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

Lokumanage Sumitra Perera,
"Yamuna", Veedagama,
Bandaragama.
Plaintiff-Respondent-Appellant in
SC/APPEAL/71/2023

Suriarachchige Rupawathi,
Suriarachchige Kamalawathie,
Suriarachchige Ariyasena,
All of Veedagama, Bandaragama.
5th, 6th and 7th Defendant-
Respondent-Appellants in
SC/APPEAL/72/2023

SC/APPEAL/71/2023
SC/APPEAL/72/2023
WP/HCCA/KAL/LA/09/2020
DC HORANA 6490/P

Vs.

1. Dissanayakage Dona Leelawathie,
2. Dissanayakage Dona Wimalawathie,
3. Wijemanna Mohottige Kanthi,
4. Suriarachchige Sumanadasa,

8A. Don Lalith Chandana Dissanayake,
All of Veedagama, Bandaragama.

Defendant-Respondent-Respondents

9A. Kankanige Somaratne,
74, “Samantha”,
Veedagama,
Bandaragama.
Defendant-Petitioner-Respondent

10. K.S. Perera,

11. K. Somasiri,
Both “Samantha”,
Veedagama, Bandaragama.

12. A. Somawathie,
Veedagama, Bandaragama.
Defendant-Respondent-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: G. Samaranayake for the Plaintiff-Respondent-Appellant in SC/APPEAL/71/2023.

Shyamal Collure with Prabhath Amarasinghe for the 5th to 7th Defendant-Respondent-Appellants in SC/APPEAL/72/2023.

Yuwin Matugama with Oshadi Fernando for the 9A, 10th and 11th Defendant-Petitioner-Respondents.

Argued on: 24.06.2024

Decided on: 09.10.2024

Samayawardhena, J.

This is a partition action filed by the plaintiff in the District Court of Horana on 04.09.1997. After the trial, the judgment was delivered by the District Court on 07.03.2007. Being aggrieved, four parties preferred appeals to the High Court of Civil Appeal of Kalutara, which delivered four judgments on 17.11.2011. On appeal, this Court, by judgment dated 11.09.2015, set aside the judgments of the High Court and directed the High Court to hear the appeals afresh on the basis that the said judgments had been delivered without taking steps to substitute the 9th defendant who had passed away while the appeals were pending in the High Court. Thereafter, the 9(a) defendant was substituted in place of the deceased 9th defendant.

However, when the case record was sent to the High Court on the second occasion, the High Court, in my view, adopted a more convenient approach. The new Bench of the High Court, by judgment dated 02.04.2018, summarily set aside the judgment of the District Court by stating "*it is our view that the judgment dated 07.03.2007 is a judgment, which does not fall within section 187 of the Civil Procedure. Therefore, we set aside the judgment and send this case back to the District Court for the present District Judge to write the judgment on the same pedigree, but if he so wishes he can let the parties to adduce more evidence and the learned District Judge is further directed to hear the parties in terms of section 184 of the Civil Procedure Code.*"

Before reaching this conclusion, the High Court, by two sentences referred to two contentions made by the appellant's counsel against the District Court judgment. However, it did not clarify whether it accepted these two contentions or whether they were sustainable in law. The High Court then stated that the District Judge had failed to provide reasons for the conclusion.

Judicial decisions must be clear and specific, without leaving room for varying interpretations. Clarity and specificity in judicial decisions are essential to maintain the integrity of the law, foster public confidence in the judiciary, promote legal certainty, and uphold the rule of law. The above order of the High Court, in my view, is vague. The District Judge has been directed to write the judgment "on the same pedigree" perhaps because, according to the proceedings, the parties agreed to a composite pedigree at the trial. When the direction is to write the judgment based on the same pedigree accepted by Court, it precludes the parties from adopting new positions which deviate from that pedigree.

Thereafter, the District Judge was further directed "*to hear the parties in terms of section 184 of the Civil Procedure Code*". I fail to understand how the parties can be heard under section 184 of the Civil Procedure Code, as this section pertains solely to the pronouncement of judgment. There is no provision for a hearing under this section. Section 184(1) reads as follows: "*The court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsel or registered attorneys (or recognized agents), shall, after consultation with the assessors (if any), pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their registered attorneys at the termination of the trial.*" The term "*after the parties have been heard*" in this section does not create a fresh right of hearing.

According to the High Court, the question was not whether the parties were heard, but rather that the District Judge did not give reasons for his findings in the judgment in violation of section 187 of the Civil Procedure Code.

The procedure for conducting trials including how parties should be heard are set out in the preceding sections of the Civil Procedure Code. In any event, procedure for conducting trials in partition cases are set out in the Partition Law No. 21 of 1977, not in the Civil Procedure Code. In terms of section 79 of the Partition Law, the Civil Procedure Code is applicable only where there is *casus omissus*.

When the case record was returned to the District Court, the 9(a) defendant moved to file a statement of claim, which was rejected by the District Court by order dated 07.02.2020 on the basis that the High Court had not granted permission to file pleadings. On appeal, the High Court by order dated 10.02.2021 directed the District Court to allow the 9(a) defendant to file a statement of claim and proceed with the case stating *inter alia* that "*At a trial or inquiry in a partition action whether a party intends to call evidence or not is up to him and if such party decides to call evidence, then there should be a statement of claim filed by that party*." It is against this order dated 10.02.2021 that the plaintiff and the 5th-7th defendants have now appealed to this Court.

If "*the present District Judge to write the judgment on the same pedigree*", the 9(a) defendant cannot be allowed to take up new positions that deviate from the accepted pedigree.

There is no dispute that the 9th defendant was made a party to the case in the plaint itself and served with summons. In paragraph 24 of the plaint, the plaintiff clearly stated that the 9th defendant does not have soil rights but was made a party as she is living on the land. The 9th defendant did not contest this fact by filing a statement of claim, nor did she participate in the trial. In other words, the 9th defendant does not come under the pedigree accepted by Court.

According to the Preliminary Plan and the Report marked at the trial, the 9th defendant has claimed certain buildings and plantations on the land. Except for a few trees (which were claimed both by the plaintiff and the 9th defendant), other parties have not contested the claim of the 9th defendant for improvements. Issues have been raised on improvements and the District Judge has answered them but apparently without reasons. I cannot agree with the finding of the High Court that if the 9(a) defendant decides to call evidence, then there should be a statement of claim filed by the 9(a) defendant. The 9(a) defendant cannot take the decision whether or not to call witnesses, "*but if he (the District Judge) so wishes he can let the parties to adduce more evidence*".

The 9(a) defendant who was substituted in place of the deceased 9th defendant, cannot claim rights superior to those the 9th defendant would have had if she were alive. A substituted party cannot take up a new position contrary to or inconsistent with that of the original party, as he merely steps into the shoes of the original party. If the 9th defendant did not file a statement of claim or participate in the trial, the legal consequences that would follow cannot be cured by the substituted 9(a) defendant presenting himself as a new party, unless the Court decides otherwise in terms of the law. No such decision has been made by the Court.

For completeness, let me also state that a party to a partition action (not a new party) can file a statement of objection to the proposed scheme of partition before the scheme inquiry (sections 35 and 36 of the Partition Law). The Court cannot deny filing objections on the basis that he has defaulted in filing a statement of claim and participating in the trial. In *Anthony Appu v. Margret Fernando and Others* [1999] 3 Sri LR 85, Weerasuriya J. stated that "*The Partition Law makes no prohibition against a party who had failed to participate at the trial in terms of section*

25(2) to file objections to the proposed scheme of partition. In the absence of a specific prohibition it is not possible to presume any such prohibition." However, in the guise of filing objections to the proposed scheme of partition, such a party cannot convert the scheme inquiry into another trial to decide issues on the pedigree. As Soertsz A.C.J. stated in *Appuhamy v. Weeratunge* (1945) 46 NLR 461 at 462, "*there must be an end to a case, particularly to a partition case which is generally of a protracted nature and which prevents parties to it from dealing with the land as freely as they would wish to in the interval.*" In *Hamidu v. Gunasekera* (1922) 24 NLR 143 at 145 it was held that "*A person entitled merely to an interest in a building on a land which has become the subject of a partition action can only obtain compensation for the interest in the building, and cannot get any share of the land in the partition.*" In the instant action, although the 9th defendant does not have soil rights, her claims for improvements need to be safeguarded.

Section 35 of the Partition Law states: "*After the surveyor makes a return to the commission, the court shall call the case in open court and shall fix a date for the consideration of the scheme of partition proposed by the surveyor. The date so fixed shall be a date not earlier than thirty days after the receipt of such return by the court.*" The thirty-day period shall be counted not from the date on which the return is received by the Registry but from the date on which it is received in open Court on the returnable date fixed for that purpose by Court (*Wickremaratne v. Samarawickrema* [1995] 2 Sri LR 212). According to section 36(1)(a) "*On the date fixed under section 35, or on any later date which the Court may fix for the purpose, the Court may, after summary inquiry confirm with or without modification the scheme of partition proposed by the surveyor and enter final decree of partition accordingly.*"

The first question of law on which leave to appeal has been granted is as follows:

> *Can a party to a partition action who has been brought into substitute a deceased original defendant, who has failed and neglected to file a statement of claim or even a proxy despite notice/summons being served on such defendant, be permitted to file fresh pleadings nearly 24 years after the institution of the action when the said action has reached the stage envisaged in section 184 of the Civil Procedure Code?*

I answer that question in the negative. There is no necessity to answer the other questions of law raised by the appellants.

I set aside the Judgment of the High Court dated 10.02.2021 and affirm the order of the District Court dated 07.02.2020 and allow the two appeals but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Kumudini Wickremesinghe, J.
I agree.

Judge of the Supreme Court