

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

Siddi Lebbe Mohamed Yoosuff of
Daulagala, Handessa (deceased)

Plaintiff

Mohamed Yoosuff Bazeer of
Daulagala, Handessa

Substituted-Plaintiff

C.A. Appeal No. 1281/99(F)

D.C. Kandy Case No. P/11310

Vs.

1. M. Yoosuff Mohamed Saleem,
2. Hassim Lebbe Najeera Beebe
3. Sulthan Marikkar Mohamed Razeed (deceased)
All of Daulagala, Handessa
- 3A. M.R. Najimudeen of Wahunkphe,
Handessa
4. Sulthan Marikkar Mohamed Sheriffdeen Mashood
5. Habeebu Mohamed Lebbe Mohamed Mashood Siddi Lebbe Mohamed Mashood
6. Siddi Lebbe Mohamed Nabeeza Nachchiya.
All of Wahunkoho, Handessa.

Defendants

Sulthan Marikkar Mohamed
 Sherifdeen Mashood of
 Daulagala, Handessa. (Deceased)

4th Defendant-Appellant

Vs.

Mohamed Yoosuff Bazeer of
 Daulagala, Handessa

Substituted-Plaintiff-Respondent

And

1. M. Yoosuff Mohamed Saleem,
2. Hassim Lebbe Najeera Beebe
- 3A. M.R. Najimudeen,
5. Habeebu Mohamed Lebbe
 Mohamed Mashood,
6. Siddi Lebbe Mohomed Nabeeza
 Nachchiya.

**1st 2nd, 3A, 5th and 6th Defendant-
 Respondents**

**IN THE MATTER OF AN APPLICATION
 FOR SUBSTITUTION**

Sulthan Marikkar Mohamed
 Sherifdeen Mashood of
 Daulagala, Handessa. (Deceased)

4th Defendant-Appellant

- 4A. Sherifdeen M. Faris

Substituted 4th Defendant-

Appellant

Vs.

Mohamed Yoosuff Bazeer of
Daulagala, Handessa

Substituted-Plaintiff-Respondent

And

1. M. Yoosuff Mohamed Saleem,
2. Hassim Lebbe Najeera Beebe
- 3A. M.R. Najimudeen,
5. Habeebu Mohamed Lebbe
Mohamed Mashood,
6. Siddi Lebbe Mohomed Nabeeza
Nachchiya.

1st 2nd ,3A, 5th and 6th Defendant-Respondent

BEFORE : M.M.A.GAFOOR, J.

COUNSEL : Harsha Soza P.C. with Srihan Samaranayake
for the substituted 4th Defendant-Appellant
H. Withanachchi for the substituted Plaintiff-
Respondent.

WRITTEN SUBMISSIONS

TENDERED ON: 30-11-2017

DECIDED ON : 06th July, 2018

M.M.A.GAFOOR, J.

The Plaintiff-Respondent in this case, instituted an action in the District Court of Kandy bearing Case No. P 11310 on 5th July 1984 to partition the land called "Bulugahapitiya Watta" which is in extent of 3 Pela among five co-owners. In that case the 1st and 2nd Defendants filed their answers on 5th June 1989. The 3rd Defendant filed his answer on 13th January, 1986. The 5th Defendant filed his answer on 17th September, 1995 and the 6th Defendant filed his answer on 6th March, 1995 respectively. After trial, having analyzed the evidence and the documents, the learned District Judge had delivered the judgment on 08.02.1996 and the interlocutory decree was entered accordingly.

Thereafter, the 4th Defendant -Appellant filed a petition with an affidavit on 28th May, 1997 and moved Court to set aside the judgment dated 08th February, 1996 in the partition action bearing No.11310/P. His position was that summons or any notice were not served on him and therefore, the Plaintiff has not followed the procedure laid down in Section 48(4) of the Partition Law.

