

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

1.Rajapakse Vithanalage Roosana Nona

And five others.,

All of No 983, Katukurunda Road,

Kottawa, Pnnipitiya.

PLAINTIFFS

Court of appeal No 1087/96 F

D.C.Homagama Case No 1850/P

Newton Dabare,

No 20/5, Hokandara South,

Hokandara.

9th DEFENDANT-PETITIONER

Vs

Nape Vithange Buddhasiri Gunapala,

981, Malabe Road, Kottawa'

Pannipitiya.

3rd DEFENDANT-RESPONDENT

AND

Newton Dabare,

No 20/5, Hokandara South,

Hokandara.

9th DEFENDANT-PETITIONER-

APPELLANT

Vs

Nape Vithange Buddhasiri Gunapala,

981, Malabe Road, Kottawa,

Pannipitiya.

3rd DEFENDANT-RESPONDENT-

RESPONDENT

Before: H.N.J.Perera, J

Counsel: Ranjan Suwandaradne for the 9th Defendant-appellant

Anil Silva, P.C. for the substituted 3rd Defendant-

Respondent

Argued On: 26.07.2013

Decided On: 08.11.2013

H.N.J.Perera, J.

This appeal has been made by the 9th defendant-petitioner-appellant from an order made by the learned District Judge refusing to set aside an order made on 14.09.1992 granting a writ of possession to the 3rd defendant-respondent.

The 3rd defendant-respondent had on or about 1st September, 1992, made an application for a writ of possession in relation to lot 10 of the final plan and thereafter executed and evicted the appellant from the said lot without any notice to him.

Thereafter on 29.09.1992 the appellant made an application under section 839 of the Civil Procedure Code seeking inter-alia for a declaration that the writ issued on 14th September, 1992 has been made per incuriam and also moved to restore the appellant back to the possession of lot 10 in final plan No 1761. Thereafter after inquiry order had been delivered rejecting the said application of the appellant with costs. The 9th defendant-appellant's contention was that the delivery of possession was issued without notice to and after a lapse of 10 years from the date of the decree.

When this matter was taken up for argument the main issue that was before this court was whether there was a ten years limitation as regards execution of delivery of possession in a partition action.

As this is an application relating to a partition action Section 52 of the Partition Law applies. Section 52 of the Partition Law reads as follows:-

- (1) Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this law and every person who has purchased any land at any sale**

held under this law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the Court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land:

Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.

(2).....

On a reading of section 52 it is clear that the Legislature has not imposed a time limit for an application seeking the delivery of possession in a Partition Action.

It was held in *Munidasa & Others V Nandasena* [2001] 2 Sri L.R. 224 that Section 52(a) of Act No 17 on 1997 not only protects the interest of a person who has directly obtained title from a decree but also persons who have derived title from such person.

It was the contention of the Counsel for the Appellant that any writ of possession in a partition action should necessarily be obtained within a period of 10 years of the entering of the final decree and no application for writ of possession can be issued after the lapse of 10 years from the date of the entering of the final decree specially in view of the fact any third party who is in possession of an allotment at the time of the entering of the final decree has a right to prescribe to such allotment after 10 year period. It was further submitted that the provision contained in section 79 of the Partition Law which states that when there is no specific provision is provided in the Partition law with regard to the procedure the provisions of the Civil Procedure Code should be followed if such

procedure is not inconsistent with the provisions of the Partition Law .

In **Munidasa & Others V Nandasena** it was very clearly held that :

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

It was further held in that case that as this being a partition action the plaintiff-respondent is entitled to proceed under section 52 and 53, if he wishes to obtain delivery of possession of the land, and it will be open to the Defendant-Petitioners to take up any defence they chooses should proceedings be initiated under section 53 of the Partition Law..

In **Samarakoon Vs S.M.Punchi Banda** 78 NLR 525 it was held that 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 lot allotted to him in the final decree. The correct procedure that should be adopted is set out in section 52 of the Partition Act. In the above case, the plaintiff-appellant made a second application for an order for delivery of possession of the lots to which he was declared entitled to in the final decree after 10 years of the first application. This application was refused by the learned District Judge upholding that section

337 of the Civil Procedure Code applied. In view of the conclusion that section 337 of the Civil Procedure Code does not apply to an application under section 52 of the Partition Act the order was set aside.

Udalagama, J. Held:-

“ And under section 53 a court exercising its jurisdiction in a partition action has full power to give effect to every order made in the action including the power to order delivery of possession of any or portion of land to any person entitled thereto and to punish as for contempt court any person who disobeys any such order. These sections are in my view, compendious enough, to give effectual possession to a party, who has been allotted shares in a final decree. There is, therefore no necessity to resort to the provisions, dealing with execution proceedings, in the Civil Procedure Code.....

As there provision for the taking of possession of a lot declared in a final partition decree, there is no necessity to resort to the provisions of the Civil Procedure Code and section 79 of the Partition Act. If the fiscal is resisted, he will report the resistance to court and the procedure set out in section 53 of the Partition Act will apply. In an application made in terms of section 52(1) of the Partition Law for the delivery of possession of a particular allotment decreed or sold in a partition action, it is not required that a person be made a respondent.

In the proceedings under section 53, it will be open to the party resisting, to satisfy the court, that his resistance did not constitute a contempt of the court. This he could do, for example by showing that he had prescribed to the said lot after the final decree had

been entered, and the party applying for an order of possession under section 52, had no right to be given possession of the land.”

Therefore it could be said that the correct procedure that should be adopted in giving possession of a divided lot, to a party who had been declared entitled to it under a final partition decree , is set out in Section 52 of the Partition Law. It is settled law that section 337 of the Civil Procedure Code has no application in cases where applications for delivery of possession under the Partition Law are made. The provisions of 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 Law.

Therefore I hold that the 3rd defendant-respondent is entitled to obtain an order for delivery of possession of the said lot 10 and the order of the learned District Judge dated 04.10.1996 and delivered on 19.11.1996 is affirmed. I make no order as to costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL