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

Sanadhirannahalage Gunatillake,
Mangedara, Thulhiriya.
14A & 18A Defendant-Appellants

CASE NO: CA/557/1999/F
DC KEGALLE CASE NO: 21625/P

Vs.

Athauda Arachchilage Mary Nona,
Mangedara, Thulhiriya.
(now deceased)
Plaintiff-Respondent
Chandratillake Appuhamilage Karunaratne, Manampitiya, Welikanda.
Witharanalage Podimahaththaya, Walavitipalla, Mangedara, Thulhiriya.
Witharanalage Piyaratne, Walavitipalla, Mangedara, Thulhiriya.
Substituted Plaintiff-Respondents
And Several Other Defendant-Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: W. Dayaratne, P.C., with D.N. Dayaratne for the 14A and 18A Defendant-Appellants.
Gamini Perera with Wijitha Salpitikorala for the 21A Defendant-Respondent.

Argued on: 09.12.2019

Decided on: 17.12.2019

Mahinda Samayawardhena, J.

The 14A and 18A defendant-appellants (appellants) filed this direct appeal against the order of the learned District Judge of Kegalle dated 07.07.1999, whereby the proposed scheme of partition suggested by the Court Commissioner, depicted in plan marked 21V1, was accepted over the alternative plan tendered by the appellants marked 14V1.

In the first place, this appeal shall be dismissed *in limine*, inasmuch as under section 36A of the Partition Law, No. 21 of 1977, introduced by the Partition (Amendment) Act, No.17 of 1997, no appeal, except by leave of the Court of Appeal first had and obtained, lies against an order made after the inquiry into the final scheme of partition.

It is common ground that the impugned order is one such order made under section 36 of the Partition Law.

Section 36A of the Partition Law reads as follows:

> *Any person dissatisfied with an order of the Court made under section 36, may prefer an appeal against such order to the Court of Appeal, with the leave of the Court of Appeal first had and obtained.*

Without prejudice to the said finding, let me now consider the merits of the appellants' claim.

The Court Commissioner's plan marked 21V1 is at page 317 of the appeal brief. According to that plan, the appellants' Lot is Lot No. 13, and the Lot allotted to the contesting 21A defendant-respondent (respondent) is Lot No. 14.

According to the report of the Court Commissioner at pages 319-320 of the appeal brief, the 2nd appellant (18A defendant) has, pending partition, transferred his rights to the land to the 1st appellant (14A defendant); and the 1st appellant has, through his mother Jeen Nona, requested the Court Commissioner to allot the portions of the two appellants together, including the wells marked "M" and "N", and the buildings marked "O", "P", "Q", "R" (in the plan marked 21V1). The appellants do not contest the contents of the said report.

The appellants have made the same request, i.e., to include the wells marked "M" and "N", and the buildings marked "O", "P", "Q", "R" to their Lot, to their private surveyor who prepared the alternative plan marked 14V1, which is at page 351 of the appeal brief.

The private surveyor in the said alternative plan has suggested three Lots be given to the appellants — Lot 14 separately and Lots 15 and 16 together.

Lot 13, which lies between Lots 14 and 15, has been suggested to be given to the respondent. In addition to Lot 13, the respondent has been given Lot 17, which is depicted in a separate place in the alternative plan.

The surveyor who prepared the alternative plan at the request of the first appellant, has stated in his evidence that Lot 17 should be necessarily given to the respondent as the respondent's buildings are in the said Lot.

The respondent's share has been given in two separate places. So has the appellants' share.

In my view, this causes inconvenience to the appellants as well as the respondent.

The appellants could not have been given the Lot extending up to the corner of the western boundary of the Commissioner's plan, because the well marked "M" had to be given to the 1st appellant, at his request.

At the argument, although the learned President's Counsel for the appellants informed the Court that the appellants do not want the well marked "M", the 1st appellant has, as I said earlier, informed his surveyor, Mr. Ranatunga, who prepared the alternative plan, of the necessity to include the well marked "M" to his Lot. Vide the evidence of Mr. Ranatunga at pages 201-202 of the appeal brief. In fact, Mr. Ranatunga has given the said

well marked "M" to the appellants in a separate Lot. This is because extending the Lot of the appellants up to the western boundary to include all the plantation to the appellants on the one hand, and including the said well which lies to the east of the corpus into that Lot on the other, is not practically possible.

Where improvements have been effected, that portion of the land on which the improvements stand should, as a general rule, be allotted, on a partition of the land, to the co-owner who has made the improvements. Nevertheless, in terms of section 33 of the Partition Law, that shall be done "so far as practicable" and not as an inflexible rule. If such inclusion of all the improvements renders a fair and equitable division impossible, the Court can deviate from the general rule. A *bona fide* improver, in such circumstances, is not without a remedy. He can claim compensation as provided in the Partition Law.

Section 33 runs as follows:

> *The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the 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.*

As seen from the Commissioner's report, the appellants had not given any prominence to the plantation when the Commissioner went to the land to prepare the final scheme of partition.

The main grievance of the appellants, according to the petition of appeal and the objections filed before the District Court against confirmation of the Commissioner's plan, is the inadequacy of compensation for their plantation, which has now fallen into Lot 14 in plan 21V1, allotted to the 21A defendant.

However, at the argument, the learned President's Counsel for the appellant stated that the appellants do not contest the impugned order of the District Court on inadequacy of compensation. The learned President's Counsel did not address the issue of compensation at all during the course of his submissions.

The appellants' surveyor has not shown any enhanced method of calculation of compensation payable to the appellants instead of the one suggested by the Court Commissioner in his report, which includes the Schedule of Appraisement and Summary of Distribution. Vide pages 332-346 of the appeal brief.

There is no complaint that the scheme of partition suggested by the Court Commissioner is in violation of the Interlocutory Decree.

Given the facts and circumstances of this case, the finding of the learned District Judge that the Commissioner's plan marked 21V1 is more acceptable than the alternative plan tendered by the appellants marked 14V1, is not unreasonable.

For the aforesaid reasons, I dismiss the appeal with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal