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

1. Don Alfred Weerasekera
1A. Don Dharmadasa Weerasekera,
Yakdehiwatte, Labungederawatte,
Nivitigala.
Plaintiff

SC/APPEAL NO: 172/2017
SP/HCCA/RAT/01/2014 (LA)
DC RATNAPURA NO: 2203/P

Vs.

1. Gonakoladeniya Gamage Pantis Appuhamy
1A. Gonakoladeniya Gamage Gamini Premadasa
2. Kubunkelawatte Dingiri Ethana
2A. Madara Maliyanage Bandulahamy
2B. Gonakoladeniya Gamage Gamini Premadasa
3. Kubunkelawatte Punchi Ethana
3A. Godage Pathalage Yasohamy
4. Metaramba Koralalage Sirisena
5. Metaramba Koralalage Charlis Appuhamy
5A. Metaramba Koralalage Piyasekera
6. Malawana Gamlalage Abraham Appuhamy
7. Malewana Gamlalage Rathenis Appuhamy
8. Malewana Gamlalage Publis Singho

9. Metaramba Koralalage Piyasena
10. Wijekoon alias Mudiyanselage
Willie Bandara Wijeratne
10A. Wijekoon alias Mudiyanselage
Mahai Bandara Wijeratne,
All of,
Yakdehiwatte,
Nivitigala.
11. Ekanayake Mudiyanselage
Sumanawathie Ekanayake
12. Godage Liyanage Yasohamy
13. Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.
14. M. M. Lamahamy
Defendants

AND

Madara Mahaliyanage Bandusena,
C/O Mr. A.W. Weeraratne,
Devale Road,
Yakdehiwatte,
Nivitigala.
Petitioner

Vs.

1. Don Alfred Weerasekera
1A. Don Dharmadasa Weerasekera,
Yakdehiwatte,

Labungederawatte,
Nivitigala.
Plaintiff-Respondent

AND

1. Gonakoladeniya Gamage Pantis Appuhamy
1A. Gonakoladeniya Gamage Gamini Premadasa
2. Kubunkelawatte Dingiri Ethana
2A. Madara Maliyanage Bandulahamy
2B. Gonakoladeniya Gamage Gamini Premadasa
3. Kubunkelawatte Punchi Ethana
3A. Godage Pathalage Yasohamy
4. Metaramba Koralalage Sirisena
5. Metaramba Koralalage Charlis Appuhamy
5A. Metaramba Koralalage Piyasekera
6. Malewana Gamlalage Abraham Appuhamy
7. Malewana Gamlalage Rathenis Appuhamy
8. Malewana Gamlalage Publis Singho,
9. Metaramba Koralalage Piyasena
10. Wijekoon alias Mudiyanselage Willie Bandara Wijeratne
10A. Wijekoon alias Mudiyanselage Mahai Bandara Wijeratne,
All of,

Yakdehiwatte,
Nivitigala.

11. Ekanayake Mudiyanselage
Sumanawathie Ekanayake
12. Godage Liyanage Yasohamy
13. Hon. Attorney-General,
Attorney-General's Department,
Colombo.
14. M.M. Lamahamy
Defendant-Respondents

AND BETWEEN

Madara Mahaliyanage Bandusena,
C/O Mr. A.W. Weeraratne,
Devale Road,
Yakdehiwatte,
Nivitigala.
Petitioner-Petitioner

Vs.

1. Don Alfred Weerasekera
1A. Don Dharmadasa Weerasekera,
Yakdehiwatte, Labungederawatte,
Nivitigala.
Plaintiff-Respondent-Respondent

AND

1. Gonakoladeniya Gamage Pantis Appuhamy
1A. Gonakoladeniya Gamage Gamini Premadasa
2. Kubunkelawatte Dingiri Ethana
2A. Madara Maliyanage Bandulahamy
2B. Gonakoladeniya Gamage Gamini Premadasa
3. Kubunkelawatte Punchi Ethana
3A. Godage Pathalage Yasohamy
4. Metaramba Koralalage Sirisena
5. Metaramba Koralalage Charlis Appuhamy
5A. Metaramba Koralalage Piyasekera
6. Malawana Gamlalage Abraham Appuhamy
7. Malewana Gamlalage Rathenis Appuhamy
8. Malewana Gamlalage Publis Singho
9. Metaramba Koralalage Piyasena
10. Wijekoon alias Mudiyanselage Willie Bandara Wijeratne
10A. Wijekoon alias Mudiyanselage Mahai Bandara Wijeratne,
All of, Yakdehiwatte,
Nivitigala.
11. Ekanayake Mudiyanselage Sumanawathie Ekanayake
12. Godage Liyanage Yasohamy
13. Hon. Attorney-General,

Attorney-General's Department,
Colombo.

14. M.M. Lamahamy
Defendant-Respondent-Respondents

AND NOW BETWEEN

Madara Mahaliyanage Bandusena,
C/O Mr. M.K. Swarnapala
Yakdehiwatte, Nivitigala.
Petitioner-Petitioner-Appellant

Vs.

1. Don Alfred Weerasekera (Deceased)
1A. Don Dharmadasa Weerasekera,
Yakdehiwatte,
Labungederawatte, Nivitigala.
Plaintiff-Respondent-Respondent-Respondent

AND

1. Gonakoladeniya Gamage Pantis Appuhamy (Deceased)
1A. Gonakoladeniya Gamage Gamini Premadasa (Deceased)
1B. Gonakoladeniya Gamage, Udayajeewa Premadasa,
Kala Bhumi, Pathakada Road,
Yakdehiwatte,

Nivitigala.

2. Kubunkelawatte Dingiri Ethana (Deceased)

2A. Madara Maliyanage Bandulahamy (Deceased)

2B. Gonakoladeniya Gamage Gamini Premadasa (Deceased)

2C. Gonakoladeniya Gamage Udayajeewa Premadasa, Kala Bhumi,
Pathakada Road,
Yakdehiwatte,
Nivitigala.

3. Kubunkelawatte Punchi Ethana (Deceased)

3A. Godage Pathalage Yasohamy

3B. Madare Kankanamalage Wjesinghe

4. Metaramba Koralalage Sirisena (Deceased)

4A. Manamperi Mudiyanselage Seelawathie

4B. Sirimewan Metarambakoralalage

4C. Swarnapala Metarambakoralalage

4D. Sudharma Metarambakoralalage

4E. Pathmini Chandra

4F. Susila Rupawathie
4A to 4F Respondents are of
C/O Mrs. M.M. Seelawathie,
Yakdehiwatte, Nivitigala.

