

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

1. Sarojini Lawrence  
No. 345/33, Kuruppu Lane  
Borella, Colombo 8.
2. Meyyappan Kulendran  
No. 3, Sayd Rukmand  
Paris 9C, France.
3. Logambikey Pareeja  
No. 36, Forest Park  
Buwaneswaru, Orissa  
India
4. Meyyappan Nagendran  
No. 114, Colins Crescent  
Brampton Ontario L6 T3 N1  
Canada.

**PLAINTIFF-PETITIONERS**

C.A 1542/2004/CALA 456/2004  
D.C Case No. 16955/P

Vs.

1. N. Jayachandran  
No. 79, Kotahena Veediya  
Colombo 13.

**DEFENDANT**

2. Remico Industries (Pvt) Limited  
No. 194, Sri Ramanadan  
Mawatha, Colombo 13.

**RESPONDENT**

And now between

2. Remico Industries (Pvt) Limited  
No. 194, Sri Ramanadan  
Mawatha, Colombo 13.

**2<sup>ND</sup> RESPONDENT-  
PETITIONER**

1. Sarojini Lawrence  
No. 345/33, Kuruppu Lane  
Borella, Colombo 8.
2. Meyyappan Kulendran  
No. 3, Sayd Rukmand  
Paris 9C, france
3. Logambikey Pareeja  
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4. Meyyappan Nagendran  
No. 114, Colins Crescent  
Brampton Ontario L6 T3 N1  
Canada.

**PLAINTIFFS-PETITIONERS  
RESPONENTS**

Vs.

N. Jayachandran  
No. 79, Kotahena Veediya  
Colombo 13.

**New address**

74, Bonjean Road,  
Colombo 13.

**DEFENDANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Nihal Jayamanne P.C with Noorani Amarasinghe  
For 2<sup>nd</sup> Respondent-Appellant

Romesh de Silva P.C., with S. Amarasekera  
for Plaintiff-Respondents

Senaka de Silva for Defendant-Respondent

**ARGUED ON:** 06.09.2011

**DECIDED ON:** 17.10.2011

**GOONERATNE J.**

The Plaintiff-Respondent was declared entitled to lot (1) in plan No. 1322 A (marked X) by final partition decree and the Defendant-Respondent to lot 2 in the said plan. Thereafter the Plaintiff-Respondent filed an application for delivery of possession of the land in question under Section 52 of the Partition Law to evict the 2<sup>nd</sup> Respondent who was in possession. The 2<sup>nd</sup> Respondent-Petitioner, Remico Industries (Pvt.) Limited, objected to such application mainly on the basis that the 2<sup>nd</sup> Respondent- Petitioner is in possession of the entire corpus and a lessee of

Plaintiff-Respondent. The learned District Judge after inquiry allowed the application made by Plaintiff-Respondent by his order of 18.11.2004.

The learned President's Counsel for the 2<sup>nd</sup> Respondent-Petitioner in his brief submissions to this court at the outset drew the attention to the above plan filed of record. (Folio 475) to show that the Hotel falls within lot (2) and the factory and office falls within lot (2) and some parts of same within lot (1). It was the learned President's Counsel for the 2<sup>nd</sup> Respondent-Petitioner's position that his client took on lease the entire corpus on rent and that his client is entitled to the protection of the Rent Act and relied on Section 14(1) and Section 22 of the Rent Act. Further the learned Counsel sought to demonstrate and impress this court that in any event Plaintiff-Respondent had acquiesced in the tenancy of the 2<sup>nd</sup> Respondent-Petitioner. He developed his argument on the above lines by submitting to court that the 1<sup>st</sup> Defendant-Respondent was a co-owner and prior to the partition decree leased the premises inclusive of lots (1) & (2) of the said plan to the 2<sup>nd</sup> Respondent-Petitioner. As such there is acquiescence the part of the Plaintiff-Respondent.

The learned President's Counsel for Plaintiff-Respondent vehemently objected to any suggestions pertaining to acquiescence and that Plaintiff-Respondent never at any point of time leased or rented her portion

of the land which she became entitled by the partition decree and denied any knowledge of a contract of tenancy even prior to final decree. Learned President's Counsel supported the learned District Judge's order of 18.11.2004 and argued that in any event Section 14 of the Rent Act applies only to residential premises and not to business premises. As such Section 14 and 22 of the Rent Act has no application to the case in hand.

The learned President's Counsel for 2<sup>nd</sup> Respondent did not contest or specifically challenge any factual matters or the learned District Judge findings on questions of fact. He based his argument on legal proposition more particularly the protection afforded to a tenant under the Rent Act as regards property which are subject to a final partition decree.

