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

Dinayadura Kanakaratne,
Dolikanda,
Boossa.
Defendant-Respondent-Respondent-Appellant

S.C. Appeal 36/12
S. C. (SPL) LA 2/2011
C.A. Appeal No.669/95(F)
D.C. Galle No. 10146/P **-VS. -**

1. Wasalage Gunawathie,
   Kendala,
   Boossa.
   Plaintiff-Respondent-Respondent-Respondent

2. Dedimuni Kamani Sriyalatha De Silva,
   Rubberwatte,
   Kapumulla,
   Rathgama.
   Petitioner-Appellant-Respondent (Deceased)

   Loku Liyaage Shiromi De Zoysa,
   Rubberwatte,
   Kapumulla,
   Rathgama..
   Substituted Petitioner-Appellant-Respondent

BEFORE : SISIRA J DE ABREW J.
ANIL GOONARATNE J.
K.T.CHITRASIRI J.

COUNSEL : D.M.G.Dissanayake with B.C.Balasuriya for the Defendant-Respondent-Respondent-Appellant

S.S.Sahabandu P.C. with Saliya Mathew instructed by Nirma Karunarathne for the substituted Petitione-Appellant-Respondent

ARGUED ON : 11.11.2016

WRITTEN SUBMISSIONS ON : 16.12.2016 by the Defendant-Appellant
16.12.2016 by the Petitioner-Respondent

DECIDED ON : 17.03.2017

Chitrasiri J

This is an Appeal filed by the Defendant-Respondent-Respondent-Appellant challenging the Judgment dated 29th November 2010 of the Court of Appeal. Decision of the Court of Appeal was to set aside the Interlocutory Decree dated 3rd May 1995, entered by the learned District Judge in Galle. This Court, upon considering the application for leave, granted Special Leave to proceed on the 14th February 2012, on the following question of Law:

> *"Has the Court of Appeal overlooked the vital fact that the Interlocutory Order in issue was made having adjudicated the 2nd Respondent's application for intervention and that, there was no right of appeal against such an Order?"*

The 2nd Respondent mentioned in the aforesaid question of law is the Petitioner-Appellant-Respondent namely D.Kamani Sriyalatha De Silva (hereinafter referred to as the Petitioner). She made the application dated 07.11.1991 which was amended subsequently by the petition dated 20.05.1993, to have her intervened to the case and then to become a defendant to this action filed by the plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff). That application for intervention was dismissed by the learned District Judge stating that no such application could be entertained since the Interlocutory Decree had already been entered, by the time the application for intervention was made. Learned District Judge in her order dated 03.05.1995 also has highlighted the finality attached to such a decree, in support of her findings.

Therefore, it is clear that the aforesaid question of law had been framed to determine the right of a person to challenge the finality of an Interlocutory Decree entered, under and in terms of the Partition Law No.21 of 1977 as amended. To find the answer to this issue, it is necessary look at the entire scheme of the Partition Law.

Section 26 as well as Section 48 of the Partition Law confers finality to Interlocutory Decrees entered in a partition action. Accordingly, such a decree

becomes good and sufficient evidence of the title of any person as to any right, share or interest awarded to him and it will be considered as final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, in the land to which such a Decree relates. However, such finality would operate subject to the matters referred to in Section 48 of the Partition Law particularly to the matters in sub section 4 thereof. Therefore, it is clear that an Interlocutory Decree entered in a partition action binds the whole world subject to the matters referred to in Section 48 of the Partition law.

Aforesaid Section 48(4) of the Partition Law enumerates the instances whereby an Interlocutory Decree could be amended, modified or set aside in order to establish a right, title or interest claimed by a party, to the land subject to a partition action. Those instances are:

- **When a party** to a Partition action has not been served with summons; or
- **When a party** being a minor or a person of unsound mind, has not been duly represented by a guardian *ad litem*; or
- **When a party** who has duly filed his statement of claim and registered his address, fails to appear at the trial.

The above provisions in the Partition law show that only a party to a partition action is entitled to make an application under Section 48(4) of the

Partition law. Admittedly, the Petitioner had not been added as a party in the plaint filed by the plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) and only the plaintiff and the defendant were remained as parties to the action until the interlocutory decree was entered. It had been entered on 21.03.1991, allocating 1/18th share of the corpus to the plaintiff and the balance 17/18 shares to the defendant. It was so decided at a time the petitioner was not a party to the action.

The petitioner made her application to intervene to the action by her petition dated 07.11.1991. Then it became an application made after entering the Interlocutory Decree. Therefore, on the face of it, the petitioner had no right to make an application under Section 48(4) of the Partition law, to establish her rights to the land. Indeed, it is the rationale behind the decision of the learned District Judge.

When such finality is attached to an interlocutory decree, it is important and necessary, to ensure that all the steps that are to be taken before the decree is entered are compiled with in strict sense. Therefore, if the steps that are to be taken prior to the entry of the Interlocutory Decree had not been followed, then it becomes grave violation of the law. In such a situation, the provisions relating to the procedure to be adopted before entering the interlocutory decree

are to be considered as mandatory. Violation of such mandatory provisions may even become committing fraud as far as the Partition law is concerned depending on the facts and circumstances of each case. If such a fraud is established, it is the duty of the Court to nullify the effect of an Interlocutory Decree notwithstanding the finality attached to Interlocutory Decrees.

