

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

1. J.M.S. Bandarawathie Jayasinghe
  2. J.M.W. Bandarawathie Jayasinghe
- both of Gallehamullawatta, Welipennagahamulla.

PLAINTIFFS

C.A. Case No. 412/1995 (F)

D.C. Kuliyapitiya Case No.  
7742/P

-Vs-

1. B.L. Ariyadasa  
of Gallehamullawatta, Welipennagahamulla.  
and 19 others

DEFENDANTS

AND NOW BETWEEN

K.A. Chandradasa

Of Gallehamullawatta, Welipennagahamulla.

20<sup>th</sup> DEFENDANT-APPELLANT

-Vs-

1. J.M.S. Bandarawathie Jayasinghe
  - la. E.M. Anoma Tanarakumari Amithirigala
  - lb. E.M. Damayanthi Pushpakumari Amithirigala
- all of Gallehamullawatta, Welipennagahamulla.
- la and lb Substituted PLAINTIFF-RESPONDENTS

2. J.M.W. Bandarawathie Jayasinghe  
2a. E.M. Anoma Tamarakumari Amithirigala  
2b. E.M. Damayanthy Pushpakumari Amithirigala  
all of Gallehamullawatta, Welipennagahamulla.  
2a and 2b Substituted PLAINTIFF-RESPONDENTS

1. B.L. Ariadasa
- 1a. Pushpa Udaya Kanthi  
both of Gallehamullawatta, Welipennagahamulla.
2. J.M. Leelawathie  
of Welipennagahamulla Post Pannara.
3. J.M. Jyasundara  
of Welipennagahamulla Post Gallehamullawatte.
4. T.M. Telisinghe  
of Wadumunnegedara Post Nawasegahawatte.
5. J.M. Nandana
6. J.M. Jagath
7. J.A. Piyarathne
8. J.A. Karunaratne
9. K.A.L. Gunawardhane  
all of Welipennagahamulla Post  
Gallehamullawatte.
10. J.M. Emonona (Deceased)
- 10a. S.M. Seelawathie  
of Gallehamullawatta, Welipennagahamulla.
11. M.A. Ranmenika
12. S.M. Dhanawathie Manike  
both of Welipennagahamulla Post  
Gallehamullawatte.

13. M.N. De Silva  
of Mahawewa Post Ihala Mahawewa.  
14. S.M. Suripala  
15. S.M. Wijesighe  
16. S.M.A. Dayananda  
17. S.M.A. Gamini Wasantha  
18. S.M.A. Chandana Subasinghe  
19. S.M.A. Dhanawathie Manike  
20.K.A. Chandradasa  
all of Welipenna gahamulla Post  
Gallehamullawatte.

**DEFENDANT-RESPONDENTS**

BEFORE	A.H.M.D. Nawaz, J.
COUNSEL	Rohan Sahabandu, PC with Hasitha Amarasinghe for the 20 <sup>th</sup> Defendant-Appellant
	M.C. Jayaratne with M.D.J. Bandara for 1A, 1B, 2A and 2B Substituted Plaintiff-Respondents
	Rubasinghe Gunasena with L.M.C.D. Bandara for the 7 <sup>th</sup> and 13 <sup>th</sup> Defendant-Respondents

Decided on : 07.01.2019

A.H.M.D. Nawaz, J.

The 20<sup>th</sup> Defendant-Appellant in the instant appeal before me (hereinafter sometimes referred to as “the 20<sup>th</sup> Defendant or Appellant”) was someone who sought to intervene under Section 69 of the Partition Law, No. 21 of 1977 and be added as a party before judgment was entered in the case and he was so added as the 20<sup>th</sup> Defendant subject to the obligation to make a prepayment of costs. This prepayment ordered by the District

