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

In the matter of an application under 839 of the Civil Procedure Code.

CA/784/1992 (F)
D.C. MATARA
Case No.12969/P

1. Mohamed Abdulla Sawahira
"Nim House"
Godapitiya
Akuressa.

2. Abdul Wahab Mohamed Azhar
"Nim House"
Godapitiya
Akuressa.

PLAINTIFFS

- Vs -

1. Abdul Wahab Mohamed Gouse
Mahamaya Mawatha, Kotuwegoda
Matara.

And 31 Others

DEFENDANTS

And

17. Mohamed Bazir (Deceased),
Godawatta, Godapitiya,
Akuressa

17A. Mohamed Haneefa Ishaththu Nawma
Godawatta, Godapitiya
Akuressa

18. Mohamed Bakir,
Godawatta, Godapitiya
Akuressa

19. Mohamed Mawzoon,
Godawatta, Godapitiya
Akuressa

DEFEDANTS-APPELLANTS

- Vs -

1. Mohamed Abdulla Sawahi
"Nim House"
Godapitiya
Akuressa.

2. Abdul Wahab Mohamed Azhar
"Nim House"
Godapitiya
Akuressa.

PLAINTIFF-RESPONDENTS

1. Abdul Wahab Mohamed Gouse
Mahamaya Mawatha
Kotuwegoda
Matara.

And 28 Others

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

17A. Mohamed Haneefa Ishaththu Nawma
Godawatta
Godapitiya
Akuressa

SUBSTITUTED 17A DEFENDANT-APPELLANT

PETITIONER

1. Mohamed Abdulla Sawahira
"Nim House"
Godapitiya
Akuressa.

2. Abdul Wahab Mohamed Azhar
"Nim House"
Godapitiya
Akuressa.

PLAINTIFFS-RESPONDENTS-RESPONDENTS

1. Abdul Wahab Mohamed Gouse
Mahamaya Mawatha
Kotuwegoda
Matara.

And 28 Others

DEFENDANTS-RESPONDENTS-RESPONDENTS

17. Mohamed Bakir,
Godawatta
Godapitiya
Akuressa.

18. Mohamed Mawzoon
Godawatta
Godapitiya
Akuressa.

DEFENDANTS-APPELLANTS-RESPONDENTS

Before:	**Janak De Silva J.**
	&
	N. Bandula Karunarathna J.
Counsel:	Ms. G. Wijemanne with Niroshika Lakmini for 17A Defendant - Appellant.
	Ms.P.Peramunagama with Ranga Peiris for 1st Party – Respondent.
Argued on:	28/05/2019.
Written Submissions:	of the Substituted 17A Defendant – Respondent filed on 12.07.2019
	of the 1st Plaintiff and 2nd Plaintiff – Respondents filed on 12.07.2019.
	Reply of the Substituted 17A Defendant-Respondent filed on 19.08.2019.
Judgment on:	**06/07/2020**

N. Bandula Karunarathna J.

This is an Appeal preferred by the 17th,18thand 19th Defendant-Appellants (hereinafter referred to as the Appellants) against the Judgement dated 05.11.1992 by the Learned Additional District Judge of Matara.

The Plaintiff-Respondent instituted this action in the District Court, seeking to partition the Land in question the extent of 4 Acres, called Hingamage Godawatta .

This matter came up for trial on 25.06.1992 and it was the 4th date of trial. The 17th, 18th and 19th Defendants were represented by their counsel and the parties accordingly settled their dispute and as this is a Partition case, the 2nd Plaintiff gave evidence without any objections, from the Defendants including the 17th, 18th and 19th Defendants.

However, before Judgment was entered it was brought to the notice of Court by a Petition and Affidavit filed on 23.07.1992 by the Appellants that, after the death of Rahinaththu Umma, her undivided share devolved on her husband Abdulla Lebbe and daughter Rahimanaththu Nachchiya and hence they became entitled to 1/16th share each. Argument of the Appellants were that, no share should go to a person call Mohamed Ali, who was the brother of Rahinaththu Umma. In proof of the fact that Rahimanaththu Nachchiya is the daughter of Rahinaththu Umma, the Birth Certificate and the Death Certificate of Rahimanaththu Natchchiya was marked and produced as X1 and X2 respectively.

