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

In the matter of an application under Articles 127 and 128 of the Constitution read with section 5(c) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006, for Leave to Appeal against the judgment dated 24/07/2017 of the Civil Appellate High Court of the Southern Province holden in Tangalle in case No. WP/HCCA/ 04/2016

SC Appeal 27/2018
S.C.(HC) CALA No.404/17
SP/HCCA/TA/RA/04/2016
DC Hambanthota Case No.281/P

Dayaratne Jayasuriya,
Debarawewa,
Tissamaharamaya

Plaintiff

Vs.

1. Warusha Hennadige Heen Nona (deceased)

1A. Indralatha Irene Jayasuriya
Both of Debarawewa,
Tissamaharamaya

2. Gamini Jayasruiya (deceased)
Debarawewa, Tissamaharamaya

2A. Lekam Mudiyanselage Chandrawathi

3. Premalatha Jayasuriya

4. Indralatha Irene Jayasuriya

5. Chandraseeli Jayasuriya
All of Debarawewa,
Tissamaharamaya

6. A.H. Misinona (Deceased)
"Paradise Cafe"
Debarawewa, Tissamaharamaya

6A. Dayananda Jayasuriya,
Debarawewa, Tissamaharamaya

7. Dayananda Jayasuriya,
Debarawewa, Tissamaharamaya

Defendants

AND BETWEEN

Buddhika Wickramasuriya,
Coranel's Land,
Debarawewa, Tissamaharamaya

Petitioner

Vs.

Premalatha Jayasuriya,
Debarawewa, Tissamaharamaya

3rd Defendant/Respondent

AND BETWEEN

Premalatha Jayasuriya,
Debarawewa, Tissamaharamaya

3rd Defendant/ Respondent/ Petitioner

Vs.

Buddhika Wickramasuriya,
Coranel's Land,
Debarawewa, Tissamaharamaya

Petitioner/Respondent

AND NOW BETWEEN

Premalatha Jayasuriya,
Debarawewa, Tissamaharamaya

3rd Defendant/ Respondent/ Petitioner/ Appellant

Vs.

Buddhika Wickramasuriya,
Coranel's Land,
Debarawewa, Tissamaharamaya

Petitioner/Respondent/Respondent

Before: B.P. Aluwihare PC, J
Priyantha Jayawardena PC, J
V. K. Malalgoda PC, J

Counsel: W. Dayaratne, PC with Ms. R. Jayawardena for the 3rd defendant- respondent- petitioner- appellant
Sanath Vidanapathirana with Shihan Ananda and Amith Weerasekara for the petitioner- respondent- respondent.

Argued on: 12th December, 2019

Decided on: 9th August, 2023

Priyantha Jayawardena PC, J

Facts of the case

This appeal is in respect of the judgment of the Provincial High Court of the Southern Province dated 24th of July, 2017 (exercising civil appellate jurisdiction) (hereinafter referred to as the "High Court"), where it was held that after the final decree is entered in a partition action, a person who had derived a contingent interest to the corpus of a partition action is entitled in law to execute a writ to obtain possession of his entitlement under the Partition Law, No.21 of 1977, as amended, (hereinafter referred to as the "Partition Law"), notwithstanding the fact that he is not a party to the original partition action.

The plaintiff instituted a partition action in the District Court of Hambantota (hereinafter referred to as the "District Court") to partition the land described in the schedule to the plaint. Thereafter, in terms of the provisions of the Partition Law, a commission was issued by the District Court. Accordingly, a preliminary survey was carried out by a Surveyor and the commission was returned with the Preliminary Plan and the Surveyor's report to the court.

Thereafter, the case proceeded to trial without a contest. At the conclusion of the trial, the learned District Judge delivered the judgment and held that the plaintiff and the 2nd to 5th defendants were entitled to 1/5th share of the corpus to the partition action. Later, an interlocutory decree was entered. Therefore, a commission was issued by the District Court for the preparation of the final plan dividing the corpus of the partition action into lots according to the entitlement of shares of the said parties. The Surveyor had returned the commission to court with the 'Final Plan No.1805' dated 5th of April, 1995 and the surveyor's report dated 23rd of April, 1995.