5. Metaramba Koralalage Charlis Appuhamy (Deceased)

5A. Metaramba Koralalage Piyasekera

(Deceased)

5B. Metaramba Koralalage Sirisena

6. Malawana Gamlalage Abraham Appuhamy (Deceased)

7. Malewana Gamlalage Rathenis Appuhamy (Deceased)

7A. Malewana Gamalakshege Wanshapala (Deceased)

7B. Raigala Desilige Suneetha

7C. Malewana Gamlakshege Chaminda

7D. Malewana Gamlakshege Chandrika Gamlakshe

7E. Malewana Gamlakshege Nisansala Manori Gamlakshe

7F. Malewana Gamlakshege Dilan Chanaka Gamlakshe

8. Malewana Gamlalage Publis Singho (Deceased)

9. Metaramba Koralalage Piyasena (Deceased)

9A. Metaramba Koralalage Sirisena (Deceased)

10. Wijekoon alias Mudiyanselage Willie Bandara Wijeratne (Deceased)

10A. Wijekoon alias
Mudiyanselage Mahinda
Bandara Wijeratne,
All of,
Yakdehiwatte,
Nivitigala.

11. Ekanayake Mudiyanselage
Sumanawathie Ekanayake (Deceased)

11A. Sarath Wijeratne Mahinda Bandara,
Yakdehiwatte, Nivitigala.

12. Godage Liyanage Yasohamy,
(Deceased)

12A. Parassage Heenmenike,
Yakdehiwatte, Nivitigala.

13. Hon. Attorney-General,
Attorney-General's Department,
Colombo.

14. M. M. Lamahamy (Deceased)

14A. Madare Mahaliyanage Athula
Pemachandra, Niralgama,
Alupothagama, Ratnapura.

14B. Madare Mahaliyanage Susantha
Sena Kumara,
Devale Road,
Yakdehiwatte, Nivitigala.

Defendant-Respondent-
Respondent-Respondents

Before: S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Shyamal A. Collure with Prabath S. Amarasinghe for the Petitioner-Petitioner-Appellant.
S.N. Vijithsingh for the 9A, 14A and 14B Defendant-Respondent-Respondent-Respondents.

Hussain Ahamed with Ayendri De Silva for the 1B and 2C Defendant-Respondent-Respondent-Respondents.

Written Submissions:

By the Petitioner-Petitioner-Appellant on 13.10.2017
By the 2B Defendant-Respondent-Respondent-Respondents on 24.11.2017

Argued on: 22.11.2023

Decided on: 30.01.2024

Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Ratnapura against eight defendants to partition the land known as *Labungederawatta* described in the schedule to the plaint according to the partition law. The 9th to 14th defendants were later added. After trial, the judgment was delivered partitioning the land among the plaintiff, the 2nd to 5th defendants, and the 7th and 9th defendants. No party appealed against the judgment. The final partition plan was confirmed by Court without any contest. In the final decree, the 2nd defendant was allotted lots 2, 3 and 7 of the final partition plan No. 1456 dated 16.08.2010. The instant appeal relates to the delivery of possession of the said three lots.

According to journal entry No. 44 dated 02.04.1987, the District Judge was informed about the death of the 2nd defendant, namely Kumbukkolawatte Dingiri Ethana and the Court directed the plaintiff to take steps. According to journal entry No. 46 dated 10.12.1987, steps were taken to serve order nisi on M.M. Lamahamy and M.M. Bandulahamy who were said to be the daughter and son of the deceased 2nd defendant, Dingiri Ethana. It is not clear from the journal entry whether they were present in Court on that date. However, the Court

substituted Bandulahamy as the 2(a) defendant. Lamahamy has later been added as the 14th defendant.

The judgment was delivered on 11.03.2009. In the meantime, 2(a) defendant, Bandulahamy, has died. According to journal entry No. 145 dated 01.09.2011, steps were tendered in open Court. The petition and affidavit dated 01.09.2011 filed by one Gamini Premadasa through an Attorney-at-Law are in the brief. No documents were tendered with the petition and affidavit. Bandulahamy's death certificate was not tendered. Not even the date of death was disclosed. In the affidavit, Gamini Premadasa stated that Bandulahamy was appointed as the sole heir of the original 2nd defendant Dingiri Ethana, and that Bandulahamy transferred his rights to Gamini Premadasa by Deed No. 679 dated 01.11.1991. These assertions, as I will explain later, are not correct.

In the judgment delivered after trial, the District Judge clearly states at page 11 that Bandulahamy is not the only child of Dingiri Ethana, and that there is no necessity in this case to investigate how Dingiri Ethana's rights devolve on others. It is on that basis, in the final decree of partition, lots 2, 3 and 7 were allotted in the 2nd defendant's name.

The succeeding District Judge had not considered any of these things but had made a perfunctory order substituting Gamini Premadasa as the 2(b) defendant in place of the deceased 2(a) defendant Bandulahamy.

What did Bandulahamy transfer by Deed No. 679 pending partition?

> ඉහත කී දීමනාකාර මට, මව් උරුමයට හා දීර්ගකාලීන භුක්තිය මත හිමිව, භුක්ති විඳගෙන එනු ලබන, සබරගමු පළාතේ රත්නපුර දිස්ත්‍රික්කයේ නවදුන් කෝරලේ මැද පත්තුවේ නිවිතිගල පිහිටා තිබෙන, ලැබුන්ගෙදර වත්ත නොහොත් පහල ලැබුන්ගෙවත්ත නැමැති උතුරට:- උඩහ ලැබුන්ගෙවත්ත සහ අගලවත්ත ද, නැගෙනහිරට:- පිටකනත්තේ වත්ත සහ අගල ද, දකුණට: හන්දුරුගෙ කනත්ත සහ බස්නාහිරට:- කහටගහ කොරටුව සහ වේල්ල යන මායිම්තුල පිහිටි අක්කර දෙකක් (අක්:02 රූ:00 පර්:00) විශාල ඉඩමෙන් මට ඇති සියලුම අයිතිවාසිකම් හෙවත්, රත්නපුර දිසා අධිකරණයේ අංක 2203 දරන බෙදුම් නඩුවේ අවසන් තීන්දුවෙන් මට ලැබෙන යම් අයිතිවාසිකමක් හිමිකමක් වේද, එකී අයිතිවාසිකම් සියල්ල වේ.

