

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

Malimbada Liyanapathiranage
Mahindadasa,
Aththinawatta, Dikkumbura,
Ahangama

Plaintiff

C.A. No. 668 / 95 F

Vs.

D.C. Galle No. 7804 / P

1. Malimbada Liyanapathiranaga Lila
Malini,
2. Malimbada Liyanapathiranage
Punyawathie,
Both of Aththinawatta, Dikkumbura,
Ahangama.
3. Andrew De Silva,
4. Petta Durage Harischandra,
Both of Malalgodapitiya,
Dikkumbura.
5. Nihal Ranjith Hewawasam,
6. Dayawathie Ranaweera,
7. Madurani Hewawasam,
8. Mangalika Hewawasam,
All of 'Ramya', Dikkumbura,
Ahangama.

Defendants

AND NOW BETWEEN

3. Andrew De Silva Jayasinghe
(deceased),
- 3a. Ariyawathie Jayasinghe,
Bogaha Junction Road,
Gothatuwa New Town.
4. Petta Durage Harischandra,
Malalgodapitiya,
Dikkumbura

3a & 4th Defendant Appellants

Vs

Malimbada Liyanapathiranage
Mahindadasa,
Aththinawatta, Dikkumbura,
Ahangama

Plaintiff Respondent

1. Malimbada Liyanapathiranaga Lila Malini,
2. Malimbada Liyanapathiranage Punyawathie,
Both of Aththinawatta, Dikkumbura, Ahangama.
5. Nihal Ranjith Hewawasam,
6. Dayawathie Ranaweera,
7. Madurani Hewawasam,
8. Mangalika Hewawasam,
All of 'Ramya', Dikkumbura, Ahangama.

Defendant Respondents

BEFORE

: UPALY ABEYRATHNE, J.

COUNSEL: Shiral Lakthilake for the 3a and 4th Defendant
Appellants

Ranjan Gunarathne for the Plaintiff Respondent

ARGUED ON

: 28.06.2013

DECIDED ON

: 13.09.2013

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said action against the 1st and 2nd Defendant Respondents in the District Court of Galle seeking to partition the land described in the schedule to the

plaint. After the completion of preliminary survey the 3rd to 8th Defendants have been added as parties to the action. The 3rd and 4th the Defendant Appellants (hereinafter referred to as the Appellants) have filed their statement of claim praying for a dismissal of the Respondent's action and to partition the corpus according to the pedigree set out in their statement of claim. The 5th to 8th Defendant Respondents has filed a joint statement of claim praying for an exclusion of lot B depicted in a plan bearing No 1398 dated 26.10.1980 from the partition.

On 08.10.1991 when the case was taken up for trial the Appellants were absent and unrepresented and the Plaintiff Respondent and the 5th Defendant Respondent who were present before court has agreed to confine the corpus of the action to Lot A 1 and Lot B 2 depicted in the preliminary Plan bearing No 322 dated 06.09.1990 (X) and to exclude the balance Lots of the said Plan from the partition. Accordingly evidence has been led and an interlocutory decree has been entered.

After the completion of the final survey a date has been fixed for the consideration of the scheme of partition. It seems from Journal Entry No 52 dated 12.05.1993 that on the date for the consideration of the scheme of partition 3rd and 4th Defendant Appellants have filed a petition supported with an affidavit dated 08.04.1993 seeking title to the land described in paragraph 13 to 19 of the said petition and affidavit and to vacate the interlocutory decree entered in the case.

The learned trials judge after an inquiry by order dated 23.05.1995 has refused the said application of the 3rd and 4th Appellants. They have preferred the present appeal from the said order.

Although there was no such averments or pleadings in the said petition of the Appellants it seems that the Appellants have sought remedies under Section 48(4) of the Partition Law No 21 of 1977. Section 48(4) stipulates that;

48(4)(a) Whenever a party to a partition action-

- (i) has not been served with summons, or
- (ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or
- (iii) being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial,

and in consequence thereof the right, title or interest of such party to or in the land which forms the subject matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian *ad litem* of such party may on or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

- (b) The aforesaid application shall be by petition, supported by an affidavit verifying the facts, which shall conform to the provisions of paragraph (a) of subsection (1) of section 19 and shall specify to what extent and in what manner the applicant seeks to have the interlocutory decree amended, modified or set aside and the parties affected thereby.
- (c) If upon inquiry into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the court is satisfied-

- (i) that the party affected had no notice whatsoever of the said partition action prior to the date of the interlocutory decree or having duly filed his statement of claim and registered his address, failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and
- (ii) that such party had a prima facie right, title or interest to or in the said land, and
- (iii) that such right, title or interest has been extinguished or such party has been otherwise prejudicially affected by the said interlocutory decree,

the court shall upon such terms and conditions as the court in its discretion may impose, which may include an order for payment of costs as well as an order for security for costs, grant special leave to the applicant.

- (d) Where the court grants special leave as hereinbefore provided the court shall forthwith settle in the form of issues the questions of fact and law arising from the pleadings and any further pleadings which are relevant to the claim set up in the petition only, and the court shall appoint a date for the trial and determination of the issues.

The applicant, unless the court otherwise orders, shall cause notice of such date to be given to all parties whose rights under the interlocutory decree are likely to be affected or to their registered attorney in such manner as the court shall specify. The court shall thereafter proceed to hear and determine the matters in issue in accordance with the procedure applicable to the trial of a partition action.

- (e) Where the court determines any matter in issue in favour of the applicant, the court shall in accordance with its findings amend or modify the interlocutory decree to such extent and in such manner only as shall be necessary to give to the successful party and to no other party or person whomsoever, the right, title or interest to which such party is entitled, or in the event of the applicant being found entitled to the entirety of the said land forming the subject-matter of the interlocutory decree, the court shall set aside the interlocutory decree and dismiss the action.

In paragraphs 14 to 19 of the petition, the 3rd and 4th Appellants have set out the manner in which they had derived title to the land to be partitioned. They have stated that by virtue of a deed bearing No 5647 dated 16.02.1964 and another deed bearing No 38036 dated 25.03.1980 they had derived title to the said land. But they have not produced the alleged deeds or copies of them for the perusal of the court. Even at the inquiry the 3rd and 4th Appellants have failed to establish that they had a prima facie right, title or interest to or in the said land, as required by Section 48(4)(c) ii of the Partition Law.

In the said circumstances I see no reason to interfere with the said order of the learned Additional District Judge dated 23.05.1995. Therefore I dismiss the instant appeal of the Appellants with costs.

Appeal dismissed.

Judge of the Court of Appeal