Pending the final decree of the partition action, the 3rd defendant-respondent-petitioner-appellant (hereinafter referred to as the "appellant"), executed the Deed of Gift No. 358 dated 26th of February, 2006, and gifted her contingent rights to the corpus to the petitioner-respondent-respondent (hereinafter referred to as the "respondent"), "subject to the final decree of the partition action".

However, after a lapse of more than four years, the said deed of gift was unilaterally revoked by the appellant by executing the Deed of Declaration No.2882 dated 27th of December, 2010. Thereafter, once again the appellant had gifted her contingent rights to the 5th defendant, by

executing the Deed of Gift No. 2911 dated 25th of January, 2011, "subject to the final decree of the partition action".

Further, the final decree of the partition action was entered by court on the 10th of October, 2011. By the said final decree, lots 3 and 8 were allotted to the appellant. Therefore, by way of another Deed of Gift, the appellant once again gifted the same lots (3 and 8) to the 5th defendant.

However, after the final decree was entered by court, the respondent in the instant appeal made an application to the said District Court to obtain delivery of possession of the said lots 3 and 8, based on the said Deed of Gift No.358 dated 26th of February, 2006 making the appellant a party to the said application. Moreover, the respondent made the said application in the original partition action notwithstanding the fact that he was not a party to the original partition action.

In the said application, the respondent pleaded that the appellant gifted him her rights to the corpus "subject to the final decree of the partition action". Accordingly, the respondent stated that following the entering of the final decree in the partition action, he was entitled to the possession of lots 3 and 8 in terms of the Partition Law.

Subsequently, the appellant in the instant appeal had filed objections to the said application, stating *inter alia,* that the respondent acted with gross ingratitude towards the appellant which compelled the appellant to revoke the said deed of gift by executing the Deed of Declaration No.2882 dated 27th of December, 2010.

After an inquiry, the learned District Judge held that the said Deed of Gift No. 358 dated 26th of February, 2006 was a valid deed as it was executed as an irrevocable deed of gift which could only be revoked after proving gross ingratitude in a competent court. In the aforementioned circumstances, the learned District Judge allowed the said application of the respondent and issued a *writ of possession* to obtain the vacant possession of lots 3 and 8.

Thereafter, the Deputy Fiscal executed the said *writ* on the 16th of January, 2013 and reported to court that at the time he visited the property, lot 3 was vacant and lot 8 was occupied by one Rahubadda Kankanamge Amarasiri Premalal. However, said Premalal vacated the premises and therefore he placed the respondent in possession of lots 3 and 8.

Being aggrieved by the said order of the learned District Judge, the appellant preferred a revision application to the Civil Appellate High Court praying for an order, *inter alia,* to dismiss the said

application of the respondent filed in the District Court to obtain delivery of possession of lots 3 and 8 on the basis that the respondent was not entitled to make an application to obtain possession of the said lots under the Partition Law as he was not a party to the original partition action.

After the hearing of the appeal, the learned High Court Judge held, *inter alia,* that the Partition Law does not prevent the respondent from making an application to obtain possession of the contingent interests to lots allotted to a party in the Partition action.

Being aggrieved by the aforementioned Order, the appellant sought leave to appeal against the said judgment of the High Court. After hearing both parties, this court granted leave to appeal on the following questions of law:

> *"(i) Did their Lordships of the Civil Appellate High Court fail to consider that the respondent who was not a party in the partition action had no right to take over possession in terms of Section 52 of the Act by making an application against the 3rd defendant [appellant] who is the allottee of Lots 3 and 8 as it is clearly stated in the said section that only a party who had been declared to any land could make an application for delivery of possession?*
>
> *(ii) Did their Lordships of the Civil Appellate High Court also seriously misdirect themselves when they came to a conclusion that the Respondent has stepped into the shoes of the 3rd defendant [appellant] and her contingent interest of the property by operation of law and therefore she has no right to agitate against the application of the respondent and the objection to his application for delivery of possession is a mere technicality as Section 52 has not expressly prohibited the respondent from invoking the provisions of Section 52 of the Partition Law when it is settled law that failure to follow the mandatory provisions of Partition Law is fundamental vice".*