By that Deed, Bandulahamy transferred what he might be allotted in the final decree of partition. He did not get anything from the final decree but his deceased mother, the 2nd defendant, was allotted lots 2, 3 and 7 of the final partition plan. Bandulahamy did not and could not transfer the entirety of lots 2, 3 and 7 unless he was the only heir of the 2nd defendant. It must be remembered that Deed No. 679 is not a Deed executed by the 2nd defendant Dingiri Ethana during the pendency of the partition action but by one of her children, Bandulahamy.

After the final decree was registered, the 2(b) defendant Gamini Premadasa tendered steps by way of a motion dated 21.03.2013 to eject the current occupants of lots 2, 3, and 7 and deliver possession of those lots to him. This was minuted in journal entry No. 156 dated 28.03.2013. The District Judge allowed that application in chambers. The possession has not been delivered yet. The heirs of the original 2nd defendant seem to be in possession of those lots.

In view of this development, Bandulahamy's son, M.M. Bandusena, made an application by way of petition and affidavit dated 07.06.2013 seeking to quash the order appointing Gamini Premadasa as the 1(b) defendant and to suspend the execution of the writ. This is minuted in journal entry No. 157 dated 10.06.2013.

The District Judge, by a two-page order dated 09.01.2014 dismissed this application with costs on the following basis:

> ඇත්තවශයෙන්ම එකී පැවරීම එනම් බන්දුලහාමි විසින් ගාමිනී ප්‍රේමදාස වෙත කරන ලද පැවරීම පෙත්සම්කාර බන්දුසේන විසින් ප්‍රතික්ෂේප කිරීම කරයි නම් කළ යුතුව තිබුනේ මෙම නඩුවේ අවසාන තීන්දුව ඇතුලත් කිරීමට පෙර වේ. නමුත් ඔහු එම ඉල්ලීම අවසාන තීන්දුව ඇතුලත් කිරීමෙන් අනතුරුව කර ඇති අතර දැනට මෙම නඩුවේ කටයුතු අවසන් වී ඇති බැවින් ඔහුට මෙවැනි ඉල්ලීමක් මෙම නඩුව පවත්වා ගෙන යාමට කළ නොහැක. ඒ සදහා වඩාත් සුදුසු වනුයේ වෙනත් නඩුවක් මගින් අදාල ඔප්පුව විවාදයට ලක් කිරීමයි. එවැන්නක්ද මෙම පෙත්සම්කරු කර ඇති බවක් නහවුරු නොවේ. හුදෙක් මෙම නඩුවේ කටයුතු ප්‍රමාද කිරීමේ අදහසින්ම මෙම නිරර්ථක ඉල්ලීම මෙම නඩුවට කර ඇති බව පෙනේ. ඒ අනුව රුපියල් 5000/- ක ගාස්තුවකට යටත්ව ඉල්ලීම ප්‍රතික්ෂේප කරමි.

The order of the learned District Judge is contradictory. Firstly, the learned Judge says that the application cannot be maintained because proceedings stand terminated with the entering of the final decree. He states the application to cancel the appointment of the 2(b) defendant should have been made prior to the entering of the final decree. According to journal entry No. 145, this appointment was made and the final decree was entered on the same date. After stating that there are no live proceedings, the learned Judge then states that this frivolous application was made to delay the conclusion of the case. The learned Judge further states that if the transfer effected by Deed No. 679 is to be challenged, it should be done in separate proceedings. Had the learned Judge read the application carefully, he would have realised that the petitioner Bandusena does not challenge the Deed. Bandusena has not even mentioned that Deed. He is challenging the appointment of Gamini Premadasa in place of Bandulahamy because Gamini Premadasa was taking steps to eject Bandusena and others from lots 2, 3 and 7. Bandusena's main application was not to hand over possession of those lots to Gamini Premadasa. In the order, the learned Judge has not mentioned a word about delivery of possession.

Being dissatisfied with this order, the petitioner Bandusena preferred an appeal to the High Court of Civil Appeal of Ratnapura. The High Court affirmed the said order of the District Court and dismissed the appeal with costs on the basis that the 2(a) defendant Bandulahamy was the sole heir of the deceased 2nd defendant and that the 2(a) defendant transferred his share to the 2(b) defendant by Deed No. 679. The High Court further stated that the 2(b) defendant is entitled to obtain possession of lots 2, 3 and 7 of the final partition plan in terms of section 52A(1)(c) of the Partition Law. As I will explain below, all these findings are not sustainable in fact and in law.

This Court granted leave to appeal to the petitioner on the following two questions of law:

(a) Has the Civil Appeallate High Court erred in law in failing to conclude that the 2(b) defendant-respondent is not entitled to obtain possession of or to obtain a writ of execution in respect of all the lots allotted to the original 2nd defendant, and does the said error vitiate the judgment dated 11.09.2014?

(b) In any event, has the Civil Appellate High Court erred in law by failing to hold that the 2(b) defendant-respondent does not become entitled to the entirety of the original 2nd defendant's interest in the corpus on Deed No. 679 dated 01.11.1991?

Alienation of rights pending partition

Deed No. 679 was executed after the *lis pendens* was registered. In terms of section 66 of the Partition Law, No. 21 of 1977, voluntary alienations made after a partition action is duly registered as a *lis pendens* are void.

