

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

In the mater of an application
for leave to appeal

Court of Appeal No: CALA 17/2004

District Court of Elpitiya No: 471/P

Piyasena Jayasinghe

24th Defendant-Petitioner

Vs.

P.K.William

23rd Defendant-Respondent
& Plaintiff-Respondent and
1-22 & 25-55 Defendant-
Respondents

Before: **Eric Basnayake J**

K.T. Chitrasiri J

Counsel: Rohan Sahabandu with Athula Perera for the 24th Defendant-Petitioner

Hemasiri Withanachchi for the 23rd Defendant-Respondent

Argued On: 24.8.2009

Written Submissions Tendered On: For the 23rd Defendant-Respondent: 1.6.2007

For the 24th Defendant-Petitioner: 21.6.2007

Decided On: 23.3.2011

Eric Basnayake J

The 24th defendant-Petitioner (24th defendant) filed this leave to appeal application *inter alia* to have the order dated 8.1.2004 of the learned District Judge of Elpitiya set aside. By this order the learned District Judge had confirmed the final plan No. 648 of 14.9.1992 (Z) prepared by K.W.Pathirana, Licensed Surveyor and Court Commissioner.

Leave to appeal was granted by this court as far back as 27.4.2005 on the question whether the learned Judge had impartially and fairly exercised his function in confirming the scheme of partition proposed by the Commissioner.

The dispute in this case is between the 24th defendant and 23rd defendant-Respondent (23rd defendant). In the final plan approved by court the 24th defendant was allotted lot 2. The 24th defendant complains that after the interlocutory decree, the 24th defendant had purchased the share of the 14th disclosed party. This party (14th disclosed party) was added later as the 55th defendant. The learned counsel for the 24th defendant submits that at the time of the partition a request was made to the Court Commissioner by the 24th defendant to allocate the lot that would be given to the 55th defendant adjoining the lot given to the 24th defendant. The adjoining lot is lot No. 3. The Commissioner had allotted lot No 3 to 23rd defendant. The 55th defendant was allotted lot No. 9 which is away from lot No. 2.

The 24th defendant had objected and filed an alternative plan No. 4912 of 15.1.1993 (Y) prepared by T. Berty A. De Silva, Licensed Surveyor. The learned counsel submits that the only change that was made in the alternative plan was to allot lot No. 3 to the 24th defendant and lot No. 9 to the 23rd defendant. The alternative plan did not change the boundaries of other allotments.

Although that appears to be so to the naked eye, this cannot be true. According to plan marked. Z (Commissioner's plan) the extent of lot No. 3 is 24.36 perches and lot No. 9 contained 26.91 perches. In the alternative plan the extent of lot No 3 is 26.91 perches

and lot No. 9, 24.36 perches. The extent of lot No. 3 has been enlarged by 2.56 perches. The extent of lot No. 9 has been reduced by an equal amount.

Although the 55th defendant was entitled to 26.91 perches, the learned counsel submitted that as a settlement the 24th defendant is now prepared to accept lot No. 3 of the Commissioner's plan with 24.36 perches. That is to swap lot 3 to 9 between the 23rd and 24th defendants. In that event the boundaries of the lots would remain unchanged.

The learned Judge justifies allocating lot No. 3 to the 23rd defendant. The 24th defendant's share was 42/2160 shares. The learned Judge states that the 24th defendant was allotted lot No. 2 in plan Z with an extent of 20.55 perches. Of the improvements the 24th defendant was given a temporary toilet and the plantation claimed by him of lot 1 of the preliminary plan X together with the building marked AA (containing a portion of a house. The other portion of the house is on a land outside the corpus). The 24th defendant was also given the building marked AB (permanent toilet), 4 jack trees (between 20-25 years old) and 5 coconut trees (2-3 years old).

The learned Judge states that the 24th defendant purchased the 55th defendant's share after the entering of the interlocutory decree. Therefore there is no justification to allocate lot No. 3 to the 24th defendant. According to the learned Judge the 24th defendant was given the improvements as far as practicable. Compensation had been awarded to the 24th defendant as against the balance improvements.

The learned counsel for the 23rd defendant submitted that the 24th defendant does not have locus standi at the final scheme and the request of this defendant cannot be accommodated in law. This submission is based on the prohibition imposed by the Partition Law on alienation after the registration of lis pendens (S. 66 of the Partition Law). However prohibition against alienation of an individual share pending a partition action does not prevent a party from disposing of the interest that will be ultimately allocated to him in the final decree (Jayatilleke vs. Somadasa 70 N.L.R. 25, Herath vs. Aslyn Nona 65 N.L.R. 570, Sillie Fernando vs. Silman Fernando 64 N.L.R. 404,

Seelawathie Perera vs. Don Peter 61 N.L.R. 109, Sirisoma vs. Sarnelis Appuhamy 51 N.L.R. 337, Thidoris Perera vs. Eliza Nona 50 N.L.R. 176, Manchenayake vs. Perera 46 N.L.R. 457, Perera vs. Attale 45 N.L.R. 210, Nazir vs. Hassim 48 N.L.R. 282, Salee vs. Natchia 39 N.L.R. 259, Abdul Aziz vs. Thamby Appu 30 N.L.R. 314, Subaseris vs. Prolis 16 N.L.R. 393.