At that time, the learned counsel for the respondent suggested the following question of law:

> "*(iii) Is a party who becomes entitled to a contingent interest able to execute a writ in terms of Section 52(1) of the Partition Law?"*

It is pertinent to note that this court did not grant leave to appeal on the question of law pleaded by the appellant pertaining to the revocation of the Deed of Gift No.358 dated 26th of February

2006 whereby the appellant gifted her rights to the corpus of the partition action to the respondent. Thus, the effect of the purported revocation of the said deed will not be considered in this judgment. Further, only the submissions relating to the aforementioned Questions of Law are considered in this judgment.

Submissions of the appellant

The learned President's Counsel for the appellant submitted that the purpose of section 52(1) of the Partition Law is to hand over the possession of a lot allotted to "*a party to the partition action"*, ejecting any person in occupation of the lot other than a tenant or a tenant cultivator. Hence, the respondent cannot make an application under the said section or under any other section of the said Law to obtain possession of the land or partition of it as he was not a party to the partition action.

Further, the learned President's Counsel for the appellant submitted that the respondent was not entitled to make an application under section 52A of the Partition Law for restoration of possession as he was not dispossessed from the said lots.

Submissions of the respondent

The learned counsel for the respondent submitted that even though the respondent was not a party to the original partition action, he was entitled to make an application to obtain possession of the said lots as the respondent "stepped into the shoes of the appellant", upon the execution of the Deed of Gift No. 358 dated 26th of February, 2006.

It was further submitted that the District Court is conferred with the jurisdiction to make orders to give effect to every order or decree made or entered in a Partition action including the delivery of possession under section 53 of the Partition Act. Further, the words "*any person entitled thereto"* allows not only a party to the partition action but also "any person" who has derived any contingent interest to an allotment given by a final decree to make an application to obtain possession of his rights. In this regard, the attention of court was drawn to the words *"any person*

entitled thereto" in the said section and submitted that the legislature has intentionally used those words instead of the words "a party to the action".

It was further contended that section 53 stipulates the substantive law conferring jurisdiction on the trial judge, whereas section 52 stipulates the procedural law in which an application to obtain possession is to be made to court.

It was also submitted that the District Court has the power to make such orders as it considers necessary to prevent injustice in respect of issues arising from the procedure.

Hence, in order to prevent further delays, the legislature has imposed a ban on the alienation, leasing and hypothecation of the corpus or part of it in a Partition action to prevent taking steps to add/substitute new parties.

In ***Subaseris v Prolis*** **16 NLR 393 at 394** Woodrenton, ACJ held;

> *"The final decree did in fact allot to Dineshamy the divided share which he had previously transferred to the plaintiff. The decision in this case depends on the question whether that transfer, made as it was before the final decree in the partition action, is void in consequence of the provisions of section 17 Ordinance No. 10 of 1863. The learned Commissioner of Requests has answered this question in the affirmative, and has dismissed the plaintiff's action with costs. In my opinion it should have been answered in the negative, and the plaintiff is entitled to succeed. It must be remembered that section 17 of the Partition Ordinance imposes a fetter on the free alienation of property, and the Courts ought to see that fetter is not made more comprehensive than the language and the intention of the section require. The section itself prohibits only, in terms, the alienation of undivided shares or interests in property which is the subject of partition proceedings while these proceedings are still pending, and the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interest had been created since the proceedings began."*

Therefore, it was submitted that the application made to the District Court by the respondent should not be dismissed as the substantive law allows to make such an application to court to obtain delivery of possession of a lot allotted in a partition decree.

The issues that need to be considered in the instant appeal

In view of the above submissions made by the parties, the two issues that need to be considered in the instant appeal are;

(a) Can a party gift his co-owned rights subject to the final decree of the partition action?

(b) Was the respondent entitled in law to make an application under the Partition Law for the delivery of possession of his contingent interest after the District Court entered the final decree in the partition action?

Can a party to a Partition action alienate, lease or hypothecate his co-owned share or interest in the Corpus subject to the final decree?

