

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

Court of Appeal No: CA 1816/2006 (Revision)

District Court of Matara No: 16198/P

In the matter of an  
application in revisions

H.G.T. Ananda Lal

Petitioner-Petitioner

Vs.

1. B.G. Charlinahamy &  
Five Others

1 to 6<sup>th</sup> Defendant-  
Respondents

Before: **Eric Basnayake J**  
**K.T. Chitrasiri J**

Counsel: Saman Galappaththi for the Petitioner-Petitioner  
H. Vithanachchi for the 6<sup>th</sup> Defendant-Respondent

Argued On: 29.4.2009 & 21.5.2009

Written submissions tendered on: 18.9.2009

Decided on: 6.8.2012

Eric Basnayake J

1. The petitioner-petitioner (petitioner) filed this revision application on 13.12.2006 inter alia to have the order dated 7.2.2006 of the learned District Judge of Matara set aside. The petitioner is also seeking to have lot 4 excluded from plan No. 223 of 31.01.1994 (preliminary plan) and to amend the judgment dated 21.7.1995 and the interlocutory decree by excluding lot 4 and to have the final plan No. 1346 and the final decree dated 26.8.1996 set aside.

2. The plaintiff instituted action in the District Court of Matara in case No. 16198/P to partition lots 8 and 11 of plan No. 743 dated 14.3.1976 prepared by A.H. Koddipili, Licensed Surveyor. These two lots were allotted to one Tiyodis in a previous partition case, namely, case No. 6556/P. Lots 8 and 11 were surveyed for the present partition case No. 16198/P and depicted in the preliminary plan No. 223 of 31.1.1994 prepared by Indatissa Kotambage, Licensed Surveyor. At the same time the surveyor had superimposed plan No. 223 on plan No. 743. After the superimposition the surveyor showed 6 allotments. Some of these allotments are portions gained and some portions lost.
3. Lot 4 of this plan (plan No. 223) is a portion gained. This lot 4 in extent 1.59 perches originally formed part of lot No. 1 of plan 743. The subject matter of this case relates to this lot No. 4. This lot 4 together with lots 1, 2 and 5 formed the corpus in the partition case No. 16198/P. The judgment in this case was entered on 21.7.1995 where the court considered lots 1, 2, 4 and 5 of plan No. 223 as the corpus. By this judgment the 6<sup>th</sup> defendant was allotted 32/48 shares. The interlocutory decree was entered accordingly. Thereafter the partition plan No. 1346 was prepared by the Court Commissioner allotting lots 2 and 3 to the 6<sup>th</sup> defendant.
4. Lot 4 of plan No. 223 claimed by the petitioner formed part of lot 2 in the final plan No. 1346. The final decree was entered on 26.8.1996 (P9) (allotting lots 2 and 3 of plan No. 1346 to the 6<sup>th</sup> defendant). On an application by the 6<sup>th</sup> defendant the court issued a writ of possession to the Fiscal on 2.9.2003. On 27.11.2003 the Fiscal had formerly handed over possession of lots 2 and 3 to the 6<sup>th</sup> defendant.
5. The petitioner states that he became the owner of lot No. 1 of plan No. 743 by deed No. 700 of 20.6.2002. The petitioner complained that in the execution of a writ, a portion of the land belonging to the petitioner had been included by the Fiscal into lot No. 2. This portion had been identified as lot No. 4 of plan No. 223.

The petitioner states that although a portion of his land has been included in to this partition case No. 16198/P, no notice was served on the petitioner and/ or the predecessor in title of the petitioner. Therefore the petitioner moves that the judgment and the interlocutory decree be amended and to set aside the final decree.

6. The petitioner sought from the District Court an order on the Fiscal to demarcate the Eastern boundary of lot No. 1 of plan 743 in order to regain lot No. 4. When this application was made the 6<sup>th</sup> defendant raised a preliminary objection with regard to the maintainability of this application.

#### Order of the learned District Judge

7. The learned Judge after an inquiry dismissed the petitioner's application with costs. The learned Judge found that there was no legal principle to amend the interlocutory decree. The learned Judge held that the petitioner had failed to mention the provisions under which this application was made. He further held that it is section 48 (4) of the Partition Law that allows a party to a partition case to have the interlocutory decree set aside. The petitioner not being a party to the partition case is not entitled to make an application under section 48 (4).
8. It is to be noted however that a party could come by way of section 48 (4) within a specified time period. With regard to the complaint that the Fiscal had seized a portion belonging to the petitioner, the learned Judge stated that the petitioner could have made a complaint under section 328 of the Civil Procedure Code within 15 days of such dispossession, which the petitioner had failed to do. The Fiscal's execution was on 27.11.2003 and the petitioner filed papers in court on 16.1.2004.
9. The learned Judge refused to exercise inherent powers of the court on the basis that inherent powers can be exercised only when there are no specific provisions

and in this case the learned Judge found that the petitioner had a remedy under the CPC (Leahman & Co Ltd., vs. Ranagalle Consolidated Ltd., (1981 2 Sri L.R. 373).