The learned Judge was convinced that the 24th defendant had purchased the interests of the 55th defendant after the interlocutory decree. The learned Judge has made reference in his order with regard to a practice that a party is entitled to make representation to the surveyor to have two allotments adjacent to each other. The 24th defendant had made such representation.

The learned counsel for the 24th defendant submits that there is no justification to allot lot No. 3 to the 23rd defendant. The 23rd defendant or his predecessor in title did not make any improvements to lot No. 3. They never had possession. As against this the 24th defendant was in possession of lot No. 3. He had his improvements in lot No. 3. The 24th defendant owned land to the north of lot No.3. The 24th defendant is living in lot No. 2. Lot No. 2 is in proportion to his entitlement. Now that he has purchased the share of the 55th defendant it is nothing but fair to consider lot No. 3 for 55th defendant and in effect to 24th defendant. The 24th defendant may not be able to claim lot No. 3 as of right. The learned counsel queried the injustice that would be caused to the 23rd defendant by allocating lot No. 3 to the 24th defendant.

It is also well settled law that whenever it is practical the co-owners should be allotted the portions that contain their improvements unless it would cause substantial injustice to another co-owner. Section 33 of the Partition Law is as follows:-

The surveyor shall so partition the land thatif that party is entitled to a share of soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be.

Lascelles C.J. observed in *Moldrich vs. La Broody* 14 N.L.R. 331 that “in dividing the property it is no more than equitable, and it is in accordance with the authority that where it can be conveniently done, the improving co-owner should be allotted the property on which he made the improvements”. K.D.J. De Silva J in *Premathiratne vs. Fernando* 55 N.L.R. 369 at 370 said that “whenever possible, a co-owner should be given at the partition a lot which carries his improvements...unless a substantial injustice is likely to be caused to the other co-owner”. Jayatileke J stated in *Thevchanamoorthy vs. Appakuddy* 51 N.L.R. 317 at 312 that “the policy of the law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so”. Sansoni J (as he then was) in *Liyanage vs. Thegiris* 56 N.L.R. 546 at 548 stated that “in dividing the property it is no more than equitable that when it can be conveniently done, the improving co-owner should be allotted the portion which contained his improvements, unless it involves substantial injustice to the other co-owners” (also *Kumarasinghe vs. Andirishamy* 55 N.L.R. 539 at 540, *Sinchi Appu vs. Wijegoonsekera* 6 N.L.R. 1, *Sanchiappu vs. Marthelis* 17 N.L.R. 297, *Pubuduni Silva vs. Kamala Mendis* CALA 93/2001 CA Minutes of 30.10.2009, *Manel vs. Kamala* CALA 378/2002 CA Minutes of 3.9.2009).

The learned Judge does not give any valid reason for allotting lot No. 3 to the 23rd defendant. The only reason the learned Judge gives is that if the two lots are exchanged as suggested the 23rd defendant would get a lot smaller than his entitlement. I am of the view that the learned Judge had erred in his decision for the reason that it has no basis. Lot 9 suggested for the 23rd defendant had the same extent in the alternative plan. Now that the 24th defendant is ready to accept lot No 3 as it appears in plan ‘Z’, the 23rd defendant would get an allotment larger than his share. Lot No. 9 is larger than lot No 3.

The learned Judge admits the improvements effected by the 24th defendant in lot No. 3. In lieu of these improvements the 24th defendant was awarded compensation. Compensation had to be made by the 23rd defendant. No such compensation would have been needed if lot No. 3 was given to the 24th defendant. In lieu of the 55th defendant’s share the 24th defendant was given lot No. 9. The submission for the 24th defendant is that lot 9 could

have been given to the 23rd defendant. The learned Judge states that lot 9 is equally fertile. In that event the 23rd defendant could have been considered for lot 9 instead of lot 3. No special reason was given by the learned Judge for allocating lot No. 3 to the 23rd defendant. As against this there are many reasons to give lot 3 to the 24th defendant. The reason for the delay in this case is due to this dispute.

Considering the above reasons it is nothing but fair to allot lot No. 3 to the 24th defendant. For the above reasons I am of the view that the learned Judge erred in his order dated 8.1.2004 and the same is set aside. The learned Judge is directed to direct the Commissioner to amend plan 'Z' by allotting lot No. 3 to the 24th defendant and allot lot No. 9 to the 23rd defendant and to confirm the plan as amended. The appeal is allowed with costs payable by the 23rd defendant to the 24th defendant.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal