orally for the first time in the appeal before the Civil Appellate High Court. Thus, the grievance of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in paragraph 9(c) of the Petition also remain unresolved by the Provincial High Court of Civil Appeals.

We observe that the concern of a presence of a legal impediment to partition the corpus into further subdivisions is not a concern that has been raised for the first time in the appeal before the Civil Appellate High Court as claimed by the learned Judge of the Civil Appellate High Court. The documents in the record bear testimony to that fact. Learned President's Counsel

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<sup>3</sup> Petition of Appeal filed in the Civil Appellate High Court.

<sup>4</sup> Petition of Appeal filed in the Civil Appellate High Court.

for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also brings to the attention of Court that the Surveyor also had raised the issue of undesirability to partition the land in that manner in the report he had submitted with regard to the proposed Scheme of Partition marked **X 8**.

According to the proposed Scheme of Partition (Plan No. 1047 dated prepared on 04-11-2010 by K. G. Krishnapillai (Licensed Surveyor), the corpus which is Lot **A** has been sub-divided into three Lots, depicted as **A1** , **A2** , **A3**. Their extents are given as follows:

**A1** - 0 A, 0 R, 2.535 P.

**A2** - 0 A, 0 R, 2.535 P.

**A3** - 0 A, 0 R, 05.07 P.

Total extent of Lot **A** = 0 A, 0 R, 10.14 P.

We observe that the fact that the afore-mentioned proposed Scheme of Partition would result in allotting to the parties, the extents which would become less than the minimum extent required to be maintained by written law regulating the subdivision of lands for development purposes in terms of Section 26(3) of the Partition Law (as amended by Act No. 17 of 1997) has been clearly adverted to, by the Surveyor in his report produced, marked **X 8(1)**, in this proceeding. The Surveyor has stated this position in his report as follows:

*"Lot A has been allotted in common to the Plaintiff, 1<sup>st</sup> Defendant & 2<sup>nd</sup> Defendant in terms of the Section 13 in the Partition (Amendment) Act No. 17 of 1977 [sic]<sup>5</sup> as the individual extent is less than written law of the Urban Development Authority."*

We further observe that the learned District Judge in fact has made a conclusion in his Order<sup>6</sup> on the issue of the subdivisions becoming less than the minimum extent required by written law<sup>7</sup> in terms of Section 26(3) of the Partition Law. We note that this is the District Court order which has been impugned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants before the Provincial High Court of Civil Appeals. Therefore, it is clear to us that it is not factually correct to categorize this objection as an objection which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had raised orally for the first time in the appeal before the Provincial High Court of Civil Appeals.

<sup>5</sup> Section 13 of the Partition (Amendment) Act No. 17 of 1997 has amended Section 26(3) of the Partition Law No. 21 of 1977; thus, the reference by the Surveyor therein must be taken as a reference to Section 26(3) of the Partition Law No. 21 of 1977 as amended by Act No. 17 of 1997.

<sup>6</sup> In paragraph 02 of page 08 of the Order dated 27-09-2023 produced marked **X 12**.

<sup>7</sup> Regulating the subdivision of lands for development purposes.

Thus, for the above reasons, we hold that the assertion by the learned Judge of the Civil Appellate High Court, i.e., the assertion that the said grievance was raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants orally for the first time in the appeal before the Civil Appellate High Court is clearly a factually erroneous conclusion. We see no justification for the said conclusion reached in the judgment dated 12-01-2016 pronounced by the Provincial High Court of Civil Appeals.

For the foregoing reasons, we proceed to answer the question of law in respect of which this Court has granted Leave to Appeal as follows:

The Civil Appellate High Court has erred and/or misdirected itself in law by holding that the concern of a presence of a legal impediment in terms of Section 26(3) of the Partition Law to partition the corpus into further subdivisions is a concern that has been orally raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the first time in the appeal before the Civil Appellate High Court.

Thus, in view of the answer provided for the above question of law, the impugned judgment dated 12-01-2016, pronounced by the Provincial High Court of Civil Appeals cannot be permitted to stand. We proceed to set aside the judgment dated 12-01-2016 pronounced by the Provincial High Court of Civil Appeals. We direct the Provincial High Court of Civil Appeals to consider the appeal filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants afresh and thereafter pronounce judgment according to law.

**JUDGE OF THE SUPREME COURT**

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

I agree,

**JUDGE OF THE SUPREME COURT**

**ACHALA WENGAPPULI, J.**

I agree,

**JUDGE OF THE SUPREME COURT**

NT/-