> *66(1) After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under section 36 or by the entry of a certificate of sale.*
>
> *(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void;*
>
> *Provided that any such voluntary alienation, lease or hypothecation shall, in the event of the partition action being dismissed, be deemed to be valid.*
>
> *(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a lis pendens shall not be affected by the provisions of subsections (1) and (2) of this section.*

The main reason for this prohibition is the potential disruption that may be caused by alienating parts of the land at frequent intervals, making it a challenging task to reach a finality in a partition action. (*Baban v. Amarasinghe* (1878) 1 SCC 24, *Annamalai Pillai v. Perera* (1902) 6 NLR 108, *Subaseris v. Prolis* (1913) 16 NLR 393, *Hewawasan v. Gunasekere* (1926) 28 NLR 33, *Srinatha v. Sirisena* [1998] 3 Sri LR 19 at 23)

However, it is now well-settled law that this prohibition for alienation does not apply to contingent interests in the land (those that might ultimately be allotted to him in the final decree) being alienated pending partition. Section 66 only prohibits the alienation of undivided interests presently vested in the owners. (*Louis Appuhamy v. Punchi Baba* (1904) 10 NLR 196, *Sillie Fernando v. Silman Fernando* (1962) 64 NLR 404, *Karunaratne v. Perera* (1965) 67 NLR 529, *Sirinatha v. Sirisena* [1998] 3 Sri LR 19)

In the case of *Kahan Bhai v. Perera* (1923) 26 NLR 204 at 208, a Full Bench of the Supreme Court presided over by Bertram C.J. with the agreement of Ennis, Schneider, Garvin JJ., and Jayawardene A.J. held that "*Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action.*"

In *Sirisoma v. Sarnelis Appuhamy* (1950) 51 NLR 337 at 341, a Divisional Bench of the Supreme Court presided over by Gratiaen J. with the agreement of Dias S.P.J. and Pulle J., having considered almost all the previous decisions including *Kahan Bhai v. Perera*, took the view that the prohibition against alienation pending partition need not be interpreted overly broadly.

> *Section 17 of the Partition Ordinance prohibits the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings. There is no statutory prohibition against a person's common law right to alienate or*

> *hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. "Section 17 imposes a fetter on the free alienation of property, and the Court ought to see that that fetter is not made more comprehensive than the language and the intention of the section require". Subaseris v. Prolis (1913) 16 NLR 393*

Nevertheless, the grantee of such contingent interest need not be made a party to the case as he has no absolute interest other than contingent interest vested in him pending partition. Interest would only vest in him upon the entering of the final decree provided the grantor is allotted a lot in severalty. (*Nazeer v. Hassim* (1947) 48 NLR 282, *Karunaratne v. Perera* (1965) 67 NLR 529, *Abeyratne v. Rosalin* [2001] 3 Sri LR 308)

If such contingent interests are alienated pending partition without any conditions, immediately on the final decree being entered, the lot in severalty allotted to the grantor will automatically pass and vest in the grantee without execution of another Deed, although, in practice, another Deed is also executed for better manifestation of the intention of the grantor.

In *Sirisoma v. Sarnelis Appuhamy* (1950) 51 NLR 337 Gratiaen J. stated at 343:

> *[W]hen an instrument has been executed whereby a present right is conveyed in respect of a contingent interest which the parties to the transaction expect to be realised at some future date, the instrument already executed operates so as to vest that interest in the purchaser as soon as it has been acquired by the vendor. No further conveyance is needed to secure the intended result – although it may well be desirable, as is often stipulated by prudent conveyancers, that the result already achieved should be "confirmed" in a further notarial instrument which will place the purchaser's rights beyond the possibility of controversy.*

In *Sillie Fernando v. Silman Fernando* (1962) 64 NLR 404, the 2nd defendant claimed certain soil rights, plantations and a thatched house in the land to be partitioned. Prior to the entering of the interlocutory decree, he, by a deed of gift, donated to his natural children born to his mistress, the 41st defendant-appellant, the soil, plantations and the thatched house which would be allotted to him ultimately by the final decree. The 2nd defendant died before the entering of the final decree and his wife and legitimate child, namely, 39th and 40th defendants, were respectively substituted in place of him. In the final decree the soil shares of the 2nd defendant, the plantations and the thatched house as a lot in severalty, were allotted to the substituted defendants, and they moved for a writ of possession against the 41st defendant and her children who were in possession. This was allowed by the District Judge. On appeal, the Supreme Court set aside that order and stated at 404-405:

> *It has been held by this Court in Sirisoma v. Sarnelis Appuhamy (1950) 51 NLR 337 and by a fuller Bench at a later stage, that, when a deed purports to sell or donate an undivided interest in a land, whatever will be allotted to the vendor or donor by a final decree in a partition action, the lot in severalty allotted to the vendor or donor or those representing him will automatically pass and vest in the vendee or donee under the deed in question, without any further conveyance, either by the vendor or donor or by his representatives.*
>
> *In view of this position, the moment a final decree was entered in this case allocating the thatched house, plantations and the lot in severalty to the representatives of the 2nd defendant in consequence of the terms of the deed Z1, title to that lot in severalty vested under the donees in Z1, namely, a life interest or usufruct in favour of the 41st defendant-appellant and title or donarium in her children.*

Substitution in partition actions

Substitution in partition actions is different from that in other civil actions. In partition actions involving multiple parties and prolonged proceedings, the death of a party might go unnoticed. A classic example might be the instant case, filed in the District Court more than 46 years ago, on 11.11.1977. In a partition action, all parties are not active; most of them remain dormant. Nevertheless, the District Judge in a partition action cannot afford to remain dormant. He must play an active role throughout the proceedings. Although the system of justice we adopt is adversarial as opposed to inquisitorial, the Judge in a partition action assumes an inquisitorial role. This distinction arises from partition actions being actions *in rem*, where the resulting decree binds the entire world.

It was the position in early cases that the death of a party without being substituted would render the entire proceedings a nullity from the point of the death of such party, despite the decree having been entered after a contested trial. (*Somapala v. Sirimanne* (1954) 51 CLW 31 per Gratiaen J., *Suraweera v. Jayasena* (1971) 76 NLR 413 per H.N.G. Fernando C.J.)

It was held by Sansoni C.J. with the agreement of T.S. Fernando, Sri Skanda Rajah and G.P.A. Silva JJ. in *Mariam Beebee v. Seyed Mohamed* (1965) 68 NLR 36 at 38-39:

> *[I]t is clear that a partition decree which allotted a share to a party, but which was entered after the death of that party, is a nullity. It is open to another party to the action to ask this Court in revision to set aside that decree (even though it may have been affirmed in appeal) and to remit the case to the lower Court in order that proper steps may be taken in the action- see Chelliah v. Tamber (1904) 5 Tamb. Rep. 52; Menchinahamy v. Muniweera (1950) 52 NLR 409; Somapala v. Sirimanne (1954) 51 CLW 31.*

Having realised the serious injustice caused to the parties thereby, when the present Partition Law, No. 21 of 1977, was enacted, the following section was introduced.

