

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

Bentara Vidanage Gunasena,
Gunasena Building,
Elpitiya.

Plaintiff – Appellant

CA 612/97(F)

D.C. Balapitiya – 283/P

Vs.

1. Daya Shamendra Panditha
2. Kamani Ayoma Panditha
3. Mahesh Eranjan Panditha
4. Kalani Sandya Panditha
5. Sanja Dammi Panditha
All of Thirangama,
Hikkaduwa.
6. Igala Vithana Karunawathee,
Igala, Elpitiya.
7. Igala Vithanage Suberan Singho,
Igala, Elpitiya.
8. I.W. Karunawathie,
Igala, Elpitiya,
9. Pannila Hettige Leelawathie,
No.192, Ganegoda.

Defendant – Respondents

BEFORE: M.M.A. Gaffoor J

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: Bimal Rajapakse with Muditha Perera for the
Substituted – Plaintiff – Appellant
R.D.N. Lenora on the instructions of Pradeep Nandasena
for the 5th Defendant – Respondent

ARGUED ON: 08.02.2017

WRITTEN SUBMISSIONS – Substituted – Plaintiff – Appellant -
5th Defendant – Appellant –

DECIDED ON: 09.05.2017

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Appellant (hereinafter sometimes referred to as the Appellant) filed action by plaint dated 30.03.1979 in the District Court of Balapitiya against the Defendant- Respondents (hereinafter sometimes referred to as the Respondents) to partition the land described in the schedule thereto.

The Trial commenced and evidence was led on behalf of the parties and interlocutory decree was entered into on 26.06.1985. As per the interlocutory decree the Appellant was allotted 9/10th share of the corpus and the 5th Defendant was allotted 1/10th share of the corpus.

Thereafter a commission was issued in respect of the corpus and on or about 07.11.1990 Plan bearing No. 1105 was tendered to Court. Both the Appellant and the 5th Defendant objected to the said plan and the Appellant proposed an alternative scheme of partition bearing No. 284 and the 5th Defendant proposed an alternative scheme of partitions bearing Nos. 3141 and 3141A.

After a lengthy inquiry into the most suited scheme of partition the learned District Judge delivered order dated 14.06.1996 in favour of the scheme of partition proposed by the 5th Defendant i.e. No. 3141 and ordered that the final scheme of partition be prepared according to Plan bearing No. 3141 aforementioned.

The final plan bearing No. 2361 dated 22.01.1997 was prepared and the final decree was entered into on 25.08.1997. Being aggrieved by the said final decree the Appellants preferred this instant application.

At the outset it is evident that the Appellant is contesting the final decree of the learned Trial Judge dated 25.08.1997 and not the order dated 14.06.1996 delivered in respect of the alternate scheme of partition. It is apparent that the Appellant took no steps to challenge the order dated 14.06.1996, within the prescribed period, which forms the basis of the instant Appeal by which Plan bearing No. 248 was rejected by the learned District Judge. The said plan depicting the scheme of partition preferred by the Appellant was rejected by the learned District Judge, having carefully considered the alternative schemes of partition proposed by both parties and giving adequate reasons for such rejection. Further, it is clear that steps were taken in the original Court stemming from the said order dated 14.06.1996 and as a result Plan No. 2361 dated 23.01.1997 was prepared by Licenced Surveyor Rabin Chandrasiri. It is only after these subsequent steps and consequent to the final decree that the Appellant has invoked the jurisdiction of this Court.

The Appellants main contention is that as the “lion share” owner, in that, since he was allotted 9/10th share of the corpus, he was entitled to the road frontage as depicted in Plan No. 284. However, it is prudent to note that the learned District Judge has carefully considered this contention at the scheme inquiry by order dated 14.06.1996 and rejected same.

The Appellant could have preferred an appeal under Section 36A of the Partition Act to challenge order dated 14.06.1996 but he has failed to do so.

Section 36A of the Partition Act reads thus;

Any person dissatisfied with an order of the Court made under section 36, may prefer an appeal against such order to the Court of Appeal, with the leave of the Court of Appeal first had and obtained.

Therefore I concur with the contention of the 5th Defendant that the present application is belated and hold that this Court cannot consider the merits of this application and as such the instant appeal is dismissed, without costs.

Appeal dismissed.

Judge of the Court of Appeal

M.M.A. Gaffoor J

I Agree.

Judge of the Court of Appeal