The Plaintiffs have objected on the basis that a settlement cannot be varied by fresh evidence. But the authorities referred to in the said objections by the Plaintiffs, are not relevant to the present situation, as they are not partition cases.

The Learned Trial Judge had upheld the objection of the Plaintiff and entered the Judgment on settlement basis, rejecting to look into consider the fresh evidence, requested by the Appellants.

It is evident that on the 02.10.1992 an application was made on behalf of the 17th, 18th and 19th Defendants, indicating that the settlement was having an error. Appellants made an application to vary the said Settlement. The Plaintiffs objected to the said application and the Court made order disallowing the said application and fixed the matter for Judgment. The Court accordingly entered the Judgment on 05.11.1992.

The 1st Plaintiff argue that the 17th, 18th and 19th Defendants did not canvass the said order dated 02.10.1992 but lodged this Appeal against the said Judgment. The 1st Plaintiff submitted that, as the 17th,18th and 19th Defendants were represented by their Counsel at the said settlement date, the 17th, 18th and 19th Defendants are not entitled to dispute the Judgment in this case, particularly because the 17th, 18th and 19th Defendants (Appellants) did not canvass the previous order. The present Appeal was lodged against the said Judgment dated 05.11.1992 and the Order dated 12.10.1992.

The Plaintiffs argument was that, the 17th, 18th & 19th Defendants did not canvas the order dated 02.10.1992 but lodged this appeal directly and therefore the Appellants are not entitled for the relief which they sought. In my view this cannot be considered as a valid legal position.

It is to be observed that a party aggrieved by an order made in the course of the action, though such order goes to the root of the case, could either file an interlocutory appeal or file his final appeal at the end of the case on the very same ground.

This has been clearly stated in the Supreme Court decision of Mudiyanse Vs Ranaweera 77 NLR 501, wherein it was held that a party aggrieved by an order made in the course of the action, though such order goes to the root of the case, has two courses of action open to him, namely;

(a) to file an interlocutory appeal or
(b) to stay his hand and file his appeal at the end of the case even on the very same ground only on which he could have filed his interlocutory appeal.

In the instance case, though the order of the Learned District Judge dated 2.10.1992 disallowing the Appellant's application to call for fresh evidence goes to the root of the case, the Appellants have the right to prefer an appeal against the Judgment of the Learned District Judge dated 05.11.1992, which was very shortly (34 days) after the said order.

The said Appeal was taken up for arguments on 20.09.2010 before this Court. All 3 Appellants were present in person and all the other partied were absent and unrepresented on that day. My Learned Predecessor has minuted as follows on the 20.09.2010 regarding the said settlement;

"17th, 18th and 19th Defendant-Appellants are present in Court and they informed Court that they have settled the matter out of Court and tender the settlement duly signed by the parties. Therefore, Court directs the Learned District Judge to incorporate the terms of settlement and enter interlocutory decree accordingly. However, the counsel for the Appellants are not present in Court today, Therefore, if there is any ambiguity in this term of settlement, as this is a Partition Action the Applicant is permitted to file a Motion and inform the Court to correct the ambiguity before this directive is sent to the District Court"

It is important to be noted that the Court of Appeal in its order dated 20.09.2010 permitted the Appellants to file a motion in the event of an ambiguity in its order and inform this Court to correct any such ambiguity before its directive is sent to the District Court of Matara. The direction of the Court of Appeal was sent to District Court and Learned District Judge could not implement the said directions as the copy of the settlement was missing. It was referred back to Court of Appeal and the so-called settlement terms were not to be found. At the same time the 17th Defendant has failed to produce the copy of alleged terms of settlement for the perusal by Court. The 17th Defendant or the 17A Substituted-Defendant has not made any application to that effect for nearly 8 years to correct any such ambiguity. It shows that there was no such settlement entered on the 20.09.2010.