> *48(6). Where by an interlocutory or final decree a right, share or interest has been awarded to a party but such party was dead at the time, such decree shall be deemed to be a decree in favour of the representatives in interest of such deceased person at the date of such decree.*

Thereafter, the legislature introduced special provisions to simplify the substitution procedure in partition actions by repealing and replacing section 81 of the Partition Law by the Partition (Amendment) Act, No. 17 of 1997.

Section 81(1) necessitates every party to a partition action or any other person required to file a memorandum under the Partition Law, to file such memorandum, substantially in the form set out in the second schedule to the Partition Law, nominating at least one person, and not more than three persons, in order of preference, to be his legal representative for the purposes of the action in the event of his death pending the final determination of the action.

According to section 81(5), such party or person may file a fresh memorandum at any time before the final determination of the action.

Section 81(2)(c) enacts that the person or persons so nominated shall subscribe his or their signatures to the memorandum signifying consent to be so appointed as a legal representative. The signatures of the nominator and those of the nominee or nominees so consenting to be appointed shall be witnessed by an Attorney-at-Law or a Justice of the Peace or a Commissioner of Oaths.

Section 4(2) of the Partition Law mandates every plaintiff to file a memorandum nominating legal representatives.

> *4(2). There shall be appended to every plaint presented to a court for the purpose of instituting a partition action, a memorandum substantially in the*

form set out in the Second Schedule to this Law, nominating in accordance with section 81, a person to be the legal representative of the plaintiff for the purposes of the action, in the event of his death pending the final determination of the action.

Section 19(d) mandates every defendant to do so.

19(d). Every defendant in the action shall file or cause to be filed, in court, a memorandum, substantially in the form set out in the Second Schedule to this Law, nominating in accordance with section 81, a person to be his legal representative for the purposes of the action, in the event of his death pending the final determination of the action.

According to section 69(1), any person who applies to be added as a party, any purchaser who is substituted under section 69(2), and any intervenient as described under section 69(3), shall also file such memorandum.

However, it should be borne in mind that the failure to file a memorandum shall not affect the substantive rights of the party or person. The proviso to section 81(2)(c) reads as follows:

Provided however, that failure to file such memorandum shall not by such failure alone render the plaint, statement of claim, or application to be added as a party defective or, notwithstanding anything in section 7, be a cause or ground for rejecting such plaint, statement of claim or any application to be added as a party.

This is emphasised in section 81(9) as well. It states that the failure to file a memorandum shall not invalidate the proceedings in the action.

Notwithstanding that a party or person has failed to file a memorandum under the provisions of this section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made,

partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action.

Under section 81(3), the Court may, at any time before the final determination of the action, direct a party or any person required to file a memorandum to do so by a specified date.

A nominee may, in terms of section 81(4), at any time prior to the death of the nominator, apply to Court by way of motion with notice to the nominator to withdraw his consent as the nominee.

After the death of the nominator, section 81(8) permits the nominee to apply for permission from Court to be released from the office of legal representative of such nominator. If such nominee is the only nominee, the Court can appoint a consenting heir of such deceased nominator to that position.

Section 81(10)(a) empowers any party or person to apply to Court for the appointment of a legal representative in the event of a death of a party or person who had failed to file a memorandum as required by section 81. Gamini Premadasa seems to have made the application dated 01.09.2011 under this section.

81(10)(a). On the death of a party or person who had failed to file a memorandum as required by this section, any party or person may apply to court by an ex parte application, requesting that a person be appointed as the legal representative of such deceased party or person and the court may, on being satisfied after inquiry that such appointment is necessary, appoint a suitable person to be the legal representative of such deceased party or person for the purposes of the action. Such legal representative shall be bound by the proceedings had up to the time of such appointment.

According to section 81(10)(a) the Court may make such appointment on being satisfied after inquiry that such appointment is necessary. However, in the instant case, no such inquiry has been held.

Section 81(11) permits an heir of the deceased nominator to apply to Court for the removal of the nominator and the appointment of another individual as the legal representative of the deceased.

> *81(11)(a). An heir of a deceased nominator may, at any time after the death of such nominator, apply to court to have the legal representative of such deceased nominator removed and to have another person named in such application or the person next named in order of preference in the memorandum filed by the deceased nominator, appointed as such legal representative. The person who for the time being is the legal representative of the deceased nominator shall be made a respondent to such application.*
>
> *(b) The court may, upon being satisfied that it is in the interests of the heirs of the deceased nominator to do so, remove such legal representative and appoint the person next named in order of preference in the memorandum filed by the deceased nominator or if there are sufficient grounds for doing so, appoint the person named in the application, as the legal representative of the deceased nominator.*
>
> *(c) An application under this section shall be by way of petition and affidavit and the court may in its discretion, issue notice of the application to the other heirs, if any, of the deceased nominator.*

The appellant seems to have made the application in terms of section 81(11).

It may be noted that such nominees who are designated as legal representatives of the nominator need not necessarily be the heirs of the nominator. They can be anybody who can take steps for the purpose of the action as the deceased nominator would have been entitled to take had he been alive.

The appointment of a legal representative does not affect the rights of the heirs of the deceased. He only represents the estate of the deceased for the purpose of the action. With the death of the deceased, the legal representative does not become the owner of all the properties of the deceased.

The devolution of title needs to be decided separately. What section 81(1) requires is for the party or any other person to file a memorandum nominating persons "to be his legal representative for the purpose of the action". The term "for the purpose of the action" is stressed throughout section 81.

Section 81(14) reads as follows:

> *For the purposes of this section "legal representative" means, a person who represents the estate of a deceased party or person, for the purposes of the action, by virtue of a nomination, or of an appointment by court under this section.*

With reference to section 81(14) of the Partition Act, Amarasekara J. in *Premawathie v. Thilakaratne* [2021] 3 Sri LR 382 at 392 states:

> *As per section 81(14) of the Partition Act, a legal representative means a person who represents the estate of the deceased person. Generally, in a partition action shares are given or rights are granted to the original party and if the party is dead, the legal representative gets it not for him/her but on behalf of all the heirs of the deceased or for the person/s entitled under the original deceased party.*

There is no requirement for the legal representative to file a memorandum nominating his legal representatives in the event of his death. Upon the death of the legal representative, the next in order of preference in the memorandum of the original party will assume the role. If the sole legal representative dies, a legal representative needs to be appointed, not for the deceased legal representative, but for the original party deceased.

