SIRISENA
v.
NANDAWATHIE

SUPREME COURT.
G.P.S. DE SILVA, C.J.
KULATUNGA, J. AND RAMANATHAN, J.
S.C. APPEAL NO. 56/92.
C.A. NO. 42/83 F.
D.C. GAMPAHA NO. 22 564/P.
MARCH 22, APRIL 29 AND MAY 17, 1993.

Vindicatory Action – Title under partition decree – Defendant claiming as tenant – S. 3 (2) Agricultural Lands Law – Lease pendente lite – Partition Act, S. 67.

The plaintiff-respondent sued the defendant-appellant for a declaration of title and ejectment in respect of a paddy field allotted to her by a partition decree. The defendant-appellant who had been appointed by a co-owner as tenant cultivator of a larger land (including the said paddy field) during the pendancy of the partition action claimed the right to remain in occupation of the said paddy field by virtue of the provisions of S. 3 (2) of the Agricultural Lands Law No. 42 of 1973.

Held :

1) The defendant-appellant had been appointed as tenant cultivator of the paddy field " pendente lite " in breach of S. 67 of the Partition Act. That lease was void.

2) The defendant-appellant is not entitled to the protection under S. 3 (2) of the Agricultural Lands Law.

Cases referred to :

1. *Ranasinghe v. Marikar* 73 NLR 361.
2. *Kirihamy v. Mudiyanse* 23 NLR 272.
3. *Appuhamy v. Nonis* 23 NLR 415.

APPEAL from a judgment of the Court of Appeal.

P. A. D. Samarasekera , PC with *Kirthi Sri Gunawardena* for Defendant-Appellant.

Rohan Sahabandu for Plaintiff-Respondent.

Cur. adv. vult.

June 17, 1993.

KULATUNGA, J.

The plaintiff-respondent (hereinafter sometimes referred to as " the plaintiff ") filed the above action against the defendant-appellant (hereinafter sometimes referred to as " the defendant ") for a declaration ot title, ejectment and damages in respect of a paddy field depicted as Lot " ඊඋ " in partition plan No. 2909 dated 21.08.76 in D.C. Gampaha case No. 15033/P.

PLAINTIFF'S TITLE TO LAND IN SUIT

The corpus of the said partition action was a land called Ulahitiyawa Pillewa, in extent 2A.1R.32P. a portion of which was a paddy field, in extent 3R.15P. In September, 1968 the plaintiff had purchased an undivided 1/16 from and out of the said land on deed No. 6881. By plaint dated 09.12.68 (P3) the plaintiff instituted the aforesaid partition action. As on the date of the preliminary survey, one Senaratne, the 5th defendant in the partition action (son of Hendrick Appuhamy, the 4th defendant) was in possession of the entire paddy field depicted as Lot 'C' in preliminary plan No. 2448 dated 02.10.69 (P4). As per final plan No. 2903 dated 21.08.76 (P2) the paddy field was lotted into four lots "ඉ", "ඊ", "උ", "ඌ", and the final decree dated 02.11.76 (P1) declared the plaintiff entitled to Lot "ඌ" in extent 1R.22.5P.

In his evidence in the partition action (P11) Hendrick said that he had *asweddumized* the paddy field in about 1936 and cultivated it for about 15 years ; that thereafter, his children cultivated it after which he had given portions of it for *ande* cultivation to a number of persons and that as at the date of his testimony (02.04.74) the defendant was cultivating it as his *ande* cultivator.

EVIDENCE IN THE ACTION

At the time of the institution of the present action, Hendrick was dead and his son Senaratne testifying for the plaintiff said that Hendrick who was illdisposed towards the plaintiff appointed the defendant as a tenant cultivator of the entire paddy field during the pendancy of the partition case. However, it is to be noted that Hendrick owned only a small share of the corpus of the action. Thus the partition decree gave Hendrick and two other defendants jointly an extent of 9.5P. only, depicted as lot "c" in the final plan P2.

In his evidence the defendant said that he became the cultivator of the paddy field in 1969 or 1970. In cross-examination he said that he was not cultivating it on the day the Surveyor came for the preliminary survey. Senaratne said during that period, he was the cultivator. Nandiris Appuhamy (the plaintiff's husband) said that by letter dated 30.12.72 (P5) the plaintiff complained to the Assistant Commissioner of Agrarian Services that Hendrick had, that year, purported to appoint the defendant as the tenant cultivator of the entire paddy field whilst the partition action was pending. The plaintiff requested that the defendant's tenancy rights be limited to the share that may be allotted to Hendrick. However, the Agrarian Services Department officials decided to register the defendant as the tenant cultivator of the field and to postpone the final decision until the conclusion of the partition action.