It was argued that the Appellants had never complained of any ambiguity in the said order dated 20.09.2010 hence there was no requirement of taking such steps but the 17th A Defendant, made an application before this Court on the basis that the said order was erroneous and *per incuriam* which has been held by the Court of Appeal, in favor of the Appellants by its order dated 19.10.2018, vacating the said order dated 20.09.2010. In view of the correspondents marked P4 and P5 tendered with the relisting application, there is no such terms of settlement available for the District Court to consider even on 19.03.2018 or thereafter either in the Court of Appeal Case Record or for that matter in the custody of the 17A Substituted Defendant.

After the Original Case was sent back to District Court (DC), Matara on the 20.09.2010, Interlocutory Decree and final Decree entered and final Partition Plan too, has been made in

this Partition case as seen from the proceedings. It came up to fix the matter for consideration on the facts and circumstances of this case and as the 17A Defendant too has participated throughout the proceeding until 19/03/2018, the 17A Defendant is now entitled to come before this Court in this manner at this stage of the proceedings and contest the said Judgment entered on the 05.11.1992, in the DC Case.

This Court cannot agree, for the argument brought up by the 1st Plaintiff, saying that in all the circumstances the Appeal preferred by the 17th,18th and 19th Defendants but now it was given up by the 18th and 19th Defendants. Therefore, it has to be dismissed. But in my view it is the duty of this Court to decide the Original Appeal on merit, which was brought before this Court 28 years ago by 3 Appellants.

Thus, now it is back to Squair one as the Original Appeal lodged on the 23.12.1992 has to be decided once again.

The Plaintiff in his Pedigree gave shares which devolved on the 1st to 20th Defendants. This appeal is concerned with the 1/8th share of Uduma Lebbe only. According to the Plaint, Uduma Lebbe transferred his 1/8th share in 1904, by Deed No.1788 (28 V1) to Rahiya Naththu Umma and upon her death her share devolved on Abdulla Lebbe. He transferred his 1/8th share to Rahimatthu Natchiya by Deed No.9134 dated 27.01.1926. This Deed was marked and produced as 17 V1. As this Deed is not available in the Appeal Brief, a true copy of the same was annexed as 'X'. Upon her death, her 1/8th share devolved on her children namely, 17th,18th & 19th Defendant Appellants and they have filed a joint statement of claim, accepting the pedigree set out by the Plaintiff.

But the 2nd Plaintiff giving evidence stated that Udumma Lebbe transferred his 1/8th share to Rahianaththu Umma in 1904 by Deed No.1788 who died leaving her husband Abdulla Lebbe and a brother called Mohamed Ali. Accordingly, Abdulla Lebbe & Mohamed Ali got 1/16th share each and Abdulla Lebbe transferred his rights to Rahimanaththu Nachchiya and after her death her rights devolved on her three children namely 17th,18th & 19th Defendants.

There was no proof placed before Courts to the effect that Rahinatthu Umma had a brother called Mohamed Ali and no party claimed any rights from Mohamed Ali. On the other hand, there was material evidence placed before Court that Rahinatthu Umma had a daughter called Rahimanaththu Nachchiya by supporting documents marked X1 and X2. It was undisputed the existence of Nachchiya and her 3 children namely, 17th 18th and 19th Defendants. Parties cannot deprive a legitimate child of his rights when the Birth Certificate and the Death Certificate shows that Rahinatthu Umma did have a daughter called Nachchiya. It is an undisputed fact as per the Plaint that the full rights of Abdulla Lebbe (1/8th share) was transferred to Nachchiya by Deed No 9134.

Although this Deed No.9134 by which the said Nachchiya has got her full rights to 1/8th share is missing from case record, this Deed has been admitted without any objection and had not been challenged by any party. The said Deed marked 17 V1 should have been considered by the Trial Judge as it was a marked document according to the proceedings dated 25.06.1992.

