

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

S.C Appeal 110/2014

S.C Spl. LA No. 28/2014

C.A Appeal No.534/1995 (F)

D.C Kalutara No. 3368/L

1. Abdul Hameed Marikkar Mohamed Ismail
2. Mohamed Ismail Ummul Kadeeja
Both of No.185, Old Road,
Beruwela.

PLAINTIFFS

Vs.

Mohamed Sainadeen Mohamed Saleem
Of No. 181/1, Old Road,
Beruwela.

DEFENDANT

AND

Mohamed Sainadeen Mohamed Saleem
Of No. 181/1, Old Road,
Beruwela. **(DECEASED)**

DEFENDANT-APPELLANT

Mohamed Saleem Misriya
No. 181/1, Old Road,
Beruwela.

SUBSTITUED-DEFENDANT-APPELLANT

Vs.

1. Abdul Hameed Marikar Mohamed Ismail
(DECEASED)

1ST PLAINTIFF-RESPONDENT

2. Mohamed Ismail Ummul Kadeeja
(DECEASED)

Both of No. 185, Old Road, Beruweala.

**SUBSTITUED-1ST PLAINTIFF AND 2ND
PLAINTIFF-RESPONDENT**

1. Mohamed Ismail Mohamed
2. Mohamed Ismail Ahamed Maood
3. Mohamed Ismail Abdul Rahuman
4. Mohamed Ismail Sulaiha Umma
5. Mohamed Ismail Ahamed Bari
6. Mohamed Ismail Abdul Cader

All of No. 185, Sheik Jamaldeen Road,
Beruwala.

7. Abdul Raheema Umma Nafeema
8. Abdul Raheema Umma Aasiya
9. Abdul Raheema Umma Ameena

All of No. 181/1, Sheik Jamaldeen Road,
Beruwala.

SUBSTITUED-PLAINTIFF-RESPONDENTS

AND NOW BETWEEN

1. Mohamed Ismail Mohamed
2. Mohamed Ismail Ahamed Maood
3. Mohamed Ismail Abdul Rahuman

4. Mohamed Ismail Sulaiha Umma
5. Mohamed Ismail Ahamed Bari
6. Mohamed Ismail Abdul Cader

All of No. 185, Sheik Jamaldeen Road,
Beruwala.

7. Abdul Raheem Umma Nafeema
8. Abdul Raheem Umma Aasiya
9. Abdul Raheem Umma Ameena

All of No. 181/1, Sheik Jamaldeen
Beruwela.

**SUBSTITUTED-PLAINTIFF-RESPONDENT-
PETITIONERS**

Vs.

Mohamed Saleem Misriya
Of No. 181/1. Old Road, Beruwala.

**SUBSTITUTED-DEFENDANT-APPELLANT-
RESPONDENTS**

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J.

COUNSEL: H. Withanachchi with Shantha Jayawardena
for the Substituted 1st Plaintiff-Respondent
and 2nd Plaintiff-Respondent-Appellant

Kumaran Aziz with Ershan Ariyaratnam
for the Substituted-Defendant-Appellant-Respondent

WRITTEN SUBMISSIONS FILED ON:

15.08.2014 (By the Substituted-Plaintiff-Respondent-Appellant)
08.06.2015 (By the Substituted-Defendant-Appellant-Respondent)

ARGUED ON: 02.11.2017

DECIDED ON: 22.11.2017

ANIL GOONERATNE J.

This was an action filed in the District Court of Kalutara for a declaration of title in favour of the Plaintiffs that the land depicted as lot 'G' in plan 4344 together with the house formerly bearing Assessment No. 2464 and presently Assessment No. 181 belongs to the Plaintiffs, and ejectment of the Defendants with all those holding under the Defendants and delivery of possession to the Plaintiffs. In brief the Plaintiff's claim and trace title from their predecessor in title who was one Omer Lebbe Marikar Mohamed Ismail. The said O.L.M. Mohamed Ismail by virtue of a certificate of sale executed in D.C Kalutara partition case No. 15312 became the owner of the land in dispute described and "Kundagodawatta" alias 'Kundagoda Tottam' The said O.L.M. Mohamed Ismail by Deed No. 4932 of 19.11.1953 conveyed to 1st Plaintiff his rights to the land in dispute which he purchased from a sale relating to a partition case, as aforesaid. The 1st Plaintiff by Deed No. 11845 dated 02.04.1973 conveyed 1/4th share of his rights and the entire rights of the house standing thereon to the 2nd Plaintiff his daughter.

