

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

Premachandra Kamalasiri,
Welikanna,
Waga.
15th Defendant-Appellant

CASE NO: CA/58/2000/F

DC AVISSAWELLA CASE NO: 15466/P

Vs.

Kulathungage Petar,
Welikanna,
Waga.
Plaintiff-Respondent
And Several Other
Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Thishya Weragoda for the 15th Defendant-
Appellant.

Rohan Sahabandu, P.C., for the Substituted
Plaintiff-Respondent.

Decided on: 06.02.2019

Samayawardhena, J.

This is a partition action. After trial the learned District Judge pronounced the Judgment dated 17.07.1995. After coming into strong findings of fact on devolution of title followed by answering of the issues raised at the trial, the learned District Judge has in the last part of the Judgment directed the plaintiff to tender to Court the schedule of shares prepared in terms of the Judgment. It is noteworthy that no party including the 15th defendant appealed against that Judgment.

The parties have not agreed to the proposed schedule of shares tendered by the plaintiff stating that it has not been prepared in terms of the Judgment. Thereafter the Court has invited all the parties including the 15th defendant to tender proposed schedules of shares for the Court to take a final decision. Accordingly, in addition to the plaintiff, several defendants including the 2nd, 10th, 11th through their Attorneys have filed their proposed schedules of shares prepared in terms of the Judgment. It is significant to note that the 15th defendant did not file a proposed schedule of shares. Having considered everything, the learned District Judge has accepted the proposed schedule of shares tendered by the 10th defendant as the correct one prepared in conformity with the Judgment. It is against this order dated 23.02.2000 the 15th defendant has filed this final appeal.

It is my considered view that this appeal is misconceived in law warranting dismissal of it *in limine* as there is no right of appeal against the impugned order, which is not the Judgment of the case. The Judgment was delivered about 5 years before the impugned order. If the 15th defendant was dissatisfied with the

order of the District Judge accepting the schedule of shares of the 10th defendant, he ought to have come before this Court by way of leave to appeal and not by way of final appeal. In *Puwalawathie Perera v. Somaratne* [2004] 1 Sri LR 119 Udalagama J. dismissed the appeal *in limine* in similar circumstances.

A schedule of shares on the face of it at most could form only a part of an interlocutory decree. Even if one was to consider an interlocutory decree to be final, such interlocutory decree would not consist only of a schedule of shares and would by no means be a complete interlocutory decree having the effect of a final judgment.

The impugned order is admittedly an interlocutory one attracting the provisions of section 754(2), as the trial judge had only to "decide shares" and he accepted the "shares" filed by the plaintiff-respondent by the impugned order.

The gravamen of the argument of the learned counsel for the 15th defendant-appellant before this Court is that the District Judge was in grave error delegating his judicial function to the parties to prepare and tender schedule of shares and on that ground alone the Judgment is rendered a nullity. I find myself unable to subscribe to that view.

It is very easy for an appellate Judge to summarily set aside a Judgment of a long-drawn-out partition action at the stroke of a pen. But, in my view, that is not justice.

Whilst emphatically emphasizing that it is the bounden duty of the District Judge to prepare the schedule of shares and to incorporate it as an integral part of the Judgment, in an

exceptional case where the District Judge has obtained the assistance of the Attorneys of the parties to work out a schedule of shares in terms of the specific findings of the Judgment, especially when the Judgment has been pronounced not by him but by his predecessor, the District Judge, in my view, does not delegate his judicial powers as long as he takes the ultimate decision. After all, that is what—assisting the Court in the dispensation of justice—the Attorneys, as officers of the Court, do right throughout the case.

This view of mine is fortified by the following observation of T.S. Fernando J. in *Wijesundera v. Herath Appuhamy* (1964) 67 CLW 63 at 64:

A statement of shares is a document—which, incidentally, finds no recognition in the Partition Ordinance—that is submitted by one or more of the parties or their proctors for the convenience of the judge in the entering of the partition decree. The submission of such a statement cannot, in my opinion, make any difference to the duty of the judge to satisfy himself that the statement of shares is in conformity with the judgment already pronounced.

In *Thomas Singho v. Cornelis* (1967) 74 NLR 109 at 112 Siva Supramaniam J. observed:

However irksome the task may be, it is the duty of a trial Judge in a partition action to determine precisely the share to which each party is entitled. This is not a duty which a Judge is entitled to delegate to a Proctor for one of the parties. If, on the basis of the findings, a statement of shares is submitted by one of the parties for the assistance

of the Judge, such a statement should be assented to by all the parties or their Proctors before it is accepted. As was observed by T. S. Fernando S.P.J., in Wijesundera v. Herath Appuhamy and others (1964) 67 CLW 63 at p. 64, “the submission of such a statement cannot.....make any difference to the duty of the Judge to satisfy himself that the statement of shares is in conformity with the judgment already pronounced”.

The learned counsel for the 15th defendant has drawn the attention of this Court to the Judgment of Basnayake C.J. in *Memanis v. Eide (1960) 59 CLW 46* in support of his argument. However the facts of that case are distinguishable from those of the instant case in that in Memanis’ case the learned Judge has mechanically adopted the schedule of shares filed by the Attorney for the plaintiff (as seen from the following passage of the Judgment) whereas it is not so in the instant case.

In his judgment the learned Judge says: “Plaintiff’s Proctor will file a schedule of shares, which when filed will form part and parcel of this judgment” and there is schedule of shares filed which he has adopted in entering the interlocutory decree. Section 25 of the Partition Act, No.16 of 1951, provides that the Judge shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made. In the instant case there had been no determination of the shares

of the parties as required by the partition Act. It is the share so determined by the Judge that the court is required to enter in the interlocutory decree. The course taken by the learned District Judge is contrary to the provisions of section 25 of the partition Act.

In the instant case, the schedule of shares had to be finalized not by the Judge who pronounced the Judgment but by his successor. He considered the schedules of shares tendered by Attorneys of the parties and decided the schedule of shares tendered by that of the 10th defendant is in conformity with the Judgment already pronounced. It is the Judge who has taken the ultimate decision. I see no illegality in it. Therefore the argument of the learned counsel for the 15th defendant that the District Judge erred by delegating his judicial function to parties to prepare and tender schedule of shares and therefore “*the Judgment of the District Court*” shall be set aside does not comment itself to me.

The 15th defendant cannot now canvass the findings of the Judgment. If he was not in agreement with the Judgment pronounced in 1995, he could have appealed against the Judgment at that time.

I dismiss the appeal with costs.

Judge of the Court of Appeal