

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

In the matter of an application for leave to
appeal under and terms of the section 754
(2) of the Civil Procedure Code as amended.

Mirihana Aarachchige Somarathne
Of Karaldanda
Bulathsinhala.

PETITIONER-PETITIONER

C.A.L.A. Application No.448/2006

D.C. Matugama No. 3678/Partition.

Vs

1. Ranawaka Arachchige Chandrapala
of Pahala Karannagoda
Panayata
Waranagoda.

PLAINTIFF-RESPONDENT

1. Nakandalage Don Saman Piyaratne
Kumara of Diyakaduwa, Magama.
2. Ranawaka Arachchilage Piyasena
of Diyakaduwa, Magama.
- 2A. Ranawaka Arachchilage
Siriawathie, of Diyakaduwa,
Magama.
3. Ranawaka Arachchige Chandrasena
of Diyakaduwa, Magama.
4. Ranawaka Arachchilage Cyril of
Diyakaduwa, Magama.
5. Ranawaka Arachchilage
Ratanawathie
Behind Hospital, Ingitiya.
6. Ranawaka Arachchilage
Yasawathie of
"Ranjani", Madampe, Haltota.
7. M.L.A. Dayawathie
8. Ranawaka Arachchilage
9. Ranawaka Arachchilage all of
Yaya 13, Kala-oya, Rajangane.
10. A.M. Sumathipala of
319, Passara Road, Badulla.
11. W.K. Janaka Pushpa Kumara of
Diyakaduwa, Magama.

DEFENDANT-RESPONDENTS

BEFORE

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

COUNSEL

: Sanath Jayathilake for the
Petitioner.

Rohana Deshapriya with
Chanakya Liyanage for the
Plaintiff – Respondent.

ARGUED ON

: 12th February, 2015

DECIDED ON

: 06th July, 2015

Deepali Wijesundera J.

Respondent in this application has filed an action in the District Court of Mathugama (No. 3678/P) to partition a land called “Hingureowita Pitakattiya” and a preliminary survey was done and after the Defendants filed their statements of claim the case was taken up for trial and judgment was delivered on 24/06/2004. Subsequent to filing of the interlocutory decree commission was issued for the final partition on 24/08/2004. The petitioner who was not a party to this case has filed a petition and affidavit and moved to set aside the decree and to add the petitioner as a party to the case.

The plaintiff respondent and one defendant had objected to this application and thereafter the learned District Judge has dismissed the petitioner's application stating that the petitioner had failed to prove how his rights were affected and that a partition decree can be challenged only if the decree is made without jurisdiction and also stating that the petitioner's claim do not come under Sec. 48 (1) or any provision of the partition Act.

Being dissatisfied with the said order the petitioner filed the instant application seeking leave to appeal.

The learned counsel for the petitioner citing a number of judgments argued that when a fraud has taken place in the original court it goes to jurisdiction, and if the court had acted without jurisdiction proceedings thereafter have to be set aside.

The petitioner's counsel submitted that the law requires that there has to be publication to enable persons who have rights to the carpus to intervene as parties and make their claims. According to the journal entries no publication has been done. Referring to *JE No. 04 of 01/03/2001* he stated that no notices have been tendered to court which

means no notices have been issued and no notices have been affixed in the land. He further referred to *JE 05* and stated that the disclosed parties have also not been noticed and said that all these facts goes to jurisdiction.

The petitioner's counsel further stated that although the District Judge has touched on the main relief sought he gravely erred when he came to the conclusion that the application of the petitioner was made in terms of *Sec. 48 (3)* and sorely on this basis the petitioner's application was refused and that the District Judge has not understood that such relief is only available to a party to the action.

Citing the judgments in ***Alwis Vs Kulatunga 1970 73 NLR 337***, ***Fonseka Vs Fonseka 1989 2 SLR 95*** along with many others the petitioner's counsel submitted that when a grave fraud had been alleged the trial judge has to take greater care before deciding.

The respondent raised a preliminary objection to the instant application stating the petitioner should have sought relief by way of revision and not by way of leave to appeal to set aside the impugned order, therefore the petitioner's application is misconceived in law.

The respondent stated that the petitioner has failed to submit any material as required by the Prescriptive Ordinance to prove his prescriptive title or possession of Lot 5 of the corpus to which he claims title. And also stated that the petitioner has failed to satisfy court as to how he was prevented from making his claim in the partition action and that the petitioner also failed to prove any fraud committed by any party as required by law.

The respondent stated under *Sec. 48 (3) of the Partition Act* the only remedy available to the petitioner is an application of revision and restitution in intergrum under the said Act, and since the final partition has been done the petitioner could file an action to claim damages under Sec. 49 of the said Act. The respondent cited the judgment in **Gunathilaka Vs Murial Silva and others 79 NLR 481, Perera Vs Adelin 2000 3 SLR 93, Somawathie Vs Madawela 1983 2 SLR 15, R.Rash Vs Thambipillai 68 NLR 145** and stated that it has been decided that the District Court has no power to allow intervention after entry of the Interlocutory decree.

The learned District Judge was correct when he decided *Sec. 48 (3)* deals with a person who has been a party to a partition action and

has failed to file his statement of claim and not to an outsider who has not been a party to the action.

The petitioner can only come into the said partition action under **Sec. 48 (5) which states;**

Sec. 48 (5) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, if, but only if, he proves that the decree has been entered by a court without competent jurisdiction.

To prove fraud has taken place which falls on to jurisdiction the petitioner has placed his evidence in the District Court. The learned District Judge after considering his claims has decided that he has failed

to prove a fraud has taken place or that he had possession of part of the corpus.

The preliminary objection taken by the respondent that the petitioner should move in revision and not in appeal is a futile objection, and the said preliminary objection is rejected under *Sec. 36 A and Sec. 45 A (1) of the Partition Amendment Act No. 17 of 1997*.

The Court of Appeal can not go into the merits of the evidence and analyze the evidence placed before the District Court but can only deal with the legal issues. Here the District Judge has gone into the merits of the evidence placed before him and decided that no fraud has taken place.

The judgments referred to by the petitioner's counsel do not apply to the instant case.

The petitioner has a remedy if he has lost his rights under the said decree under Sec. 49 of the Partition Action. The petitioner should have moved under Sec. 49 which deals with action for damages by a person who has not been a party to a partition action.

For the afore stated reasons the application of the petitioner is dismissed with costs fixed at Rs. 10,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE ~~COURT~~ OF APPEAL