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

CA 646/99 (F)
D.C. Ratnapura 8140/P

09. U. Amaradasa
9th Defendant-Appellant
Vs.
Dasanayake Lekamlage
Kusumawathi,
Amuhengoda,
Kiriella.
Plaintiff-Respondent
and others.

BEFORE : A.W.A. Salam, J.
COUNSEL : Naveen Marapana for the 9th Defendant-Appellant.
Anuruddha Dharmaratne for the substituted 1st Defendant-Respondent and
Pubudu de Silva with S.H.U. Amarawansha for the Plaintiff-Respondent.
ARGUED ON : 17.07.2012
W/S FILED ON : 09.07.2012
DECIDED ON : 27.08.2012.

A.W.A. Salam, J.

This is a partition action brought by the plaintiff to have his undivided 1/6 share of the corpus divided in terms of the Partition Law No 21 of 1997 without specifying the exact manner in which the title to the balance 5/6 share devolved. Amongst other parties, the 9th defendant filed statement of claim moving for a dismissal of the action and a declaration of his entitlement to lots A, B and C depicted in the preliminary plan. He also prayed that the plaintiff and the other defendants who are in occupation of the said lots be ejected.

When the case came up for trial on 29.3.1999 the plaintiff moved to have the action withdrawn and the 9th defendant at that point of time applied for leave of court to prosecute the action in place of the plaintiff. The application of the 9th defendant was refused and accordingly the partition action was dismissed. The 9th defendant who is referred to in the rest of this judgment as the "appellant" challenges the propriety of the refusal of his application shutting him out from prosecuting the partition action on the basis that the said refusal is contrary to law and in particular the ratio decidendi in Pieris Vs Chandrasena 1999-3 SLR at page 153.

The learned district judge has refused the application of the appellant based on the decision in Amrasingha Vs Podimenike 1997 1 SLR 349 where the rule was laid down that a defendant may be permitted to prosecute a partition action only when the plaintiff fails or neglects to prosecute the action and not on account of a withdrawal of the action which is a deliberate act of abandoning the prosecution of a partition action. Further it was specifically laid down that a defendant who had asked for a dismissal of the action is not entitled to have leave of court to prosecute the partition action.

Admittedly in this case the action has been dismissed not on account of the failure or neglect on the part of the

plaintiff to prosecute the action but quite strikingly on the deliberate act of the plaintiff having moved for the withdrawal of the action. Further, the appellant has not sought to have the corpus partitioned instead has moved for a dismissal of the same. The prayer to the statement of claim filed by the appellant is for a declaration that he is entitled to certain and defined allotments of land depicted in the preliminary plan.

The appellant takes up the position that the judgement relied upon by the learned district judge can easily be distinguished from the facts of this case. He further submits that the learned judge has failed to interpret properly the provisions of section 70 of the Partition Law No 21 of 1977. In the case of Pieris Vs Chandrasena 1999 3 SLR 153, it was held that there is no legal impediment to a defendant to prosecute a partition action in pursuance of section 70 as the phraseology "any defendant" appearing in section 70 would mean any defendant irrespective of whether he has soil rights or not.

In the light of the authorities cited above it is quite clear that a defendant is entitled to prosecute a partition action even if he has no soil rights only in circumstances where there has been a failure or neglect on the part of the plaintiff to prosecute the action and not when the action is brought to an end by reason of the dismissal that

emanates on the application of the plaintiff to withdraw the case. In the circumstances, I am unable to find fault with the basis on which the learned district judge refused the application of the appellant to prosecute the action. For the foregoing reasons, I am of the opinion that the impugned judgement does not warrant the intervention of this court. The appeal therefore is dismissed without the plaintiff-respondent having his costs of appeal.

Judge of the Court of Appeal

NR/-