Applicability of section 81 to the issue in the instant appeal

The learned District Judge misunderstood the issue. He neither referred to section 81 nor to the delivery of possession of lots.

The High Court referred to section 81(10) and stated that "*These sections are applicable only in the instances where the case is pending and before the final determination for the purpose of the action*". The High Court concluded that the appellant does not meet these qualifications. I am unable to agree.

The application of Gamini Premadasa dated 01.09.2011 fell under section 81(10)(a), while the application of the appellant dated 07.06.2013 fell under section 81(11).

The High Court took the view that the action had been finally determined and that there is nothing to be done "for the purpose of the action".

Section 81(10)(a) requires the Court to appoint a person to be the legal representative "for the purpose of the action". Gamini Premadasa made the application to appoint him as the legal representative not of the original 2nd defendant but of the legal representative of the 2nd defendant, Bandulahamy, on the same date the final decree was confirmed. This application was made seeking an order from Court to deliver possession of lots 2, 3 and 7 of the final plan to him on the basis that he is the owner of those lots by Deed No. 679. This was allowed by Court. I have already commented on Deed No. 679. Even if it is a valid Deed, Gamini Premadasa does not become entitled to the entirety of lots 2, 3 and 7 by virtue of that Deed as Bandulahamy is not the only heir but one of the heirs of the original 2nd defendant, Dingiri Ethana. The delivery of possession of lots 2, 3 and 7 will result in ejecting the 2nd defendant's heirs and Bandulahamy's heirs from possession of the said lots. Is not the application of the appellant "for the purpose of the action"? The High Court states that "*It appears that the appellant, very well knowingly that he has no locus standi as his mother, the 2A defendant, has already transferred the share to be allocated, subject to the*

pending partition, has made this vague application in order to delay the application made by the respondent [Gamini Premadasa] for the writ of possession." The High Court has misdirected itself on the facts. It was not the mother (the 2nd defendant) who transferred contingent interests, but her legal representative Bandulahamy who transferred his (Bandulahamy's) contingent interests. The High Court ought to have considered the application of the appellant on the merits and made an appropriate order.

The High Court also misdirected itself on the facts when it stated "*It was revealed in the evidence that the 2A defendant [Bandulahamy] was the only heir of the deceased 2nd defendant, and therefore he shall have all the rights to alienate entitlement of the land, subject to the partition action as there were no other heirs to be substituted.*" As I stated previously, the District Judge in his judgment clearly came to the finding that Bandulahamy is not the only heir of the 2nd defendant and that the question of devolution of the 2nd defendant's rights need not be decided in this case. The District Judge allocated lots 2, 3 and 7 in the name of the original 2nd defendant, Dingiri Ethana, not in the name of Bandulahamy. Bandulahamy did not appeal against these findings of the District Judge.

Delivery of possession in partition actions

The High Court states that "*the respondent [Gamini Premadasa] as a person who derived title of the 2nd defendant in accordance with section 52A(1)(c), has made an application to obtain possession in the same case*", and therefore that application should be allowed.

The delivery of possession in partition actions is different from the delivery of possession in any other civil action. Sections 52, 52A, 77 and 79 of the Partition Law are the sections relevant to the delivery of possession. Section 52A was introduced by the same Amendment Act, No. 17 of 1997, which introduced section 81, discussed earlier.

Section 52(1)

According to section 52(1), a successful party or a purchaser, for whom a certificate of sale has been issued by Court, is entitled to make an application in the same action, by motion, for an order for the delivery of possession of the land or a portion thereof as per the final decree of partition. The proviso to this section stipulates that this entitlement is contingent upon payment of any owelty or compensation for improvements, if applicable.

> *52(1). Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land:*
>
> *Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.*

In view of section 81(7), every party and every person referred to in section 52 includes his legal representatives in the event of the death of such party or person.

> *81(7). A nominee deemed to be the legal representative of a deceased nominator shall be entitled to take all such steps for the purposes of the action as the deceased nominator would have been entitled to take had he been alive.*

Section 52(1) does not expressly state the time period within which an application for delivery of possession can be made to Court. This is an omission

on the part of the legislature. However, this omission can be addressed through sections 77 and 79.

Section 77 enacts that the provisions of the Civil Procedure Code relating to the execution or service of writs, warrants and other processes of Court shall apply in relation to the execution or service of writs, warrants and other processes of Court in a partition action.

Section 79 enacts that in any matter or question of procedure not provided for in the Partition Law, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the Court, if such procedure is not inconsistent with the provisions of the Partition Law.

In cases such as *Samarakoon v. Punchi Banda* (1975) 78 NLR 525, *Abeyratne v. Manchanayake* [1992] 1 Sri LR 361, *Munidasa v. Nandasena* [2001] 2 Sri LR 224, it was held that section 337 of the Civil Procedure Code, which states that (subject to some exceptions) an application to execute a decree shall be made within 10 years from the date of the decree or on appeal affirming the same, is inapplicable to partition decrees.

In *Abeyratne v. Manchanayake* the Court held that if the 10-year period stipulated in section 337 of the Civil Procedure Code is applicable, such period shall commence from the date the owelty or compensation was paid.

If section 337 of the Civil Procedure Code is inapplicable or applicable only from the date the owelty or compensation is paid, an allottee in a partition action could delay execution of the writ for an indefinite period. This delay might allow him to seek ejectment of those in possession, possibly even several decades after the final decree was entered. This cannot be the intention of the legislature. By the time the allotee makes the application for delivery of possession, those lots may have been prescribed by others.