Partition cases take a long time to conclude because of the several mandatory procedural steps that are required to be taken in such actions and the large number of persons that are required to be made parties to the case. Hence the legislature has included the following provisions in the Partition Law to minimise the delay in concluding Partition cases.

Section 66 of the Partition Law states:

> *"(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:*
>
> *(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.*"

[emphasis added]

Thus, in terms of section 66 (2), any voluntary alienation, lease or hypothecation of the Corpus is void. Where an instrument is executed pending partition proceedings in respect of an interest to which the grantor may ultimately become entitled upon the final decree in a partition action, a question arises as to whether such a transfer should be construed as an actual alienation, lease or hypothecation of the rights or in a conditional transfer subject to a future entitlement from a final decree. In this regard, the allotment of shares in the final decree is a condition precedent to pass the actual alienation, lease or hypothecation.

A careful analysis of section 66 shows that there is no legal impediment to alienate, lease or hypothecate a contingent interest in a corpus which is the subject matter of the partition action "subject to the final decree". Further, whether the instrument that alienates the property specifically refers to "subject to the final decree of the partition action" or not, that does not prevent a contingent interest from passing to a recipient upon entering the final decree in a partition action.

Thus, no rights of ownership, lease or hypothecation pass to the grantee, upon the acquisition of such interest in the land until, and unless the grantor acquires a right under the final decree from the partition action.

A similar position was taken in the case of ***Sithi Fareeda v Mohamed Noor***, **SC/Appeal 134/2013, S.C. Minutes 28th October, 2014**, where it was held;

> *"I am of the view that it is settled law for many decades that in spite of the provisions included in the Partition Ordinance firstly by Section 17 and thereafter in the Partition Law by Section 66, any party to a law suit of partitioning a co-owned land is able to gift, sell, or hypothecate his entitlement to the share of the land which would be allocated to him at the end of the case*".
>
> [emphasis added]

Further, in ***M.W.A.P. Jayathilake v P.G. Somadasa*** **70 NLR 25** referring to section 67 of the repealed Partition Act No. 16 of 1951, which is the corresponding provision of section 66 of the Partition Law, it was held:

> "*Section 67 has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing*

<u>or disposing of the interest to be ultimately to be allotted to a party in the pending action.</u>"

[emphasis added]

A similar view was explained in ***Karunaratne v Perera*** **67 NLR 529,** where it was held that where, pending a partition action, a co-owner gifts to certain persons the shares to which he will be declared entitled in the action, the interests which are allotted in that action to the donor pass automatically to the donees when the final decree is entered. It is not necessary that the interest which the done obtained on the deed of gift should be expressly conserved to them in the final decree even though they intervened in the action.

Further in ***Silie Fernando v Silmon Fernando*** **64 NLR 404**, the transferor pending the action, transferred the interests to which he would become entitled in the final decree. Thereafter, he died before the final decree was entered in the Partition Action. Thus, the rights of transferee were decided in the said case and the court held,

> *"Whatever will be allotted him by the final decree, the lot is in severalty finally allotted to the transferor or those representing him (if he has died before the entry of the final decree) will automatically pass and vest in the transferee without any further conveyance by the transferor or his representatives."*

In ***Nazeer v Hassian 48 NLR 282,*** it was held that, where pending a partition action, some of the co-owners covenant to convey absolutely all the shares, right title and interest which will accrue to them under and by virtue of the final decree in the partition action, the other contracting party obtains an immediate interest in the property, but the title can only accrue upon the entering of the final decree.

In case of ***Sirinatha vs. Sirisena and other (*1998) 3 SLR 19** it was held;

> *"In Sirisoma v. Saranelis Appuhamy (51 NLR 337), Gratiaen, J. interpreting section 17 of the Partition Ordinance held that it prohibits the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of 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.

The submission that the transfer by the 2nd defendant of the rights to which he may become entitled to in the partition action, is obnoxious to the provisions of section 66 of the Partition Law cannot therefore succeed. Section 66 of the Partition Law prohibits only the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings. There was no bar preventing the 2nd defendant from transferring the interests which he would acquire upon the conclusion of the partition action."

