

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

In the matter of an appeal with Leave
to Appeal granted from the order of
the High Court of the Civil Appeal of
the Southern Province (Holden in Galle)
dated 14.09.2011, under and in terms
of Section 5C of the High Court of the
Provinces (special Provisions)
(Amendment) Act No.54 of 2006.

S.C.APPEAL NO:-92/2012

CASE NO:-SP/HCCA/GA/LA 04/2011

D.C.GALLE CASE NO:-13211/P

- 1.Sumathipala Vidana Pathirana,
No.202A, Richmond Hill Road,
Galle. (deceased)
- 2.Charles Vidana Pathirana,
No.30/38, Longdon Place,
Colombo 7.(deceased)

3.Anulawathi Vidana Pathirana,
No.59, Lighthouse Street, Galle.

4.Dayawathi Vidana Pathirana,
Punchi Duuwa, Uluvitike,Galle.

1A.Sumudu Lakmal Abeywardena,
Vidana Pathirana,
No.202A, Richmond Hill Road,
Galle.

2A.Gamini Charles Vidana Pathrana,
No.30/38, Longdon Place,
Colombo 7.

PLAINTIFFS

V.

1.Thawalama Gamage Anura,
Thalangalla, Opatha.

2.Wickremanayake Karunarathna
Wasantha.Thalangalla, Opatha.

3.Samarage Sunil, Thalangalla, Opatha.

4.Punchhewamulle Mudiyansele
Indrawathi, Thalangalla, Opatha.

5.Nilanka Sampath, Thalangalla, Opatha

6.Jayanthi Chandralatha, Thalangalla,

Opatha.

7.Saumyadasa Koralage,

Thalangalla,Opatha.

8.Padma Shanthini Weerasinghe,

No.3/33, Udayapura, Robert

Gunawardena Mawatha, Battarmulla.

DEFENDANTS

AND BETWEEN

Punchihewamulle Mdiyanselage

Indrawathi,

4th DEFENDANT-PETITIONER

v.

1.Sumathipala Vidana Parhirana,

No. 202A, Richmond Hill Road,

Galle. (deceased)

2.Charles Vidana pathirana ,

No.30/38, Longdon Place, Colombo 7

(deceased)

3.Anulawathi Vidana Pathirana,

No.59, Lighthouse Street,Galle.

4. Dayawathi Vidana Pathirana,
Punchi Duuwa, Uluvitike, Galle.

1A. Sumudu Lakmal Abeywardena,
Vidana Pathirana, No.202A,
Richmond Hill Road, Galle.

2A. Gamini Charles Vidana Pathirana,
No.30/38, Longdon Place, Colomb0 2

PLAINTIFF-RESPONDENTS

AND

1. Thawalama Gamage Anura,
Thalangalla, Opatha.

2. Wickremanayake Karunaratna
Wasantha. Thalangalla Opatha.

3. Samarage Sunil, Thalangalla, Opatha.

5. Nilanka Sampath, Thalangalla, Opatha

6. Jayanthi Chandralatha, Thalangalla,
Opatha.

7. Saumyadasa Korlage, Thalangalla,
Opatha.

8. Padma Shanthini Weerasinghe,
No.3/33, Udayapura, Robert

Gunawardena Mawatha, Battaramulla

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Punchihewamulle mudiyansele

Indrawathi, Thalangalla Opatha.

4th DEFENDANT-PETITIONER-PETITIONER

V.

1. Sumathipala Vidana Pathirana,

No. 202A, Richmond Hill Road,

Galle.

1A. Sumudu Lakmal Abeywarden Vidana

Pathirana, No. 202A, Richmond Hill

Road, Galle.

2. Charles Vidana Pathirana,

No. 30/38, Longdon Place, Colombo 2.

(deceased)

2A. Gamini Charles Vidana Pathirana,

No. 30/38, Longdon Place, Colombo 2.

3.Anulawathi Vidana Pathirana,
No.59, Lighthouse Street, Galle.

4.Dayawathi Vidana Pathirana,
Punchi Duuwa, Uluvitike, Galle.

PLAINTIFF-RESPONDENT-RESPONDENTS

1.Thawalama Gamage Anura,
Thalangalla, Opatha.

2.Wickremanayake Karunarathna
Wasantha, Thalangalla, Opatha.

3.Samarage Sunil, Thalangalla, Opatha.

5.Nilanka Sampath, Thalangalla, Opatha

6.Jayanthi Chandralatha,Thalangalla,
Opatha.

7.Saumyadasa Koralage, Thalangalla,
Opatha.

8.Padma Shanthini Weerasinghe,
No.3/33, Udayapura, Robert
Gunawardena Mawatha, Battaramulla

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE:-SISIRA J.DE ABREW, J.

H.N.J.PERERA, J. &

PRASANNA JAYAWARDENA, PCJ.

COUNSEL:-Nilshantha Sirimanne for the 4th Defendant-Petitioner-Appellant.

Shihan Ananda for the 1A Substituted Plaintiff-Respondent-Respondent

ARGUED ON:-14.10.2016

DECIDED ON:-09.12.2016

H.N.J.PERERA, J.

The Plaintiff-Respondent-Respondents above named (hereinafter referred to as “the Plaintiffs”) instituted Partition action to partition a land called Atahawlevila Deniya more fully described in the schedule to the plaint. The land described in the schedule to the plaint is lots A to S depicted in Plan No. 348 dated 20.04.1997 made by surveyor Y.R.D.Samarwickrema. After trial the judgment and the Interlocutory Decree was entered by the learned District Judge on 05.12.2000. Accordingly a commission was issued to the Licensed Surveyor Y.R.D.Samarawickrema, the Court Commissioner, to prepare a Final Partition Plan.

The said commission was thereafter returned to Court together with the Survey Plan bearing No. 584 dated 01.02.2002 and report. Subsequently the 4th Defendant-Appellant-Appellant (hereinafter referred to as the 4th Defendant) filed objections against the scheme of partition proposed by

the Commissioner and sought a commission in the alternative to prepare a scheme of partition.

The main contention of the 4th Defendant was that the scheme of partition proposed by the Commissioner Samarawickrema did not contain the improvements which were effected by the said Defendant. Accordingly, a commission was issued to Mr. Weerasuriya Licensed Surveyor, to prepare an alternative scheme of partition and the Plan Y was prepared. Subsequently, at the inquiry held thereto, both Mr. Samarawickrema and Mr. Weerasuriya gave evidence. Thereafter the scheme of partition proposed by the Commissioner Mr. Samarawickrema plan marked "Z" was affirmed and the Final Decree was entered by the Learned District Judge.

Being aggrieved by the said order made by the District Court on 28.01.2011 the 4th Defendant preferred an application to leave to appeal to the High Court of Civil Appeal in Galle seeking to have, inter alia, the said order set aside and to have the said alternative scheme of partition confirmed but however, the said application was dismissed by order dated 14.09.2011.

Being aggrieved by the said judgment of the High Court of Civil Appeal, the 4th Defendant filed an application for leave to appeal to the Supreme Court and the Court granted leave on the following questions of law stated in paragraph 26 (F) and (G) of the Petition dated 24.10.2011.

26(F) Did the High Court (and the District Court) err by totally failing to consider and/or appreciate that, in any event, the Petitioner had not, at any time or in any manner, given up her preferential rights in respect of the plantations consisting of coconut trees and tea Plants on Lot No.13 and / or that the Interlocutory decree evidently

had no effect or application whatsoever to the Petitioner's said preferential rights?

26(G) In the circumstances of this case, did the High Court (and the District Court) err by failing to appreciate that the said alternative Plan bearing No.2054 (prepared by Mr. Ajith Ranjan Weerasuriya, dated 18.06.2006 and marked as "Y") and the scheme of partition pertaining thereto was a fairer and a more reasonable scheme than the said previous scheme of partition and Survey plan bearing No. 584 (marked as "Z")?

The 4th Defendant claimed the plantations contained on Lots 13 and 01 of the said Plan No. 584 marked "Z" as well as dwelling house/building contained in Lot No.13 thereof. It was the position of the 4th Defendant that the majority of the 4th Defendant's plantations consisted of 1,800 tea plants and 28 coconut trees. A part of the 4th Defendant's said plantations were also located on Lot No.01 of the said Plan "Z".

The interlocutory decree in this Partition Action was entered on 25.01.2001. It was contended on behalf of the 4th Defendant that although she did not give up her preferential rights to the building/dwelling house standing on Lot No.13 of plan "Z", it was erroneously stated in the judgment and ensuing interlocutory decree that the 4th Defendant had given up her preferential right to the said building/dwelling house. It is her position that she did not challenge the said decision to the effect that she had given up her preferential rights to the said dwelling house located on Lot No.13, as she was confident that, since the majority of the plantations were also located on the said same Lot No.13, she would be allocated the said Lot of land when the Court

Commissioner surveyed the same and prepared the scheme of partition in terms of his obligations under section 31 of the Partition Law.

The finality and conclusiveness of an interlocutory decree and a final decree, subject to certain exceptions, and an appeal to a Superior Court are defined in section 48(1) of the Law.

48(1) “ 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 of an 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 persons against all purposes 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 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 4th Defendant has not appealed from the said judgment of the Learned District Judge. According to her own admission she was quite aware of the fact that she was not given preferential rights to the said building in the judgment. The 4th Defendant had done nothing about it. It is now too late to complain about it.

The Learned District Judge finds that the scheme of partition depicted in the plan of Court Commissioner Mr. Samarawickrema marked “Z’ ensures that the land is partitioned in a more equitable manner. The Learned trial Judge has clearly considered the claim put forward by the 4th Defendant regarding the said building and has clearly come to the

conclusion that the 1st to 7th Defendants cannot claim preferential rights to the buildings depicted in the said plan “Z”.

Section 33 of the Partition Law No.21 of 1977 provides as follows:-

“The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as practicable, that portion of the land which has been so improved or built upon, as the case may be”.

As the interlocutory decree does not give any preferential rights to the 1st to the 7th Defendants regarding the buildings there is no need for the court Commissioner to take special care to include the said building to the said lots given to the 4th Defendant. It is also to be noted that the proceedings of 24.10.2000 clearly indicate that the defendants have not claimed preferential rights to any buildings.

This Court cannot agree with the submissions made on behalf of the 4th Defendant that the Surveyor has completely failed to allocate to the 4th Defendant that particular allotment of land that encompasses her said plantations and /or at least a major portion thereof. Whenever possible, co-owners should be allotted the portions containing their improvements. A co-owner is not entitled as of right to be allotted the portion containing his improvements.

The Learned trial Judge had also considered the claim put forward by the 4th Defendant regarding the plantation and has given cogent reasons for his conclusions in detail. On an examination of the two schemes, it is apparent that the scheme preferred by the learned District Judge is undoubtedly the better one.

The Court Commissioner Mr. Samarawickrema has given cogent reasons for his conclusions. Mr. Weerasuriya who prepared the alternative plan

'Y', whilst giving evidence has conceded that the scheme of partition proposed by the Court Commissioner Mr. Samarawickrema was more equitable than that of his plan. The scheme of partition proposed by the Court Commissioner gives the improvements and buildings to the parties according to the interlocutory decree. Therefore the learned District Judge was absolutely correct in affirming the scheme of partition proposed by the Commissioner Mr. Samarawickrema.

In Appuhamy V. Canekeratne 46 N.L.R 461 it was held that a partition proposed by the Commissioner will not be rejected on light grounds, if in making it, the Commissioner has honestly exercised his judgment. Also see Peers V. Needham (1854) 19 Beav. 316

The surveyor is required to partition the land in such a way that each party entitled to compensation in respect of improvements effected thereto will, if such party is entitled to a share of the soil, be allotted, as far as practicable that portion of the land so improved or built upon by him. A co-owner should be allotted the portion which contains his improvements whenever it is possible to do so. Nevertheless, this is not an invariable and rigid rule, which must be followed in all cases.

In Premithiratne V. Elo Fernando 55 N.L.R 369 it was held that although in a partition decree a co-owner should, whenever possible, be given the lot which carries his improvements, this principle should not be adhered to, if in the process of giving effect to it, substantial injustice is likely to be caused to the other co-owners.

Similarly, in Liyanage V. Thegiris 56 N.L.R 546 it was held that in an action for the partition of a land owned in common the rule that a co-owner should be allotted the portion which contains his improvements is not an invariable rule, and that it will not be followed if it involves substantial injustice to the other co-owners. Thus it is very clear that a co-owner should be allotted the portion which contains his improvements "so far

as is practicable” This is not an invariable rule, and the allocation in this manner has to be followed as far as practicable.

In my opinion, the Civil Appellate High Court had quite correctly dismissed the said application for leave to appeal made by the 4th Defendant at the stage of support itself. I see no reason to interfere with the said order made by the Civil Appellate High Court dismissing the application of the 4th Defendant on 14.09.2011. Therefore I answer the two questions of Law raised in this case in favour of the Plaintiff-Respondent. Accordingly the appeal of the 4th Defendant is dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

SISIRA J.DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

PRASANNA JAYAWARDENA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