Although *Samarakoon v. Punchi Banda* is cited to argue against the applicability of the 10-year period stipulated in section 337 to partition actions, a closer scrutiny of the judgment reveals that the Supreme Court appreciates the necessity of filing the application for writ within 10 years. The Court states at pages 527-528 that if the fiscal is resisted during execution, he will report it to the Court, triggering the procedure outlined in section 53 (regarding contempt of Court). In these proceedings under section 53, the resisting party can demonstrate to the Court that his resistance did not constitute contempt by presenting a defence, such as having acquired prescriptive title to the land after the final decree was entered. Let me quote what the Supreme Court stated at pages 527-528 of the judgment:

> *The correct procedure that should be adopted in giving possession of a divided lot to a party who had been declared entitled to it under a final partition decree is set out in Section 52 of the Partition Act.*
>
> *A party requiring possession must apply by way of a motion in the same action for an order for the delivery of possession of the lot. The Court thereafter on being satisfied that the person applying is entitled to the order will issue an order to the Fiscal to put the party in possession of the lot. The Fiscal on receiving the order, will repair to the land and deliver possession of the lot to the party.*
>
> *If the Fiscal is resisted, he will report the resistance to Court and the procedure set out in Section 53 of the Partition Act will apply.*
>
> *In the proceedings under Section 53, it will be open to the party resisting, to satisfy the Court, that his resistance did not constitute a Contempt of the Court. This he could do, for example by showing that he had prescribed to the said lot after the final decree had been entered, and the party applying for an order of possession under Section 52, had no right to be given possession of the land.*

This illustrates that if the application under section 52 is to succeed, a party to the action or a purchaser at sale must make the application to Court within the 10-year period.

This is further understood by a closer reading of section 52A, which was introduced by Partition (Amendment) Act, No. 17 of 1997. In short, in terms of section 52A, a party who has been dispossessed or whose possession has been interfered with can make an application for restoration of possession in the same action within 10 years of the date of the final decree of partition. If the application for restoration of possession must be made within 10 years of the date of the final decree of partition, it is illogical to assume that an application for delivery of possession can be made beyond the period of 10 years. If delivery of possession has not taken place, restoration of possession does not arise.

I hold that in terms of section 52 of the Partition Law read with section 337 of the Civil Procedure Code, an application for delivery of possession in a partition action shall be made within ten years of the date of the final decree of partition or the issuance of the certificate of sale or on appeal affirming the same.

Eviction of a tenant

The law relating to eviction of a tenant under the partition law suffers from a lack of clarity and is therefore complicated.

According to section 48(1) of the Partition Law, the right, share or interest awarded in the interlocutory and final decree of partition is free from all encumbrances whatsoever other than those specified in the decree.

> *Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient*

> *evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.*

The term "encumbrance" is defined in section 48(1).

> *In this subsection and in the next subsection "encumbrance" means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.*

Although section 48(1) states that this definition is applicable to both subsection (1) and (2) of section 48, section 48(2) makes a difference.

Section 48(2) reads as follows:

> *Where in pursuance of the interlocutory decree a land or any lot thereof is sold, the certificate of sale entered in favour of the purchaser shall be conclusive evidence of the purchaser's title to the land or lot as at the date of the confirmation of sale, free from all encumbrances whatsoever except any servitude which is expressly specified in such interlocutory decree and a lease at will or for a period not exceeding one month.*

After the trial, the District Court may order partition of the land or sale of the land in whole or in lots. While section 48(1) relates to partition of land, section 48(2) relates to sale of the land.

When it comes to "encumbrances", Partition Act, No. 16 of 1951, did not have a provision similar to section 48(2) in the present Partition Law. Hence there was a difference of opinion as to whether a purchaser at sale upon receipt of the certificate of sale acquires the full title without any encumbrances unlike a party who has been declared entitled to a lot or lots in the final partition plan. *Vide Heenatigala v. Bird* (1954) 55 NLR 277, *Britto v. Heenatigala* (1956) 57 NLR 327, *Ranasinghe v. Marikar* (1970) 73 NLR 361.

Section 52(2) of the Partition Law now in force addresses the issue of eviction of a tenant in the execution of the final decree of partition or a purchaser at a sale held under the Partition Law.

In terms of section 52(2)(a), an allottee of a final decree of partition or a purchaser at a sale held under the Partition Law, can make an application by petition to which such person in occupation shall be made respondent for delivery of possession seeking eviction of anyone in the land or a house in the land.

> *Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.*

The nature of the inquiry and the order to be made are stated in section 52(2)(b):

> *After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application; otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue.*

At the inquiry, two conditions must be satisfied by the respondent who claims tenancy:

(a) that he came into occupation prior to the date of the final decree or certificate of sale, and
(b) that he is entitled to continue in occupation of the said house as tenant under the applicant as the landlord.

Under (b) above, the person claiming tenancy shall prove that the allottee of the lot on which the premises stand in terms of the final decree is his landlord. If the lot on which the premises stand is allotted to another, the tenant cannot claim tenancy under the new owner.

In *Martin Singho v. Nanda Peiris* [1995] 2 Sri LR 221, the District Court allowed the 1st respondent's application for delivery of possession of lot 1 by ejecting the petitioners who claimed tenancy rights. On appeal, the Court of Appeal held at 223:

> *Section 52(2) read with section 48(1) of the Partition Law and section 14(1) of the Rent Act, required court to determine (1) whether the petitioners had entered into occupation of the premises as tenants prior to the date of the final decree and (2) whether they were entitled to continue in occupation of the premises as tenants under the original 1st respondent Rosalin Fonseka, who was allotted the lot in which the relevant houses stood. If the petitioners succeeded in satisfying court of the two matters aforesaid, the application of the 1st respondent had to be dismissed, as section 14(1) of the Rent Act makes provision for the tenants of residential premises to continue as such, under any co-owner who has been allotted the relevant premises in the final decree.*

The petitioners failed to prove what was required from them by law. Hence the Court of Appeal dismissed the application of the petitioners remarking at page 224:

> *As observed by the District Judge, the petitioners have failed to produce any documentary evidence in proof of their tenancy. The best test of establishing tenancy is proof of payment of rent, and the best evidence of payment of rent is rent receipts. (see Jayawardene v. Wanigasekera [1985] 1 Sri LR 125) We see no reason to interfere with the order of the District Judge.*

In *Ramasinghe v. Hettihewa* [1998] BLR 34 at 35, the Court of Appeal held:

> *It is to be noted that a co-owner is entitled to let his undivided shares of the common property. Similarly a co-owner has a right to compel a division of the common property. Where property could not be divided without injury or if partition was impossible or inexpedient the law permits a sale of it among the co-owners for preference. As tenant's rights are derived from and dependent on the title of the person from whom he gets his tenancy, the rights of a tenant under one co-owner are subject to the prior rights of the other co-owners to compel a division of the property by partition or sale. Where there is a partition, his rights will be restricted to the divided portion obtained by the co-owner who gave him tenancy.*
>
> *In the instant case the learned trial Judge after due inquiry found that the petitioner was not a tenant of the 1st respondent who was allotted lot 4 in the final decree. I reject the proposition that the new owner of the lot in which there is a house with a tenant is the landlord, by operation of law.*

Ranasinghe v. Marikar (*supra*) was a five judge bench decision made under the repealed Rent Restriction Act on the question of delivery of possession after a sale of the premises under the repealed Partition Act, No. 16 of 1951. It was held in that case:

> *Where there is a valid letting of the entirety of premises to which the Rent Restriction Act applies, a sale of the premises under the Partition Act does not extinguish the rights of the tenant as against the purchaser, even if the tenant's interest is not expressly specified in the interlocutory decree*

entered in the partition action. Section 13 of the Rent Restriction Act protects any tenant of rent-controlled premises "notwithstanding anything in any other law" except upon grounds permitted by the Section.

But if rent-controlled promises are owned by co-owners and one of them lets the entirety of the premises without the consent or acquiescence of the other co-owners, the protection of the Rent Restriction Act is not available to the tenant as against a purchaser who buys the premises subsequently in terms of an interlocutory decree for sale entered under the Partition Act. In such a case, the tenant cannot resist an application by the purchaser to be placed in possession of the premises.

In the case of *Thambirajah v. Abdul Kudoos Dorai* [1990] 2 Sri LR 319, the premises were situated within the municipal limits of Colombo and hence were governed by the Rent Act, No. 7 of 1972. Both the District Court and the Court of Appeal held that the plaintiff was entitled to an order for delivery of possession in terms of section 52(2)(b) of the Partition Law as the evidence was insufficient to establish a valid tenancy.

If a valid tenancy is established in respect of premises governed by the Rent Act, section 14(1) of the Rent Act becomes applicable. It states "notwithstanding anything in any other law", the tenant of any residential premises which is purchased by any person under the Partition Law or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner.

Section 14(1) of the Rent Act reads as follows:

Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under the Partition Law or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner, as the case may be, and the provisions of this Act shall apply accordingly, and where such

tenant is deprived of any amenities as a result of such partition, the owner of the premises where such amenities are located shall permit such tenant to utilize such amenities without making any payment therefor until such amenities are provided by such purchaser or co-owner or by the tenant under subsection (3).

Although this section is in conflict with section 52(2)(b) of the Partition Law which specifies that the person claiming tenancy shall prove that he "is entitled to continue in occupation of the said house as tenant under the applicant as landlord", section 14(1) of the Rent Act overrides section 52(2)(b) due to the term "notwithstanding anything in any other law" used in that section. Accordingly, the protection given to tenants by the Rent Act is not extinguished by a partition or sale of land under the Partition Law whether or not the allottee or purchaser at sale is the landlord of the tenant.

In *Esabella Perera Hamine v. Emalia Perera Hamine* [1990] 1 Sri LR 8, the Court of Appeal affirmed the order of restoration of such a tenant to possession by the District Court when it was found that the tenant had been evicted without following the procedure stipulated in section 52(2). The Court of Appeal held that such restoration can be done by invocation of the inherent powers of the Court.

In *Virasinghe v. Virasinghe* [2002] 1 Sri LR 264, the Supreme Court held that it is not permissible to enter a finding in a judgment, interlocutory decree or final decree in a partition action with regard to any claim of a monthly tenant in respect of the land sought to be partitioned. Such questions should, if at all, be considered at the stage of execution in terms of section 52 of the Law.

Restoration of possession

Section 52A deals with restoration of possession.

52A(1). Any person –

(a) who has been declared entitled to any land by any final decree entered under this Law; or

(b) who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by Court; or

(c) who has derived title from a person referred to in paragraph (a), or paragraph (b),

and whose possession has been, or is interfered with or who has been dispossessed, shall, if such interference or dispossession occurs within ten years of the date of the final decree of partition or the entering of the certificate of sale, as the case may be, be entitled to make application, in the same action, by way of petition for restoration of possession, within twelve months of the date of such interference or dispossession, as the case may be.

(2) The person against whom the application for restoration of possession is made, shall be made the respondent to the application.

(3) The Court shall, after due inquiry into the matter, make order for delivery of possession or otherwise as the justice of the case may require:

Provided that, no order for delivery of possession of the land shall be made where the respondent is a person who derives his title to the land in dispute or part thereof directly from the final decree of partition or sale, or is a person who has acquired title to such land from a person who has derived title to such land under the final decree of partition or sale, or from the privies or heirs of such second mentioned person.

In the instant appeal, the High Court took the view that the 2(b) defendant Gamini Premadasa has made the application to obtain possession in accordance with section 52A(1)(c).

In terms of section 52A, if the possession of a party or a purchaser or a person who has derived title from such party or purchaser has been or is interfered with or has been dispossessed, if such interference or dispossession occurs within 10 years of the date of the final decree of partition or entering of the certificate of sale, such person shall be entitled to make an application in the same action by way of petition naming as the respondent the person against whom the application is made, within 12 months of the date of such interference or dispossession for restoration of possession. The Court shall, after inquiry, make an order restoring the petitioner to possession or refusing it.

It may be noted that section 52A deals with restoration of possession, not delivery of possession. The 2(b) defendant cannot be restored to possession unless he was previously in possession. Section 52A cannot be invoked to deliver possession for the first time. The delivery of possession for the first time is done in terms of section 52.

The High Court was not correct to have concluded that the 2(a) defendant had successfully made an application to recover possession in terms of section 52A(1)(c).

Conclusion

The two questions of law on which leave to appeal was granted are answered in the affirmative.

The order of the District Court dated 09.01.2014 and the judgment of the High Court dated 11.09.2014 are set aside.

According to the final decree of partition, lots 2, 3 and 7 of the final partition plan No. 1456 dated 16.08.2010 have been allotted to the original 2nd defendant, Kumbukkolawatte Dingiri Ethana. How Dingiri Ethana's rights in respect of the said lots should devolve shall be resolved in a separate action.

The 2(a) defendant, Gamini Premadasa, cannot seek delivery of possession in respect of these three lots in the instant action.

The appeal is accordingly allowed.

Parties will bear their own costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court