Court was not complied with by the 20<sup>th</sup> Defendant and on this account he was precluded from filing his statement of claim though I find that a statement of claim appears on record. This was the sanction that had been imposed by the learned District Judge of Kuliapitiya for not complying with the order of prepayment and thus the 20<sup>th</sup> Defendant-Appellant was not permitted to participate at the trial which had since proceeded to the stage of judgment on 30.08.1995. The 20<sup>th</sup> Defendant-Appellant has preferred this appeal strenuously impugning it on several grounds and he has put forward an argument that long before the institution of this partition suit, he had purchased 1/16<sup>th</sup> portion of the subject-matter which is supported by a deed in his possession bearing No. 595 and dated 17.02.1975. The 20<sup>th</sup> Defendant argued that his interest and share in the subject matter were extinguished by the judgment of the District Court dated 30.08.1995, which has not investigated his title as a result of his exclusion from participating at the trial. Mr Rohan Shahabandu, P.C. argued that the non-compliance with the order of prepayment should not have led to his exclusion from participation at the trial as there were irregularities such as the non-compliance with Section 12 of the Partition Law, No. 21 of 1977 as amended.

As is well known in Partition Law, there exists a duty in terms of Section 12 of the Partition Law No. 21 of 1977 as amended on the part of the Attorney-at-Law of the Plaintiff to cause a search of the entries in the land register relating to the land and disclose the names of all those persons found therein and there should be a declaration under his hand that he has made such a search. Such a declaration is conspicuous for its absence from the record. Thus the argument was made that the absence of such a declaration should be treated as a fundamental vice—an expression quite felicitously used by Soza, J. in *Somawathie v. Madawela* (1983) 2 Sri.LR 15 at 31.

So I would begin from this beginning. There was no Section 12 declaration and the inference is inevitable that if such a search which was enjoined upon the Attorney-at-Law of the Plaintiff had been made, the presence or otherwise of the 20<sup>th</sup> Defendant's Deed bearing No. 595 executed long before the institution of this partition case would have been disclosed and if he was found to be a co-owner of the land, it was imperative by virtue of Section 12 of the Partition Law that he should have been added as a Defendant and issued

with summons. All these requirements are spelt out by Section 12 of the Partition Law which for reasons of clarity must be set out:-

1. After a partition action is registered as a *lis pendens* under the Registration of Documents Ordinance and after the return of the duplicate referred to in section 11, the plaintiff in the action shall file or cause to be filed in court a declaration under the hand of an attorney-at-law certifying that all such entries in the register maintained under that Ordinance as relate to the land constituting the subject-matter of the action have been personally inspected by that attorney-at-law after the registration of the action as a *lis pendens*, and containing a statement of the name of every person found upon the inspection of those entries to be a person whom the plaintiff is required by section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid register, that address.
2. The plaintiff in a partition action shall, together with the declaration referred to in subsection (1) of this section, file or cause to be filed in court-
  - a. if the aforesaid declaration discloses any person who is not mentioned in the plaint as a party to the action but who should be made such a party under section 5, an amended plaint including therein that person as a party to the action, which amended plaint shall be deemed for all purposes to be the plaint in the action;
  - b. as many summonses as there are defendants, each such summons being a summons substantially in the form set out in the Second Schedule to this Law and containing the name and address of the defendant on whom that summons is to be served;
  - c. if the language of any defendant is not the language of the court, a translation of the summons in that language;
  - d. as many copies of the plaint as there are defendants, with a translation thereof in the language of each defendant whose language is not the language of the court; or, with the leave of the court, where compliance with this requirement involves an expense which appears to the court excessive and unnecessary in the

- circumstances, a concise statement of the relevant paragraphs of the plaint relating to each defendant with translations thereof in the language of any defendant whose language is not the language of the court;
- e. one copy of the plaint certified by the registered attorney as a true copy, such copy being the copy to be attached to the commission issued to the surveyor who is to make the preliminary survey of the land to which the action relates;
  - f. as many copies of a notice substantially in the form set out in the Second Schedule to this Law as there are lands to which the action relates together with translations thereof in the language of any defendant whose language is not the language of the court;
  - g. such number of copies of the aforesaid notice and of each translation thereof referred to in paragraph (f) of this subsection as would enable the transmission of one copy of such notice and one copy of each such translation to the Grama Seva Niladhari of the division or of each of the divisions in which the land or each of the lands to which the action relates is situate;
  - h. a precept to the Fiscal substantially in the form set out in the Second Schedule to this Law."