10. The question that arises is whether the court is entitled to hold an inquiry under the provisions of the Civil Procedure Code. The provisions of the Partition Law provide a specific remedy and the provisions of the Civil Procedure Code cannot be resorted to. Provisions of the Partition Act are mandatory and provide a simple and easy remedy of obtaining delivery of possession (Munidasa and Others vs. Nandasena (2001) 2 Sri L.R. 222 at 229) These sections are compendious enough, to give effectual possession to a party, who has been allotted shares in a final partition decree (Samarakoon vs. Punchi Banda 78 N.L.R.525).
11. If the Fiscal is resisted, he will report the resistance to Court and the procedure set out in section 53 of the Partition Law 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 Contempt of Court. This he could do, for example by showing that he had prescribed to the 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 (Samarakoon Vs. Punchi Banda (supra pg 525)).
12. Where there is specific provision recourse cannot be had to other provisions (Kamala v. Andiris 41 NLR 378, In re Jayatileke 63 NLR 202, Esabella perera Hamine v. Emalia Perera Hamine (1990) 1 Sri L.R. 8).
13. The learned Judge having found that there are no violations committed by the Fiscal while executing the writ dismissed the petitioner's application on 7.2.2006. It is this order the petitioner is seeking to vacate.
14. The learned counsel for the petitioner strongly relied on the judgment of Rev. Induruwa Dhammananda vs. Piyatissa and another (2001) 2 Sri L.R. 266 in

support of his case. In Induruwe Dhammananda's case five allotments which did not form part of the corpus were included into the corpus without issuing notice on the interested parties under section 5 of the Partition Law. Section 5 states that the plaintiff shall include all persons who, whether in actual possession or not, to his knowledge, are entitled or claim to be entitled to any right share or interest and improvement and subject to the limitations stated therein. Thus the interlocutory decree was amended excluding lots 2, 3, 5 and 8 of the final plan. This was done on the basis that there was no cogent evidence of prescriptive possession of the said lots.

15. The learned Counsel for the 6<sup>th</sup> defendant submitted that the 6<sup>th</sup> defendant was declared the owner of lots 2 and 3 and was placed in possession by Court pursuant to an application made under section 52 of the Partition Law. The petitioner admits the 6<sup>th</sup> defendant's partition title. "The partition decree is conclusive against the whole world, and on no ground, whether of fraud or otherwise, can it be disturbed. The only remedy lies is an action for damages" (Burnside C.J. in *Nona Hamy vs. De Silva* (9 SCC 198)). It is well settled as any point of law can be that a partition decree is conclusive against all persons whosoever, and that a person owing an interest in the land partitioned whose land even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings, is not entitled on that ground to have the decree set aside, his only remedy being an action for damages" (Wood Renton C.J. in *Jayawardene vs. Weerasekera et al* 4 C.W.R. 406).
16. "It is 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.....(section 48 (1)) (*Fernando v. Fernando* 9 N.L.R. 241, *Catherine Hamy v. Baby Hamy* 11 N.L.R. 20, *Mudali Hamy v. Dingiri Menika* 8 C.L.R. 140, *Bernard v. Fernando* 16 N.L.R. 438, *Fernando v. Marshal Appu* 23 N.L.R. 370, *Umma Sheefa v. Colombo Municipal Council* 36 N.L.R. 38, **Muthumenka v. Appuhamy** 50 N.L.R. 162, **Mahamedaly Adamjee v. Hadad**

Sadeen 56 N.L.R. 345 and 58 N.L.R. 217 (Privy Council), Nonis v. Charles 63 N.L.R. 501, Victor v. Cyril de Silva (1998) 1 Sri L.R. 41, Jayasena and others v. Premadasa (2004) 1 Sri L.R. 340, Maduluwawe Sobitha Thero v. Joslin (2005) 3 Sri L.R. 25).

17. The 6<sup>th</sup> defendant was placed in possession lawfully. The correct procedure 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 Law (Samarakoon vs. Punchi Banda (supra)).

Section 52 (1) is as follows:-

**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.....shall be entitled to obtain from the court, in the same action, on an application made by motion in that behalf, an order for the delivery to him of possession for the land (emphasis added).**

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18. This section had been further strengthened by Section 53 (1) which empowers court to enforce its decrees and orders and to deal with offences of Contempt of Court. Section 53 (1) is as follows:-

**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**

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19. Udalagama J held that “a party requiring possession must apply by way of a **motion in the same action for an order for 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 (Samarakoon v. Punchi Banda (supra at pg 527)).

20. It appears that the 6<sup>th</sup> defendant had been in possession of this 1.59 perches of land even prior to the preliminary survey on 1.8.1993. At the time of the preliminary survey the 6<sup>th</sup> defendant claimed this portion. This portion did not have any plantation. The western boundary of lot No. 4 was shown as the western boundary of the corpus. Thus this lot 4 was considered as part of the corpus for a long period. Therefore Induruwe Dhammananda's case cannot be considered as authority.

21. The petitioner made this application on 9.12.2006 against the order dated 7.2.2006, that is more than 10 months after and the petitioner would be answerable for delay as well. For the above reasons this case is without any merit and therefore this case is dismissed with costs.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal