

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

An application for leave to appeal against the Order
of the learned Additional District Judge of Colombo
dated 30th June 2006.

CA 271/2006 (L.T.A.)

District Court Case No.14241/P.

Response Marketing (Private) Ltd.,
No.660, Galle Road, Colombo 03.

Respondent-Petitioner

Vs.

Abdul Raheem Mahamaed Lafir
No.86, Rajamalwatte, Malwana.

Substituted Plaintiff-Respondent

Ayesha Hussin (nee Gafoor)
No.61, Green Path, Colombo
And 49 others

Defendant-Respondents

AND

Wadu Arachchige Mailina Sumathipala,
No.11, Campbell Place, Colombo 10.

30th Defendant-Petitioner-Respondent

(NOW DECEASED)

Udu Watuwage Jagath Priya Anura Sumathipala,
No.30, Wijerama Mawatha, Colombo 07.

30A, Substituted Defendant-Petitioner-Respondent

Before **PRASANTHA DE SILVA, J. &
K.K.A.V. SWARNADHIPATHI, J.**

Counsel Faiz Musthapha, P.C. with Thushani Machado
(For the Defendant-Petitioner)

Gamini Marapana, P.C. with Thanuja Meegahawatha
(For the 30th Defendant-Petitioner-Respondent)

Argument By written submissions

Decided on 01.12.2022

K.K.A.V. SWARNADHIPATHI, J.

ORDER

This case is an application from an order made in case of No.14241/P by the District Court of Colombo. Plaintiff filed a partition case on 16th August 1982, according to a minute of the register in journal entry No.199. This date is affirmed in the written submissions of the Respondent-Petitioner dated 27th January 2020.

The Respondent-Petitioner had purchased the interest of the 18th Defendant by deeds dated 09.03.2005 and 01.04.2005.

After purchasing, the Petitioner started constructing a building on the land. Construction was objected to by the 30th Defendant-Respondent, who moved for an interim injunction restraining the Petitioner from building on the subject matter of the partition action.

The learned Additional District Judge of Colombo granted an interim injunction on 17th July 2006. Another appeal was pending in the Court of Appeal regarding an order by the learned District Judge on 01.08.1996. The partition action was dismissed as Plaintiff had not appeared in courts on 14.07.1994.

However, once Plaintiff moved court to re-open the case, the learned District Judge, by order dated 01.08.1996, had allowed Plaintiff's request and proceeded to re-list the case vacating the order of dismissal. While that application was pending in the Court of Appeal, the Petitioner Company of the present application had entered and started building on the subject matter on the strength of deeds bought from the 18th Defendant in the partition action.

When the 30th Defendant applied for the interim injunction at the District Court, the Additional District Judge, after an inquiry, had issued the interim injunction giving reasons that the Deeds of the Petitioner were void in law. According to the learned District Judge, they were deeds of rectification that will bere no legal right.

The present application is against that order. This court must discuss whether leave should be granted or not to proceed in this case. According to the journal entries of this case recorded on 21.02.2014 argument of both counsels had been completed. A date was given to fix for judgment regarding whether leave to appeal should be granted or not.

The following day [06.05.2014], parties moved to tender copies of the case law mentioned in the argument and were given until 19.05.2014. On 19.05.2014, there was a minute to mention the case 19.06.2014 without any mention of an order or judgment.

On 19th June 2014 case was fixed for argument on 24.09.2014. From this date, the argument had got postponed on various grounds. On 14.10.2021, both parties agreed to dispose of the matter through written submissions already filed.

The Petitioner had argued that the learned District Judge had made an error by granting the interim injunction as he was not a party to the action. To substantiate his position, he discussed Section 54 of the Judicature Act and the case law of *A.M. Chettiar Vs. Sethuraman*. The case law and the Judicature Act point out that an interim injunction can only be given among the parties to an action.

Petitioner had discussed Section 67 (3) of the Partition Law, which speaks of any party to the action, not any person. This wording had limited the court's jurisdiction to make interim orders while an appeal was pending. As the 30th Defendant-Respondent had not pleaded any waste or damage, the learned District Judge had no authority to entertain the application of the 30th Defendant-Respondent.

Section 67 (3) of the Partition Law No.21 of 1977, as amended by Act No.17 of 1997, reads as follows:-

"Where an appeal had been preferred against any judgment, decree or order made or entered by any court in any partition action, such court may, an application made by way of Petition and Affidavit in that behalf make such orders, pending the determination of the appeal. As may be necessary to prevent any waste or damage to the land in respect of such action was instituted. Any such order may be given effect to in the manner provided for in Section 53".

On behalf of the 30th Defendant-Respondent, the written submissions point out two main reasons why leave should not be granted. As the Petitioner is not a co-owner, he had no right to build on the land. Therefore, the act of building by an outsider amounts to damaging the property.

The other argument was that the Petitioner became a party to the interim injunction as he had filed an objection and took part in the inquiry.

Considering the written submissions of both counsels, I set out my reasoning below:-

The Petitioner had bought the rights of the 18th Defendant while a partition action was pending. He had agreed to accept what the 18th Defendant would get in the judgment of the partition action. A person purchasing a property subject to a partition action will only have a right once the final decree is entered. Until then, the purchaser will not know where and what he will get. Therefore, any action, such as building without court permission, will be an act which will affect the property. In such an instance, the District Court has the power to safeguard the property's nature and maintain the *status quo*.

The Petitioner need not be a party to the partition action. He was named a Respondent by the 30th Defendant-Respondent. The act of the 30th Defendant-Respondent paved the way for the Petitioner to come to court and file his objections and make himself a party to the limited action of praying for an interim injunction.

The fact that the building started after the dismissal of a partition case cannot be accepted. The dismissal of the case will come to a final stage only after the lispendence is cancelled, and until then, the subject matter is a subject matter of a partition case. Petitioner Respondent should have taken steps through the previous owner, the 18th Defendant, to cancel the lispendence and confirm his share so that he will be named a co-owner in a future partition action.

The final judgment of a partition case is a judgment in rem. Therefore, the learned District Judge has to safeguard the parties' rights in a partition action. He has a duty to study and evaluate all evidence, deeds and plans before him. In the final partition scheme, a judge tries to allocate whatever the party had enjoyed being given to that party.

It may be necessary to allocate common space for roads and other necessities. Therefore, it is not legal to construct without obtaining leave of court in a subject matter of a pending partition action.

For the reasons discussed above, we see no grounds to grant leave in the present application. We dismiss the application with taxed costs.

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal