

**In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka**

CA 993/97F
DC Galle : 10506/P

Angulugaha Gamage
Nandawathie,
Rajagedarawatta,
Eththiligoda,
Galle

Plaitiff-Appellant

Vs

Ahangama Liyanage
Sumanadasa,
Rajagedarawatta,
Eththiligoda,
Galle

Defendant-Respondent

Before: A W A Salam J
Counsel: N R M Daluwatta PC with Mrs M Maitipe for
the 2nd and 3rd Defendant-Respondents, AMJ
Hemantha for 1st and 4th defendant-respondent and
Maduranga Ratnayaka with Shantha Jayawardena for
the plaintiff-Appellant.

Argued: 28.07.2010

Decided on: 25.01.2011 *d*

A W Abdus Salam,J

The subject matter of this partition action is depicted in the preliminary plan No.3641 dated 19.6.1989 made by W.A.Garvin de Silva, Commissioner of Court. After trial the learned district judge entered interlocutory decree directing that the corpus be partitioned among the co-owners in the proportion of $\frac{1}{2}$ share to the plaintiff and $\frac{1}{4}$ share each to the 1st and 2nd defendants.

A scheme of partition was accordingly suggested by M.N.J.A.Perera, Commissioner of Court, by plan No.175 dated 18.5.1995. On the initiation of the plaintiff an alternative scheme of partition (plan No.2/96 dated 31.12.1996) was tendered through H.K.Alles, Licenced Surveyor.

When the matter of the inquiry into the scheme of partition commenced parties agreed to abide by an order delivered by court on the controversy after carrying out a site inspection by the Judge. Having carried out the inspection in terms of the agreement, the learned additional district judge made the impugned order confirming the scheme of partition of the commissioner i.e. that of M.N.J.A.Perera, as contemplated by Partition Law..

The present appeal has been preferred by the plaintiff against the order confirming the said scheme of partition.

The ^{2nd} and ^{3rd} Defendant-Respondents have raised a preliminary objection against the maintainability of the appeal. The learned President's Counsel relies on the judgment in the case of Suriyapperuma vs Senanayake (1989) 1 SLR page 325, to drive home his argument as to the non-availability of a statutory appeal against the impugned order.

In the case of Suriyapperuma vs Senanayake (supra) parties agreed to abide by the decision of the judge after an inspection of the land in dispute and also signified their consent by signing the record. The inspection was carried out and thereafter order was made declaring the plaintiff entitled to a cartaway. On an appeal being preferred against the order made, it was held that where parties agree to abide by the court's decision after an inspection there is implied in it, a waiver of all defences taken in the answer and a total acceptance of the outcome of the court's decision. It was further held that no right of appeal lies against such an order.

In the case of Walliamma vs Selliah 73 NLR 509 cited with approval in Suriyapperuma's case Tennakoon J.(as he then was) expressed the view based on an English case that the judge in a civil case is given the power to inspect any place or thing with respect to which any question arises in the course of matter.

The value to be attached to an inspection carried out by a judge in order to decide an issue before him has been impeccably described by Birikett L.J. in Buckingham vs Daily News Ltd. 1956 2 QB 534, 1956 2 All E R 904, 1956 3 WLR 375 in the following manner

“When a judge goes to see machinery, and sees it in operation when the parties are present and everything is done regularly and in order, it is just the same as though the machine were brought into court and demonstration made in the well of the court, so that the judge or judges may see it”.

The value to be given to an inspection by a trial judge was observed by His Lordship Denning LJ in the case of Goid Vs Evans & Co 1951 TLR 1189 as follows..

"It is fundamental principle of our law that the judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I

think that a view is a part of the evidence just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or a photograph of it. But, even if a view is not evidence, the same principles apply. The judge must make his view in the presence of both parties, or at any rate, each party must be given an opportunity of being present. The only exception is when a judge goes by himself to see some public place, such as the site of a road accident, without either party present".

The learned counsel of the appellant has submitted that the Partition Law does not allow the district judge to conduct a site inspection to decide on the partition scheme and therefore the parties in any event could not have agreed to abide by the order based on such a site inspection. In the result, he urges that the plaintiff could not have in any event waived his right of appeal. In short, it has been submitted on behalf of the appellant that the Civil Procedure Code has no application to decide on the scheme of partition under the partition law, after a site inspection.

In this respect it must be remembered that in terms of section 79 of the Partition Law, No 21 of 1977 in any matter or question of procedure not provided for in the Partition Law, the procedure laid down in the Civil Procedure Code in a like

matter or question shall be followed, as long as such procedure is not inconsistent with the Partition Law.

An inspection of the subject matter by the judge in order to decide the question as to the feasibility of the division of the subject matter among the co-owners in terms of the interlocutory decree, on the invitation of the parties and with their express consent to abide by the decision to be eventually made after such inspection, in my opinion is perfectly in order and not inconsistent with the Partition Law. Therefore, in such an event the Provisions of the Civil Procedure Code can conveniently be applied to fill the omission in a partition case.

For the above reasons, the preliminary objection raised on behalf of the contesting defendants is upheld and appeal dismissed.

There shall be no costs.

Judge of the Court of Appeal

Kwk/-