Accordingly, the inquiry was fixed for 22.07.1998 and the 4th Defendant gave evidence and stated that he did not receive summons. In his evidence, he stated that he was 90 years old (at

page. 100 of the brief) but according to his Identity Card he was 76 at that time.(at page 110 of the brief). He also stated that he did not know the surveyor surveyed the questioned land. It's at page 102 of the Brief and reads as follows:-

Q: මේ ඉඩම මිනින්දෝරු මහතා මැන්නා. තමා කටදාවත් ඒක දන්නේ නැහැ?

A: නැහැ.

At page 103 of the brief

Q: මීට ඉස්සර මේ ඉඩම මැන්නා කියලා, එහෙම මිනින්දෝරු මහත්තයෙක් මැන්නාද?

A: දන්නේ නැහැ.

Q: තමා නැති වෙලාවේ මනින්න ඇති?

A: මම දන්නේ නැහැ. මම පිට සිටියා මැන්නාද කියලා මා දන්නේ නැහැ.

According to the Surveyor's evidence, the 4th Defendant informed him that he did not receive the summons.

At page 119 of the brief

Q: මහත්තයාම අධිකරණයට කියලා තිබෙනවා 4 වන විත්තිකරුට සිතාසි ලැබුණේ නැහැ කියලා?

A: අධිකරණයෙන් සිතාසි ලැබුණේ නැති බව ඔහු කීවා.

After inquiry, the learned District Judge having carefully considered the evidence and documents placed before him, had observed that according to the journal entry No.13, dated 17.06.1985 ~~the summons were served on the 3rd, 4th and the 5th Defendants but, the 4th defendant did not appear before Court.~~ Accordingly, the District Judge made order on 17.11.1999 refusing the ~~application of the 4th Defendant and affirming the judgment dated~~ 08.02.1996.

Being aggrieved by the said order dated 17.11.1999 this appeal was filed by the 4th Defendant-Appellant praying to set aside the judgment of the learned District Judge dated 08.02.1996.

The 4th Defendant's position right throughout the case was that summons was not served on him, and therefore, the Plaintiff has not followed the proper procedure laid down in Section 48(4) of the Partition Law.

The Plaintiff-Respondent took up a preliminary objection as that the order made by the District Court in respect of an application made under Section 48(4)(a) is not a judgment within the meaning of Section 754(1) and 754(5) of the Civil Procedure Code for the purpose of an appeal but it is an order within the meaning of

Section 754(2) of the Civil Procedure Code which an appeal may be preferred with the leave of the Court of Appeal.

In *Ranjith V Kusumawathi* the Supreme Court has held that interlocutory decree is not final and the order of the District Court is not a judgment within the meaning of Section 754(1) & 754(5) of the Civil Procedure Code for the purpose of an appeal.

In Salter Rex Vs. Gosh Lord Denning stated :-

"if their decision whichever way it is given, will if it stands finally dispose of matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

The 4th Defendant-Appellant's position is that the order dated 17.11.1999 rejecting his petition dated 28.05.1997 was a final order and it affects his rights completely. But according to the judgment of the learned District Judge dated 08.02.1996 the 4th Defendant has to get 15/60 share of the questioned land and a 1/2 share of the building marked as "R" in the plaint. The written submissions filed by the 4th Defendant in the District Court, it was referred to as an application under Section 48(4)(a)(i) of the Partition

Law. And also according to the journal entry No.13 dated 17.06.1985, the summons were issued on the 3rd, 4th and the 5th respondents.

In **Sivanandan v. Sinnapillai - NLR- 300 of 77[1974]** , it is stated:

"Where, in a partition action, a claimant (not being a party to the action) is mentioned in the Surveyor's report, the Court has no power to dispense with the service of notice on the person who is alleged to be a claimant. In such a case, the notice is imperative under Section 22(1) of the Partition Act and the provisions of Sections 77 and 79 should be observed and Section 356 of the Civil Procedure Code followed in serving the notice. Where these Sections have not been strictly followed, the Supreme Court has power to set aside, in revision the Interlocutory Decree entered in the absence of the claimant, more especially if no declaration under Section 12 of the Partition Act has been filed by the plaintiff."

For the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge. Therefore, the appeal is dismissed with cost.

JUDGE OF THE COURT OF APPEAL