Automatic transfer of rights to a transferee after the final decree is entered in a partition action.

A similar view was held in ***Sirisoma v Sarnelis Appuhamy*** **51 NLR 337,** if a co-owner sells or donates an undivided interest in a land, a share will be allotted to the vendor or donor by a final decree in a partition action, will automatically pass and vest in the vendee or donee under the transfer deed or interest in question, without any further conveyance, either by the vendor or donor or by his heirs or representatives;

"Whether each question which I have discussed be examined by reference to the trend of past decisions of this Court or on the assumption that it may legitimately be considered as res integra, I think that the following propositions should now be accepted as settled law: -

(1) Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings, of an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending action;

(2) Where an instrument is executed, pending partition proceedings, in respect of an interest to which the grantor may ultimately become entitled upon the decree, the question whether it should be construed as an actual alienation or hypothecation, of such contingent interest or merely as an agreement to alienate or hypothecate such interest (if and when acquired) must be decided in

accordance with the ordinary rules governing the interpretation of written instruments;

(3) If such an instrument is in effect only an agreement to alienate or hypothecate a future interest, if and when acquired, no rights of ownership or hypothecary rights (as the case may be) pass to the grantee upon the acquisition of that interest by the grantor unless and until the agreement has been duly implemented ; if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be determined with reference to other legal principles such as the application of Section 93 of the Trusts Ordinance ;

(4) <u>If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor; and no further instrument of conveyance or mortgage requires to be executed for the purpose; the execution of "a deed of further assurance" confirming the result which has already taken place may in certain cases be desirable but it is not essential in such a case</u>;

(5) The provisions of section 9 of the Partition Ordinance do not invalidate a transaction whereby an interest (which is not presently vested in the grantor and which could only become vested in him, if at all, upon the passing of a final decree for partition) is intended to pass to the grantee upon its acquisition.

Any earlier decisions of this Court which express or appear to express opinions in conflict with the general propositions enumerated above should now be regarded as over-ruled to that extent. Owners of land, and the practitioners who are called upon to advise them, should not be left in a state of continual doubt as to the scope of the restrictions which the Partition Ordinance imposes upon the alienation and hypothecation of interests in land. As Dr. C. K. Allen points out, it would be disastrous to the public interest if "the vaunted ' certainty ' of our system of precedents has too much in common with the kind of 'certainty ' which is to be found on the race-course and the dog-track."

[emphasis added]

In ***B. Sillie Fernando v W. Silman Fernando*** **64 NLR 404,** it was held that, where prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before entering the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives.

Further, it was held:

> *"In this action, which is a partition action, the 2nd defendant claims certain soil shares, certain plantations and a thatched house. Prior to the entering of the interlocutory decree, the 2nd defendant, by the deed marked Z1, donated to his natural children born to his mistress the 41st defendant-appellant, the soil, plantations and thatched house, which would be allotted to him ultimately by the final decree.*

Is the respondent entitled to make an application under the Partition Law to obtain possession of his entitlement after the final decree is entered

In the instant appeal, the respondent had made an application to the District Court under the Partition Law to obtain possession of lots 3 and 8 allotted to the appellant by the final decree of the partition action.

Section 52 of the Partition Law sets out the procedure for a party to a partition action to obtain possession of the land or any portion of the land after the final decree is entered in a partition action.

Section 52(1) of the Partition Law states as follows:

> *"(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.

(2) (a) 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 a 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.

(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."

[emphasis added]

However, section 53(1) of the Partition Law states as follows:

*"(1) A court exercising jurisdiction in a partition action shall have full power to give effect to every order or decree made or entered in the action (**including the power to order delivery of possession** of any land or portion of land **to any person entitled thereto)** and to punish as for contempt of court any person who-*

(a) disobeys any such order, or

(b) obstructs or resists any person acting under the authority of the court or exercising any power conferred on him by this Law, or

(c) damages, destroys or removes, during the pendency of the action, any boundary mark which under section 31, has been made or set up on the land to which the action relates."

[emphasis added]

The appellant's position is that the respondent was not entitled to invoke the jurisdiction of the District Court to obtain possession of the land as he was not a "party to the partition action".

However, a careful consideration of sections 53(1) and 52(1) show that both sections have conferred power on the District Court to make *order for the delivery of any land or share of a land.* Hence, both the said sections should be considered together for the purpose of interpreting section 53(1) of the said Law. Moreover, it is pertinent to note that the said section 53(1) specifically stipulates that the court has power to "*order delivery of possession of any land or portion of land* ***to any person entitled thereto****",* as opposed to a ***'party to the partition action'***.

In view of the different words used in the abovementioned sections 52(1) and 53(1), it is necessary to consider whether only a 'party to the original partition action' could make an application to obtain possession of the lot allocated to a party in a partition action or whether any person who has acquired a contingent right to any of the allotments from a final decree could make such an application to court.

According to the rules of interpretation, the provisions in an Act shall be interpreted in harmony with other provisions in the Act to achieve the object of the Act.

A similar view was held by Sripavan, J (as he then was), in ***Herath v Morgan Engineering (Pvt) Ltd.***, ***(2013) 1 SLR 222 at 229:***

> "*Whether it is the Constitution or the Act, the Courts must adopt a construction that will ensure the smooth and harmonious working of the Constitution or the Act as the case may be, considering the cause which induced the legislature in enacting it.*"

The purpose of enacting the Partition Law was to establish a special procedure to partition a land held in co-ownership, providing a simple and easy remedy for obtaining possession of the land, rather than resorting to the cumbersome general procedure set out in the Civil Procedure Code. It is trite law that the Partition Law of Sri Lanka stands above compiling both substantive and procedural law relating to the area.

Further, section 53(1) of the Partition Law has conferred power on the District Court to give effect to every order or decree made or entered in a Partition action. Moreover, the words "including the power to order delivery of possession of any land or portion of a land to any person entitled thereto" shows that any person who is entitled to have the benefit from an order

or a decree made or entered in a partition action can make an application for the delivery of possession of any land or portion of a land if he has got an entitlement to the land or portion of it consequent to a Partition decree.

However, neither section 53(1) nor any other section in the Partition Law set out the procedure to obtain possession of an entitlement to a land or portion of a land by "a person" who has gotten an entitlement from a partition decree.

Thus, I am of the opinion that any person who gets the contingent right to a property subject to the final decree steps into the room and in place of a party to the Partition action and therefore, such a person can invoke section 53(1) to obtain possession of rights that his predecessor got from a final decree of a partition action.

Further, as the said section does not stipulate the procedure to obtain possession of the land or the portion of which "the person" got rights from a final decree, he can make an application under section 52(1) to obtain possession of the entitlement he got from the final decree.

Conclusion

In the foregoing circumstances, the two questions of law raised by the appellant should be answered as follows:

(1) Did their Lordships of the Civil Appellate High Court fail to consider that the respondent who was not a party in the partition action had no right to take over possession in terms of section 52 of the Act by making an application against the appellant who is the allottee of Lots 3 and 8 as it is clearly stated in the said section that only a party who had been declared to any land could make an application for delivery of possession?

NO

(2) Did their Lordships of the Civil Appellate High Court also seriously misdirect themselves when they came to a conclusion that the respondent has stepped into the shoes of the appellant and her contingent interest of the property by operation of law and therefore she has no right to agitate against the application of the respondent and

the objection to his application for delivery of possession is a mere technicality as section 52 has not expressly prohibited the respondent from invoking the provisions of section 52 of the Partition Law when it is settled law that failure to follow the mandatory provisions of Partition Law is fundamental vice?

NO

Further, the question of law suggested by the respondent should be answered as follows:

(3) Is a party who becomes entitled to a contingent interest able to execute a writ in terms of section 52(1) of the Partition Law?

YES

Therefore, the order of the learned High Court Judge dated 24th of July, 2017 is affirmed. The appellant's appeal is dismissed without cost.

Judge of the Supreme Court

B. P. Aluwihare PC, J
I agree.

Judge of the Supreme Court

V. K. Malalgoda PC, J
I agree.

Judge of the Supreme Court