The fact that Section 12 is mandatory, as I said before, was alluded to by Soza, J. (with Sharvananda, J. Wanaundera, J. Wimalaratne, J. and Ratwatte, J. agreeing) in *Somawathie v. Madawela* (*supra*) as follows:-

*"The purpose of this declaration is to satisfy the conscience of the Court that all persons who are seen upon an inspection of the entries in the Land Registry to be persons entitled to a right, share or interest in the land sought to be partitioned are before it. In fact it is only after the declaration is filed that the Court issues summons. It is the declaration that gives the green light for the case to proceed."*

*"This glaring blemish taints the entire proceedings. It amounts to what has been called 'fundamental vice'. It transcends the bounds of procedural error."*

This principle was again articulated by Wimalachandra, J. in *Maduluwawe Sobitha Thero v. Joslin* (2005) 3 Sri.LR 25 at 31:-

*"It is imperative to make a declaration under Section 12 (1) of the Partition Law after the partition action is registered as a lis pendens. Section 12(1) stipulates that after the registration of the lis pendens, the plaintiff must file or cause to be partitioned in the register maintained under the Registration of Documents Ordinance, stating the names of all persons found, upon the inspection of those entries, to be added as necessary parties to the action under section 5 of the Partition Law, No. 21 of 1977."*

*"The failure to make a correct declaration under section 12(1) of the Partition Law, amounts to a procedural irregularity which results in a miscarriage of justice, in that the petitioner who has a title deed duly registered to the entire property, which is the subject matter of the said partition action, was kept out without being made a party. This amounts to what is called a fundamental vice."*

The evidence or existence of a Section 12 declaration would have thrown light on the fact whether or not the 20<sup>th</sup> Defendant should have been added and issued with summons and the question arises what if the deed of the 20<sup>th</sup> Defendant had been found in the register? If so found and if not included in a mandatory declaration as enjoined by Section 12 of the Partition Law, the failure to include the name of the 20<sup>th</sup> Defendant might have even approximated to a fraud and as Lord Denning exclaimed in *Lazarus Estates Ltd., v. Beasley* (1956) 1 Q.B. 702:-

*"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever..."*

Lord Diplock had already articulated his often cited expression-“fraud unravels all” in that seminal decision in letter of credit law namely *United City Merchants v. Royal Bank of Canada* (1983) A.C 168 at 184. Lord Diplock’s plain English -“fraud unravels all” is a pithy

summation of that well known Latin dictum *ex turpi causa non oritur actio*. I would not go so far as to find fraud against the Plaintiffs but the absence of a Section 12 declaration is good enough a reason to draw an adverse inference against the two Plaintiffs in terms of illustration (f) to Section 114 of the Evidence Ordinance namely;

*"Evidence which could be and is not produced if produced, be unfavourable to the person who withholds it."*

So the inference that the interests of the 20<sup>th</sup> Defendant were found on the entries in the land registry pertaining to the corpus but yet the declaration to the effect was not filed with a view to hiding it away from Court is no doubt rebuttable having regard to the language of Section 114 which couches the presumption thus—"the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case." If the 20<sup>th</sup> Defendant had registered his deed bearing No 595, a search of the entries pertaining to the land would have disclosed his name as a co-owner of this land but the absence of the mandatory declaration leads to the irresistible inference that he was kept out of the case deliberately. As I said before, the presumption under Section 114 of the Evidence Ordinance is only rebuttable but in the absence of rebutting evidence this Court draws the inference that the 20<sup>th</sup> Defendant who appears to have a legitimate interest in the corpus has been deliberately ousted from any kind of participation at the trial.

What is the effect of non-compliance with Section 12 of the Partition Law No. 21 of 1977 as amended?

The two judgments I have cited above *Somawathie v. Madawela* (*supra*) and *Maduluwawe Sobitha Thero v. Joslin* (*supra*) both speak in terms of the peremptory nature of Section 12 of the Partition Law No.21 of 1977 and whilst Soza, J. states in *Somawathie v. Madawela* that Section 12 declaration gives green light for the case to proceed and a failure to comply with it is a blemish that taints the entire proceedings Wimalachandra, J. in *Maduluwawe Sobitha Thero v. Joslin* declares that such

procedural irregularity leads to a miscarriage of justice. The import of all these pronouncements is that whatever step that is taken subsequent to the non-compliance with Section 12 becomes invalid and the entire proceedings thereafter become null and void.