The Defendant on the other hand plead that his predecessors were in possession of the land in dispute for generations and was never in possession under the leave and licence of the Plaintiffs. Paragraphs 6 to 9 of the amended answer shows the chain of title as to how the Defendant got ownership to the land in dispute. The Defendants further plead that by uninterrupted long term possession of the land in dispute along with the house standing thereon, indicates that Plaintiffs have no title to the said land. Defendant also plead that the final decree has not been entered in D.C. Kalutara Case No. 15312 and sale as relied by the Plaintiffs has not taken place as pleaded in the amended plaint. It was the position of the Defendant party that the Plaintiffs are not entitled to the benefit of a certificate of sale in the absence of a Fiscal's Conveyance which the Plaintiffs do not have. Defendant relies on Section 289 of the Civil Procedure Code which requires a Fiscal's Conveyance subsequent to the sale of the property in dispute and confirmation of the sale by court.

The District Judge gave Judgment in favour of the Plaintiffs, taking into consideration the certificate of sale marked as 325 in the trial before the District Court. However in the appeal by the Defendant, to the Court of Appeal, the Court of Appeal set aside the Judgment of the learned District Judge mainly on the ground of the provisions contained in Section 289 of the Civil Procedure

Code on the basis that there had not been a Fiscal's Conveyance in favour of the Plaintiffs. The action of the Plaintiffs was also dismissed.

The only point for decision in this case is whether the certificate of sale confers valid title on the successful purchaser, at a sale held according to the provisions of the Partition Law. At this point in this Judgement I have to mention that prior to the present Partition Law of 1977, we had from earlier times the Partition Ordinance No. 10 of 1863 and Partition Act No.16 of 1951. The case in hand relates to an alienation of land under Partition Ordinance No. 10 of 1863. It is a certificate of sale issued under the hand of the District Judge.

The certificate of sale on which the Plaintiffs rely is contained at Pgs. 249-256 of the brief. It is in favour of the purchaser O.L.M. Marikkar Ismail. The certificate is dated 23.05.1938. It inter alia refer to the Case No. 15312. The certificate of sale in its caption gives the names of the Plaintiffs and Defendants. It states it is a sale in terms of Partition Ordinance No. 10 of 1863. It is further stated that by the Decree of 22.09.1937 entered in the said action it was ordered that the land and premises be sold in 3 blocks as set out in the survey and proceeds be distributed amongst the said parties. A commission was also issued to one Mr. L.G. Abeysinghe Auctioneer. Land premises valued at Rs. 663/75 and O.L.M. Mohamed Ismail became the purchaser. It is certified by the District Judge and signed by the District Judge affixing the District Court Seal.

In the text on “The Law of Partition in Ceylon by D.A.St. V. Jayawardena Pg. 187 – The certificate takes the place of a conveyance from the former owner to the new owner. The certificate should

- (1) Be signed by the Judge
- (2) State that the property was sold on the Order of the Court
- (3) Give the names of the purchaser; and
- (4) State the purchase money has been duly paid.

At. Pg. 188 *Sir Joseph Hutchinson, C.J in the case of Cathirihami Vs. Babahamy 11 NLR 20*, where he said that the intention of the Partition Ordinance was to give an indefeasible title to the purchaser to whom the land was sold when the sale was affirmed and completed by the certificate of the Court under Section 8, intended to say anything more than that the title of the purchaser was indefeasible as regards the estate that passed to him under the Decree.

I observe, as the description given above on the relevant certificate of sale and in comparison with the above authority refer to and demonstrate that the certificate of sale would pass good title to the purchaser in this case the said O.L.M. Mohamed Ismail the purchaser.

I will now consider Section 8 of the Partition Ordinance No. 10 of 1863. The said section deals with the Commission for sale issued by court to a Commissioner to Survey and return the Commission. It also states the certificate

of court to be sufficient title. Section 9 of the said Ordinance states the Decree for partition or sale gives as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property. To give more clarity I annex to this Judgement an annexure of the said sections.

I do not think and nor can I agree with the Court of Appeal Judgment, that states that provisions of Section 289 of the Civil Procedure Code should be complied with and a certificate as aforesaid is not sufficient. It must be kept in mind that the Plaintiff's derive title from the above named purchaser O.L.M. Mohamed Ismail. The said O.L.M. Mohamed Ismail had good and valuable title from the purchase he made and the certificate of sale is conclusive in terms of Section 8 & 9 of the said Partition Ordinance. The said purchaser who got title from the certificate of sale sold by deed No. 4932 of 19.11.1953 the land in dispute to the Plaintiff. As such the law relevant at the time of issuance of the certificate of sale was the Partition Ordinance No. 10 of 1863. As such the certificate of sale is final and conclusive and the necessity to have a further conveyance like a Fiscal Conveyance is not acceptable in law (which prevalent at that time). Certificate of sale operates as a final Decree. Section 8 of the said Ordinance enacts that where a Decree for sale has been ordered like in the case in hand, the procedure to be followed in a partition case where instead of

dividing the land among co-owners, court could issue a Commission for sale of lands by public auction.

In the full Bench Judgment of *Bandara Vs. Baba* 18 NLR Pg.1, Supreme Court settled the law, held: The Decree for sale to which a conclusive effect is given by Section 9 of the Partition Ordinance of 1863 is the Decree under Section 4 or the Final Judgment spoken of in Section 6 of that Ordinance. It is the last step in the proceedings, namely, the issuance of the certificate of the Court (At Pg. 3).

I would also refer to a more recent case, *Cinemas Ltd. Vs. Ceylon Theatres Ltd.* 67 NLR 97. This deals with the Partition Act of 1951. This Act was enacted to among other things to clarify certain issues the Act was intended to give conclusive title to the land which a person buys under a Decree of Court. Even the subsequent Partition Act of 1951 fortify the position of certificate of sale.

Pg. 97.

On a proper construction of sections 46, 48 and other relevant provisions of the Partition Act, it is clear that when, in pursuance of an order for the sale of a land, a certificate of sale of the land is entered in terms of section 46 of the Partition Act, the title which the certificate of sale confers on the purchaser of the land and buildings thereon is free from any life interest or usufruct which may be declared in favour of a person in the interlocutory decree entered under section 26, read with section 48 of the Act. The purchaser under a decree for sale gets title free from all encumbrances except only the interests of the

proprietor of a *nindagama* and the interests which are specially preserved by section 54 of the Act.

In the interlocutory decree entered in a partition action, the Court gave the 2nd defendant life interest over one-third share of the land and building standing thereon and ordered that the sale of the property should be subject to the life interest of the 2nd defendant over the one-third share.

Held, that that part of the interlocutory decree which stated that “the said premises will be put up for sale subject to the life interest of the 2nd defendant in respect of one-third share of the soil and one-third share of the building” should be deleted and the following words be substituted: “the said premises will be put up for sale”. The interests awarded to the 2nd defendant should be valued and he should be paid the estimated value of his usufruct out of the proceeds of the sale.

The Partition Act of 1977, as amended as well as the previous partition laws which I mentioned above comprises both the substantive law and the procedural law. There is no doubt that parties need not resort to the provisions of the Civil Procedure Code, when the partition law itself provide for the procedural law. In the case reported in 78 NLR 525, when execution proceedings were initiated under Section 337 of the Civil Procedure Code, for an order to put the Appellant in possession of the lots, Supreme Court held that it is a wrong procedure and under Section 53 of the Partition Act, he should ask for possession by way of a motion.

In the same way I observe that the decree for sale and decree for partition are two different decrees and whether the decree for sale is of a lesser degree of recognition? It is not so. In *Aserappa Vs. Jokino Jouse (1915) 1CWR*

133, *Shaw J.* held “it is perhaps unfortunate that the ordinance gives no discretion to the court to refuse partition or sale, in cases where it is clearly detrimental to the interests of the majority of persons affected, but in my opinion no such discretion is given and the right of an owner in common to compel partition or sale is absolute. In the present Partition Law of 1977 also there are provisions dealing with sale. In the 2nd schedule to the Act gives the format of a certificate of sale under Section 46 which has to be signed by the District Judge. It specifically state, in the final paragraph of the certificate of sale, shall be conclusive evidence of the title.

In the circumstances I state that there is no necessity to resort to the provisions of the Civil Procedure Code, especially Section 289 of the Code. The certificate of sale, and the law applicable is clear as regards the case in hand. The Ordinance No. 10 of 1863, the Partition Act of 1951 and the present Partition Law of 1977 are all laws which recognise that the certificate of sale is conclusive evidence of title.

In all the facts and circumstances of the case in hand I affirm the Judgment of the District Court. Title of O.L.M. Mohamed Ismail is valid and conclusive and one need not resort to any provisions of the Civil Procedure Code. In these circumstances I set aside the Judgment of the Court of Appeal. Supreme Court on 04.07.2014 granted Special Leave on question of law set out

in paragraphs 17(i), (iv) & (vi) of the petition dated 10.03.2014. I answer the said question of law in favour of the Substituted-Plaintiff-Respondent-Petitioner in the affirmative.

I also state in a partition action it is not necessary to execute a Fiscal Conveyance consequent to a Decree of sale in order for title to effectively pass to the purchaser, in the circumstances and in the context of the case in hand. Relief granted as per subparagraphs (b) & (c) of the prayer to the Petition.

Appeal allowed as above with costs.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