Moreover, appellate courts are permitted to look at the issue as to the finality of decrees entered in a partition action under the proviso to Section 48(3) of the Partition Law in order to see the ends of justice. It gives power to the Appellate Court to exercise its revisionary power in order to make an order preventing injustice being caused to a person affected by an Interlocutory Decree. It reads as follows:

> *48(3) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.*
>
> ***The powers of the Supreme Court by way of revision, and restitutio in integrum shall not be affected by the provisions of this subsection.***
>
> (emphasis added)

At this stage, it is relevant to refer to the following decision as well since it highlights the importance of the duty, casts upon a judge who decides

a partition action. Privy Council, in the case of Mather Vs. Thamotharam Pillai [6 NLR 246] stated thus:

> *"As collusion between parties to a partition action is always possible, and as in such a suit, the parties get their title from the decree of the court awarding them a definite piece of land, and as a decree for partition under section 9 of the ordinance is good and conclusive against all persons whomsoever, whatever their rights may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a judge by which he can avoid performing the duty cast expressly upon him by Ordinance."*

In the case of Mohamedaly Adamjee Vs. Hadad Sadeen [58 NLR 217] it was held as follows:

> *"The facts of each case will indicate the manner in which the judge can best carry out his duty and their Lordships would not attempt to lay down a complete course of procedure for the trial judge to follow in every case."*
>
> *"The trial judge should also investigate in sufficient detail the question of possession."*

Furthermore, when looking at the scheme of the Partition Law, it is significant to note that its provisions are specifically designed to ensure making every person who has any interest to the land, a party to a partition action. That is why steps, such as affixing notices on the land, beating of tom

toms, and giving notice by the surveyor himself, to the parties who claim rights when surveying the land are made mandatory.

Section 5 of the Partition Law too refers to such a requirement that is to be performed by the plaintiff and it stipulates thus:

> *5. The plaintiff in a partition action shall include in his plaint as parties to the action all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled-*
>
> *(a) to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise, or*
>
> *(b) to any improvements made or effected on or to the land:*

Admittedly, the Plaintiff has failed to make the petitioner, a party to the action. The only defendant who was made, as a party to the case, up to the time the interlocutory decree was entered was the appellant D. Kanakaratne. Neither the plaintiff nor the Defendant-Appellant had taken steps to make the petitioner a party despite the fact that she had been living on this land since her birth up to now having built a dwelling house on the land. Her parents had been living there even before the petitioner was born. Her mother was the person who gifted the property in question to the petitioner by the Deed

marked P2, which had been executed on 11th September 1964. Even thereafter she had continued to possess the land though several transactions affecting this land had taken place afterwards affecting this land.

In the Affidavit filed by the Petitioner Sriyalatha, she has stated that she had been living on this land since the day she was born. (vide Paragraph 2 of the Affidavit dated 20th May 1993). She also has stated that neither the Plaintiff nor the Defendant Kanakaratne had any possession of the land at any given time. The said averment of the Petitioner Sriyalatha had not been disputed in the objections dated 21st October 1993 filed by the Plaintiff when she filed the counter objections to the application dated 20th May 1993 of the Petitioner. Moreover, the Court Commissioner who carried out the preliminary survey has stated that the Petitioner Sriyalatha had claimed the buildings and the entire plantation found on the land when he surveyed the land on the 27th August 1989. Therefore, it is abundantly clear that the Petitioner Sriyalatha had been living on the land for a long period, having possessed the plantation found thereon. Despite such a physical possession by the petitioner, the plaintiff has failed to make her a party to the action as required by Section 5 of the Partition Law. Certainly, it is a grave violation of

Section 5 of the said Law. I believe such failure of the plaintiff amounts committing fraud on the petitioner.

Section 16(3) of the Partition law also stipulates that the Surveyor who was commissioned to survey the land shall serve notices to the persons who make a claim at the time he surveyed the land, requesting them to be present in Court in order to support their respective claims. In this instance, the surveyor has failed to serve such a notice to the Petitioner Sriyalatha at the time she made her claim before the commissioner, to entire improvements found thereon. It is a gross violation of Section 16(3) of the Partition Law. Issuing notices through courts at a subsequent time cannot cure the said violation of the Court Commissioner.

Sansoni C J in Siriwardena Vs. Jayasumana [59 NLR 400 at 401] stressed the importance of serving summons, having quoted the following statement of Greene M R in the case of Craig Vs. Kanseen. [1943 (1) A E R 108].

> *"Failure to serve process, the service of process is required as a failure which goes to the root of our conceptions of the correct procedure in legislation. To say that an order of that kind is to be treated as a merely irregularity and not something affected as fundamental rise is in my*

opinion that cannot be sustained. This failure also adds to many failures in this case."

In the circumstances, it is clear that the plaintiff has failed to follow the procedure referred to in the Partition Law, which I have described as mandatory. Hence, this is a fit case for the appellate court to act under the proviso to Section 48(3) of the Partition law and then to make appropriate orders preventing any miscarriage of justice being caused to the petitioner Sriyalatha. It may have been the reason for the Court of Appeal to set aside the Interlocutory Decree entered by the learned District Judge though it is not recorded in those words.

In the circumstances, I am of the opinion that the learned District Judge has failed to consider the matters referred to hereinbefore in the manner as required by the Partition Law, when she made the Order refusing the application for intervention made by the Petitioner Sriyalatha in her Petition dated 20th May 1993. Accordingly, I do not see any error on the part of the Court of Appeal reversing the said judgment of the learned District Judge. For the reasons set out above, I affirm the Judgment dated 29th November 2010 of the Court of Appeal. Learned District Judge is directed to comply with the

directions given in the aforesaid judgment of the Court of Appeal. No party is entitled to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

SISIRA J De ABREW J.

I agree

JUDGE OF THE SUPREME COURT

ANIL GOONARATNE J.

I agree

JUDGE OF THE SUPREME COURT