I am fortified in this reasoning by the language of Section 48(1) and its 2<sup>nd</sup> paragraph thereto which have the object of making partition decrees inviolate and immune from internal and collateral attack. The legislature sought to secure finality for the decrees entered under the partition law by specifically providing that the interlocutory decree and final decree shall be final and conclusive "*notwithstanding any omission or defect of procedure*" and by expressly protecting these decrees from attack on the ground of fraud and collusion.

So even an *omission or defect of procedure* will not result in partition decrees being attacked and having taken note of the fact that the Courts had intervened on several occasions to impugn partition decrees on the ground of what was called a fundamental vice, the legislature sought to insulate partition decrees from these fundamental vices. They were categorized as *omissions or defects of procedure* and formulated as such in the 2<sup>nd</sup> paragraph of Section 48 (1) of Partition law No. 21 of 1977. The expression "*omission or defect of procedure*" was defined to include an omission or failure-

- (a) to serve summons on any party; or
- (b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or
- (c) to appoint a guardian *ad litem* of a party who is a minor or a person of unsound mind.

The upshot of these legislative amendments was that despite these enumerated omissions or defects of procedure in the 2<sup>nd</sup> paragraph to Section 48 (1) of Partition Law, finality of partition decrees was kept inviolate. I hasten to point out that the failure to file a Section

12 declaration is not specified as an enumerated item in the expression “*omission or defect of procedure*”. If those omissions or defects of procedure as are enumerated in (a), (b) and (c) of the 2<sup>nd</sup> paragraph to Section 48 (1) will not invalidate partition decrees, the failure to file a Section 12 declaration is not one of those grounds falling within the above enumeration and therefore the failure to file such a declaration is bound to have the effect of eroding the finality.

In my view the omission to specify, within the classification of *omission or defect of procedure*, “failure to file a Section 12 declaration and take all the steps that have to be taken under Section 12” is deliberate on the part of the legislature and therefore it follows that when there is non-compliance with Section 12 of Partition law, such non-compliance would not come within such omissions or defects of procedure that are excusable. It is only the *omissions or defects of procedure* categorized under the 2<sup>nd</sup> paragraph to Section 48 (1) that are excusable.

Failure to comply with Section 12 is more than an omission or defect of procedure. It is more fundamental than a mere omission or defect of procedure. That is probably the reason why Justice Soza stated in *Somawathie v Madawela* (supra) that the failure to follow Section 12 of the Partition Law transcends the bounds of procedural error.

A failure to follow Section 12 leads to the ouster of a true claimant with a legitimate interest from participating at the partition suit and such a deprivation of a due process cannot be a mere omission or a defect of procedure.

It is indeed a fundamental vice to precipitate the non-participation of a legitimate claimant at the trial and such a fundamental vice cannot save the partition decrees from attack. In my view the legislature deliberately omitted to keep out of the list given in the 2<sup>nd</sup> paragraph to section 48 (1) “the failure to comply with Section 12” and such a deliberate exclusion fortifies my reasoning that Section 12 non-compliance renders the decrees under Partition Law susceptible to attack and impugnation. The failure to make a correct declaration under Section 12 would amount to a fundamental vice which is more than a mere omission or defect of procedure and such an irregularity results in proceedings that

are null and void. In other words the failure to follow Section 12 is jurisdictional and not merely procedural.

A non-conformity with Section 12 gives rise to a jurisdictional defect which can be impugned both directly and collaterally. If I may sum up the effect of the 2<sup>nd</sup> paragraph of Section 48 (1) in another way, a failure to effect due service of summons on any party may not vitiate partition decrees but a failure to file a Section 12 declaration correctly and accurately is more fundamental than a mere omission or defect of procedure.

Adopting the above reasoning, I proceed to hold that all the steps that the District Court took subsequent to the stage of Section 12 are a nullity and even the order made by the learned District Judge ordering the intervention of the 20<sup>th</sup> Defendant subject to prepayment of costs also becomes inoperative and null and void. In other words the District Judge of *Kuliyapitiya* should have ensured that Section 12 was complied with. No other steps could have been taken without the requirements of Section 12 being complied with. District Judges trying partition suits should ensure that the jurisdictional requirements of Section 12 are strictly followed in order to prevent the supervening consequences of nullity.

The learned Counsel for the 1A, 1B, 2A and 2B Substituted-Plaintiff-Respondents in his written submissions has drawn the attention of this Court to Journal Entry No 13 at page 26 of the Appeal brief wherein it has been journalized on 02.02.1987 that K.A.Chandradasa-the Appellant before this Court had been handed over notices along with other new claimants but the Appellant was not present in Court in response to this notice. In fact the other new claimants who were present in Court in response to the notices issued by Court were added as 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants and given an opportunity to file their statements of claim-see Journal Entry 13. Thus the argument was that the Appellant before this Court being the 4<sup>th</sup> claimant before the Surveyor was duly noticed by Court in terms of Section 20 (1) of the Partition Law as amended but on the notice returnable date-i.e.02.02.1987 he was absent and thus had not responded to the notice. It was only after a lapse of 7 years and 9 months that the Appellant made an application to intervene on 23.11.1994 in terms of Section 69 of the Partition Law.

As is well known under section 69 of the Partition Law which is now in force any person who claims an interest in the land may apply to court at any time before Judgment is delivered in a partition action, that he be added as a party to the action. Therefore it could be seen that an intervenient cannot come to court after the judgment is delivered in a partition action. In addition to this restriction of time for interventions, Section 20 (5) of the Partition Law debars a person from making an application for intervention if he has not responded to a notice sent by court. The preclusive provision goes as follows:

*The provisions of Section 69 shall not apply to a person to whom notice has been sent under this section.*

So the contention is that here is an appellant who was noticed to appear because he was a new claimant before the Surveyor. But he did not respond to this notice. So though he made an application to intervene before judgment was delivered, he could not avail himself of the right to intervene given to him under Section 69 because Section 20 (5) debars him from making the application for intervention. I am afraid I cannot assent to this proposition.

I have held that all steps taken subsequent to the non-conformity with Section 12 were nullities and the partition case, like Humpty Dumpty, had fallen irretrievably and if I may paraphrase Mother Goose, *all the king's horses and all the king's men could not put Humpty together again*. The proceedings became void at the stage of non-compliance with Section 12 and it remained void. What is void cannot be rendered valid thereafter. In fact Lord Denning in the Privy Council in *McFoy v United Africa Company* (1961) 3 AER 1169 stated at p 1172

*If an act in law is void, then it is in law a nullity.....There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

See the effect of the maxim "you cannot put something on nothing" in *Piyadasa Perera v Cooray* CA 1104/00 (F) -D.C.Mt.Lavinia 2286/L (Argued & Decided on 17.03.2017).

Thus Section 20 notice that was issued was without jurisdiction and Section 69 along with its restriction in Section 20 (5) would all apply only when *valid proceedings* had commenced and continued.

Only when proceedings are recognized by law, there can be a valid decree. So the statutory bar in Section 20 (5)-“one cannot intervene under section 69, because one has not responded to notice” had not application in proceedings that were conducted without jurisdiction. Having regard to all these considerations, I take the view that a grave injustice has occurred by reason of the failure on the part of the learned District Judge to evaluate evidence according to law and to bear in mind the consequences of nullity arising owing to non-compliance with Section 12 of the Partition law. In the end there is no comprehensive investigation of title at all as is required under Section 25 of the Partition Law as amended.

In the circumstances I set aside the impugned judgment and interlocutory decree and direct the learned District Judge of Kuliyapitiya to take proceedings *de novo*. The learned District Judge shall take steps to compel the Plaintiffs to comply with section 12 of Partition Law before the matter is taken up for trial.

JUDGE OF THE COURT OF APPEAL