It was decided in Jayasekara Vs Appuhamy and others 2012 BLR 291, article 139 (2) of the Constitution gives the Appellate Court, wide discretionary powers to deal with appeals and even admit fresh evidence, having in mind that justice should prevail at all times and Appellate Court is legally bound to give effect to those Legal Provisions to ensure rights and interests of all the parties, legally.

In the circumstances, 17V1 should be considered and those rights must be given to the aggrieved parties.

Appellants say that a settlement is not sacrosanct. It can be set aside on the ground of mistake or misrepresentation. It was the position of the 17th,18th & 19th Defendant Appellants, that it was a mistake or that they did not know what happened on the day the settlement was entered. They have not signed the Case Record. The record does not show that they were physically present in Courts on 25.06.1992.

It was held by the Court of Appeal in the Case of Gunasekera Vs. Leelawathi (Sriskantha's Law Report Volume 5 page 139) that a settlement can be set aside or varied on the ground of misrepresentation.

The Court held in Saranelis Vs.Agnes Nona 1987 (2) SLR 109, that if a settlement has been entered by misleading Court, such settlement should be set aside.

In the case of Somaratne Vs. Padmini De Silva 1988 (2} SLR 195 the Supreme Court stated that, one must look at the nature and the scope of the settlement. If a settlement has been arrived at on the premise that somebody had no children and therefore his share should go to his brother and then if the court finds out that in fact, that person had a child, it is in the interest of Justice and Justice requires that the mistake should be corrected.

The Court cannot simply say that there is a settlement and you cannot now go back. A Court is not an academy of law but a place whether administration of Justice takes place and when a mistake is shown by solid and good documentary evidence that someone who is not entitled to any share has got 1/16 share of the corpus depriving the lawful owners of their 1/16th share, the Court should inquire and ascertain that position as much prejudice has been caused to the Appellants by that settlement.

When considering all the above-mentioned grounds, it is crystal clear that the 17th,18th & 19th Defendants would never have compromised their position as they get their lawful rights from Rahinatthu Nachchiya, their mother apart from the transfer by her father to her which devolved on the 17th, 18th & 19th Defendants. The reasonable question arises would be "Who would compromise their rights to such as extent?" "Will they, if they were aware of the settlement, agree to give 1/16 share to Ali, who is their uncle. Ali had not been given any share even in the Plaint. Much injustice would be caused to the Appellants, if their lawful share inherited from their mother is not given to them but given to someone who is not legally entitled to the same.

The Trial Judge has a duty to investigate and examine title of each party in a Partition case despite any private arrangement among the parties.

In the case of Madanayake Vs. Weeragunaratne (2013 ACJ 167 – CA), it was held that it is incumbent on Court in a partition suit under sec.25 of the partition law to examine the title of each party, and the rights, share or interest of each party.

It was held in Piyaseeli Vs Mendis and others 2003 3 SLR 273 that the Trial Judge in a partition action should investigate title under sec 25 of the Partition laws no 21 of 1977. Partition decree cannot be the subject of a private agreement between parties on matters of title which the Court is bound by law to examine. There is a greater need for the exercise of Judicial caution before a decree is entered. On an appeal in a partition action if it appears to the Court of Appeal that the investigation has been defective, it should set aside the decree and thereafter make an order for proper investigation or to amend the decree accordingly.

In the circumstances, I am of the view that to set aside a part of the Judgment which allows 1/16 share to Mohamed Ali, who was not even made a party to this Action. This Court set aside that part of the judgment where Mohamed Ali was given 1/16 share and allow same to be given jointly, to the 17th ,18th & 19th Defendants.

In view of the above reasons, this Appeal is allowed subject to said alteration, enabling 17th 18th and 19th Defendants to get the 1/16 share jointly, earlier which was allocated to Mohamed Ali, by the Learned Trial Judge, without properly investigating the title.

Final decree can be amended accordingly.

Appeal allowed. No Order for Cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal