

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

In the matter of an application for Revision

1. Dahanayakage alias Dasanayaka,
Mudiyanselage Gunawathie of
Angitihaldeniya,
Anhettigama.
2. Udabage Vidanelage Nandawathi,
Vidyal Mawatha, Deraniyagala.

Plaintiff

C.A.(Revision) Application No: 144/2003

D.C.Avissawella Case No.1759/P

Vs

- 1.Dahankge alias Dasanayaka Mudiyanselage
Punchi Mahathmaya of Angitihaldeniya,
Anhettigama.
And five (05) others.

Defendants

Now Between

Udapola Dahanayakage Siriwardena,
Of Udapola, Malwathukanda,
Deraniyagala.

1st Claimant Petitioner

Vs

1. Dahanayakage alias Dasanayaka,
Mudiyanselage Gunawathie of
Angitihaldeniya,
Anhettigama.

2. Udabage Vidanelage Nandawathi,
Vidyal Mawatha, Deraniyagala.

Plaintiff- Respondent

Dahankge alias Dasanayaka Mudiyanseleage
Punchi Mahathmaya of Angitihaldeniya,
Anhettigama.

And fourteen (14) others.

Defendants-Respondent

1. Erathna Pathirenehelage Podimahaththaya.
of Udapola , Malwathukanda.
Deraniyagala.

And six (06) others.

Claimant Respondents

BEFORE : **S. SRISKANDARAJAH, J.**
COUNSEL : Rohan Sahabandu,
for the Petitioner
Samantha Vithana
for the Plaintiff-Respondent.
Vijith Singh with Sandamal Rajapakse
for the 2nd ,3rd and 4th Claimant -Respondent.

Argued on : 04.11.2010

Decided on : 28.02.2011

S.Sriskandarajah, J.

The Plaintiff Respondent instituted a partition action to partition a land called "Gallenehena" which was in extend of 10 pelas among themselves and 1st to 4th Defendants Respondents. It is the position of the Petitioner that when the survey

was conducted on a commission issued by court to prepare preliminary plan during 6th to 8th March 1987 the Petitioner and five other persons claimed rights in the said land before the surveyor. The surveyor had submitted a report to court to this effect. The Plaintiffs tendered to court notices to be served on the new claimants and the court made order to issue notice on the claimants returnable on 12.08.1991. The notices on the 1st and 2nd claimants were not served as the addresses were insufficient. The Petitioner contended that the Plaintiffs' had not taken steps either to tender the correct address of the said claimants (Petitioner) or to add them as party to the partition action. The case proceeded to trial and evidence was led to the effect that the buildings marked A and B in the preliminary plan belongs to the Petitioner. The learned District Judge relying on this evidence kept the portions of the land in which the said buildings are situated un allotted. The Petitioner contended that he never received any notice from the court and it is apparent from the case record that on 12.08 1991 the court has made order to serve notice on the Petitioner. The Plaintiff has not taken steps either to issue notice on the Petitioner or to add this petitioner a party to this partition action.

The failure on the part of the Plaintiff to make the Petitioner a party to the Partition action alone will not give right to the Petitioner to seek an order to revise the Judgement and the Interlocutory Decree entered in the said partition action. It is a mandatory requirement under Section 5 of the Partition Act to include in the plaint of the plaintiff as parties to the action 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 to, of, or in the land to which the action relates or to any improvements made or effected on or to the land. But a failure to comply with this mandatory requirement will only result in the rejection of the plaint as provided under Section 7. In the instant case this stage has passed and the plaint was accepted and the case proceeded and the Judgement and the Interlocutory Decree were entered. The only action that can be taken against the plaintiff is to institute proceedings in the Magistrates Court for the commission of an offence under Section 71(1) of the

Partition Law if it can be proved that the Plaintiff, knowing that the Petitioner has any interest in the land to which such action relates, fraudulently or dishonestly fails or omits to disclose in the pleading filed by him, the fact that such person has such interest or that such person is a necessary party to such action.

The plaintiff's position is that after the surveyor filed his report the necessary notices were tendered to court to issue on the claimants who made claims before the surveyor, according to the journal entry appears in the case record that the notice was not served on the Petitioner as the address provided is insufficient to serve the notice. The learned counsel for the Petitioner contended that the service of notice is the duty of court and the failure on the part of the court to perform this function would amount to an error of law. As the said judgment was entered without complying with that statutory duty this court should exercise its revisionary powers and revise the said judgement. It is the duty of the plaintiff in a partition action to file in court the notices which are to be sent to every claimant (not being a party to the action) who is mentioned in the report of the surveyor Under Subsection (2)(a) of Section 20. The court shall order notice of a partition action to be sent by registered post- to every claimant (not being a party to the action) who is mentioned in the report of the surveyor Under Subsection (1) of Section 20. In this instant case the notices were tendered by the Plaintiff and the Court ordered that the notices to be sent by registered post but in fact it was not served on the party to be added as the address was not sufficient to deliver the notice. One has to observe that the duty cast on the court is to order for the service of notice by registered post but the law has not imposed a burden on the court to make every claimant (not being a party to the action) who is mentioned in the report of the surveyor a party to the action. It is the duty of the person receiving notice under subsection (1) of this section 20 to apply by motion in writing to add him as a party on or before the date specified in the notice as provided by Subsection (3) of Section 20. In this background the Petitioner who is aware of the partition action and as he has made a claim before the surveyor

should have been vigilant in establishing his rights. If the position of the Petitioner is that he has not received notice then he is entitled under Section 69 to apply to court at any time before judgment is delivered that he should be added as a party to the action and the court may add him as a party to the action, but the Petitioner has not taken these steps until the Interlocutory Decree is entered in the Partition action. The Partition action was pending in the District court from 1984 to 2001 for a period of over 16 years and after the interlocutory was entered the Petitioner has waited 16 months to file this application. These delays are not explained by the Petitioner.

On the other hand the properties that are claimed by the Petitioner are unallotted in the Judgement and therefore the Petitioner is not prejudiced by the judgement and the Interlocutory Decree. Further the Petitioner under Section 49(1) of the said Act would vindicate his rights by a separate action and claim damages from any party to the action by whose act, whether of commission or omission, such damages may have accrued and where the whole or any part of such damages cannot be recovered from any such party, recover such damages or part thereof from any other person who has benefited by any such act of such party. In *Perera and Others v Adline and Others* [2000] 3 Sri L R 93, Jayawickrema, J held:

“ According to S.48(5) and S.48(1) it is clear that the only remedy available to a person who was not a party to a partition action, is to file a separate action to recover damages from any party to the action, if he says that his land has been partitioned.

The above provisions state that "the amount of damages shall be a charge on any share of the land or any money allotted in such action" makes it clear that a party will not be prejudiced by the mere fact of not being added as a party - S.49(1) prevents such prejudice.

Although in an appropriate case this Court has jurisdiction to act in Revision and restitutio-in-integrum, but where a party has deliberately not shown due diligence even after he was notified by the Surveyor to appear in Court and fails to apply to be added

as a party, this Court will not exercise its jurisdiction in his favour."

For the above reasons this court dismisses this application without costs.

Judge of the Court of Appeal