I have perused the order of the learned District Judge. Though it is a very brief order the reasons for not accepting the 2<sup>nd</sup> Respondent-Petitioner as a tenant or lessee of the Plaintiff-Respondent are being clearly stated in his order. This court cannot see a basis to reject or interfere with the learned District Judge's reasoning. I have noted the following:

- (a) Plaintiff was not in the island since 1973. One Karuppiah Nagalingam was looking after Plaintiff-Respondent's property according to 2<sup>nd</sup> Respondent-Petitioner and the said Karuppiah Nagalingam leased Plaintiff's property to the 2<sup>nd</sup> Respondent-Petitioner. In evidence it was Plaintiff-Respondent's position that she had no dealings or had any good relations with both the said Nagalingam or

the 1<sup>st</sup> Defendant. There were disagreements and ill feeling between 1<sup>st</sup> Defendant and Plaintiff-Respondent which resulted in litigation as evidenced from X1 – X 12. As such court rejects any form of arrangement to lease the property of Plaintiff.

- (b) No independent or oral/documentary evidence led at the inquiry to prove tenancy or lease other than the evidence of Manager of 2<sup>nd</sup> Respondent-Petitioner Company.
- (c) The lease agreement entered between Karuppiyah Nagalingam and the Proprietor of 2<sup>nd</sup> Respondent-Petitioner Company. The Plaintiff-Respondent never had a hand in it. If at all it is a dealing between 1<sup>st</sup> Defendant and 2<sup>nd</sup> Respondent-Petitioner.
- (d) In terms of Section 50 (1) A of the Partition Law right of a lessee or Mortgagee cannot be interfered. However it would be applicable only to the portion of land leased i.e between 1<sup>st</sup> Defendant and 2<sup>nd</sup> Respondent-Petitioner. As such in the absence of acceptable material to prove that the lease agreement was between the Plaintiff-Respondent and the 2<sup>nd</sup> Respondent-Petitioner, Plaintiff-Respondent's entitlement to lot (1) in plan 1322A by the partition decree would not be effected and no impact on her portion of portion of the land.

The above reasoning of the learned District Judge cannot be set aside by this court. I accept the facts as adverted to by the Original Court Judge. The Plaintiff-Respondent on the available facts and evidence had no dealings at all with the 2<sup>nd</sup> Respondent-Petitioner Company. No tenancy or lease had been established between the 2<sup>nd</sup> Respondent-Petitioner Company and the Plaintiff-Respondent. As such I agree with the order of the learned District Judge.

The writ of possession under Section 52 of the Partition Law has been incorporated into the Partition Law I believe after much consideration by the Law Commission of 1929. This is a recognized right made available in terms of a statutory provision in Partition Law. Unless provided by law the Provision contained in Section 52 should not be taken lightly. In the text of Law of Partition in Ceylon by K. D. P. Wickremasinghe – pg. 326 ...

The need for a writ of possession after a final decree in a partition action was widely felt, and the Land Commission of 1929 in its report made the following recommendations:

“We also recommend that provision should be made enabling the Court to issue a writ of possession in the case of a purchase or partition under this Ordinance.”

However, all these difficulties regarding the applicability of these sections of the Civil Procedure Code to partition actions, for the purpose of obtaining an order for delivery of possession of the land under a final decree in a partition action, are now removed by section 52 of the Partition Act which enacts that those who are entitled to any land by any final decree, and those who hold a certificate of sale under the Act are entitled to obtain from Court an order for delivery of possession of the land.

In fact it is an offence to interfere with a partition decree, unless by lawful means. In Herat Deputy Fiscal Vs. Alice Nona – The Ceylon Weekly Reports Vol. 1 (1915) Pg. 84. The decree in a partition suit is binding as against all the world and a person obstructing the fiscal in the

execution of a writ of possession issued under such a decree cannot be said to do so in the exercise of a bona fide claim of right and is guilty under Section 183 of the Penal Code.

Apart from above, the importance of a writ of possession has been considered from very early times of enacting the Partition Law. The above position has been considered and dealt in the Law of Partition in Ceylon by *D.A. St. V. Jayawardena* pg. 154 refer to writs of possession.

When final decree has been entered allotting specific lots to each of the parties, the allottees are entitled to be placed in possession of the lots so allotted under order of Court, and for that purpose to obtain writs of possession as provided for in sections 323 and 324 of the Civil Procedure Code: *Ungehami v. Naidehami* and *Herat v. Alice Nona*. Under such a writ the Fiscal can remove not only persons parties to the action and directly bound by the decree, but also all persons whomsoever, as a partition decree binds all the world. In *Herat v. Alice Nona*, the Fiscal was obstructed in the execution of a writ of possession issued in a partition action by two persons, one of whom was not a party to the decree. Both of them were charged under section 183 of the Penal Code with obstructing a public servant in the execution of his duty. The Magistrate convicted the accused who was a party to the partition decree and acquitted the other. On an appeal against the acquittal, Shaw, J.. said:-

“I am of opinion that the Magistrate was wrong. The decree in a partition suit is binding against all the world and the 1<sup>st</sup> accused’s claim to retain possession of the land cannot be considered as a *bona fide* one, as it was a claim to a right that could not exist in law.”



I would also refer to some recent case law (Act No. 21 of 1977) on the subject to demonstrate that provisions of the Partition Act are mandatory. *Munidasa Vs. Nandasena 2001 (2) SLR 224 – CA*

The question arose as to whether a party to a partition action who was allotted a lot could proceed under section 325 Civil Procedure Code without resorting to the specific provisions under section 52(1) and 53(1) of the Partition Act.

Held –

- (i) The Partition Law provides a specific remedy, the plaintiff-respondent is not entitled to resort to provisions of the Civil Procedure Code. Provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.
- (ii) The provisions of the Civil Procedure Code could be made use of as regards the formalities of execution of writs etc., but regarding the delivery of possession of land to parties and purchasers, application should be made under section 52 of the Partition Act.

*Abeyratne v Manchanayake 1992 (1) SLR 361 - CA*

By a final partition decree dated 24.10.71 a party was declared entitled to certain lots and also ordered to pay owelty and compensation to certain other parties, which amounts were paid only on 9.11.83.

He thereafter made an application for an order for delivery of possession under section 51(1) of the Partition Law, when objections were taken based on section 337 of the Civil Procedure Code which prohibits an application for execution of decree after 10 years from the date of decree (subject to certain exceptions which were not relevant).

Held –

The proviso to section 52(1) of the Partition Law, which provides that a party who is liable to pay compensation or owelty, shall not be entitled to obtain an order for delivery of possession until such amount is paid, is applicable in the matter and the 10 year period in section 337 of the Civil Procedure Code begins to run from the date when compensation or owelty is

Paid.

When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests its intention very clearly. This is expressed by the Latin maxim *generalia specialibus non-derogant* (general words do not derogate from very special provisions)

Neither section 77 of the Partition Law which states that the provisions of the Civil Procedure Code relating to the execution or service of writs etc. shall apply in relation to the execution of service of writs etc. in a partition action, nor section 79 of the Partition Law which lays down that in any matter or question or procedure not provided for in the Partition Law the procedure laid down in the Civil Procedure Code in a like matter or question is to be followed by the court governs the matter because special provision has been made by the Legislature under section 52(1) of the Partition Law and the proviso thereto in respect of partition decree.

The Partition Act No. 16 of 1951 also had in its section 52 provisions relating to delivery of possession.

In *Samarakoon v Punchi Banda* 78 NLR 525

The provisions of section 337 of the Civil Procedure code do not apply where a party to a partition action applies to Court for an order to put him in possession of the lots allotted to him in the final decree. The correct procedure that should be adopted is set out in section 52 of the Partition Act.

I would at this point of my judgment wish to point out something that was not submitted to this court by the learned President's Counsel for 2<sup>nd</sup> Respondent-Petitioner. There was no reference by him to any items of evidence with reference to the inquiry in the District Court to demonstrate acquiescence on the part of the Plaintiff-Respondent as regards tenancy. In fact the learned District Judge rejects any form of a lease or tenancy involving the Plaintiff-Respondent. As such I am firmly of the view that the provisions of the Rent Act has no application. Even otherwise section 14 of the Rent Act is limited only to residential premises, where emphasis was made on this point by learned President's Counsel for Plaintiff-Respondent, and there was no response to such submissions by the other learned President's Counsel.

However section 14(1) of the Rent Act reads thus:...

(1) Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under the Partition Act or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or such co-owner, as the case may be, and the provisions of this Act shall apply accordingly, and where such tenant is deprived of any amenities as a result of such partition, the owner of the premises where such amenities are located shall permit such tenant to utilize such amenities without making any payment therefore until such amenities are provided by such purchaser or co-owner or by the tenant under sub-section (3).

The above section applies to residential premises. Admittedly the claim of the 2<sup>nd</sup> Respondent-Petitioner is according to the above plan describes office, hotel and factory. There are no residential units. I am not convinced of any argument to bring the case within Section 14 of the Rent Act. Attempt by 2<sup>nd</sup> Respondent-Petitioner to object in this manner is merely to delay the process and deny justice and whittle down the procedure under Section 52 of the Partition Law. This provision available under the Partition Law is paramount to safeguard the interest of a rightful allottee.

Section 22 of the Rent Act refer to grounds of ejection of tenant. It has no application as far as partition decree is concerned.

At the hearing stage this court was concerned about the question of a final appeal since order under Section 52 is on the issue of a writ of possession subsequent to a final decree and one could very well argue that it is an incidental stage in the process. However I do not think that this court is denied of jurisdiction to terms of Section 773 of the Civil Procedure Code. As far as the writ of possession under Section 52 of the Partition Law is concerned it is in effect of final order in the process of a partition suit which could be the final step to an allottee entitled in terms of final decree.

Further there was no objection raised by any of the President's Counsel as regards the right of appeal under Section 52 of the Partition Act No. 21 of 1977. Though parties cannot confer jurisdiction on court I am mindful of the case law on that aspect. Vide Martin vs. Wijewardena 1989 (2) SLR 410; Sangarapillai's case 32 NLR 92; Shanmugam vs. Commissioner of Registration of Indians & Pakistanis Residents 64 NLR 29, 33; 1982 (2) SLR 250 & 252 etc.

In all the above circumstances, I affirm the order of the learned District Judge dated 18.11.2004 and dismiss the Petition of Appeal with costs fixed at Rs. 25,000/-

JUDGE OF THE COURT OF APPEAL