We next have the plaintiff's letter dated 02.01.73 addressed to the A.C.A.S. (P8) objecting to the registration of the defendant as a tenant cultivator. This was followed by a letter dated 02.06.75 (P9) addressed to the Chairman, Agricultural Productivity Committee wherein the plaintiff repeated her objection to the registration of the defendant as a tenant cultivator. After the conclusion of the partition action she complained to the Chairman, Agricultural Tribunal by letters dated 25.09.76, 25.02.77 and 01.06.77 that the defendant was forcibly cultivating the portion of the paddy field allotted to her. Copies of the last two letters have been produced marked P10.

Despite these protests the defendant continued to cultivate the entirety of the paddy field. He also paid acreage tax for 1972 (V3) and for 74/75 (V4) and further, insured the crop for 1976 (V5). The register of agricultural lands for 1979/80 (V5) shows the defendant as the tenant cultivator of the said paddy field.

According to the evidence of Nandoris Appuhamy, Piyadasa (Cultivation Officer) and Abeygunawardena (Grama Sevaka), the plaintiff had refused to accept the landlord's share of paddy from the defendant but was made to accept paddy on two occasions and a sum of Rs. 40 on one occasion, under protest and through the intervention of the said officials. This is confirmed by the evidence of the defendant himself who said that he had to obtain such intervention whenever the plaintiff refused to accept the landlord's share.

It was the plaintiff's position that the defendant was in unlawful occupation of lot "ඌ" in Plan P2. This was only a portion of the entire paddy field originally let to him by Hendrick. The defendant, however, continued to occupy the said lot after the partition decree claiming that he had since become the tenant thereof under the plaintiff.

It was in this background that the plaintiff was constrained to file this action on 26.05.80 for a declaration of title and ejectment and damages against the defendant. On behalf of the plaintiff it was contended before the District Court that the letting of the paddy field by Hendrick (a co-owner of the land) during the pendency of the partition action did not create a tenancy as against the plaintiff who did not consent to or acquiesce in such letting and hence the plaintiff was entitled to the share allotted to her absolutely (free from any encumbrance) ; and that the defendant's rights of *ande* cultivator should be confined to the share allotted to Hendrick. In support of this contention, Counsel for the plaintiff cited the decision in *Ranasinghe v. Marikar* [1] the head note of which reads :

> " Where there is a valid letting of the entirety of premises to which the Rent Restriction Act applies, a sale of the premises under the Partition Act does not extinguish the rights of the tenant as against the purchaser, even if the tenant's interest is not expressly specified in the interlocutory decree entered in the partition action. S. 13 of the Rent Restriction Act protects any tenant of rent–controlled premises " notwithstanding anything in any other law " except upon grounds permitted by the section.
>
> But if rent-controlled premises are owned by co-owners and one of them lets the entirety of the premises without the consent or acquiescence of the other co-owners, the protection of the Rent

Restriction Act is not available to the tenant as against a purchaser who buys the premises subequently in terms of an interlocutory decree for sale entered under the Partition Act. In such a case, the tenant cannot resist an application by the purchaser to be placed in possession of the premises ".

JUDGMENT OF DISTRICT COURT–APPEAL TO COURT OF APPEAL

The learned District Judge held that there was evidence, documentary evidence, that the defendant had cultivated t field as its tenant cultivator for several years prior to the of this action, commencing in about the year 1970 and the plaintiff's action. The plaintiff appealed to the Court against the judgment of the District Court. In resisting th Counsel for the defendant relied on S. 3 (2) of the Agricultu Law No. 42 of 1973 which provides :

" Notwithstanding anything in any other law, the tenant of any extent of paddy land which is purchased by ar under the Partition Act or which is allocated to a co-ow a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner, as the case ma the provisions of this law shall apply accordingly ".

JUDGMENT OF THE COURT OF APPEAL

The Court of appeal held that section 3 (2) of the Agricultu Law has no application to the facts of this case as the partit in question had been instituted in 1968 and the said Law effect in 1973 ; and that in the light of the decision in *Ra v. Marikar* (supra), there was no evidence that the defen a tenant cultivator (as against the plaintiff) within the m " tenant cultivator " under the law in that he had commenced of the paddy field after the institution of the partition action too without an oral or documentary agreement between hin plaintiff. Accordingly, the Court of Appeal allowed the appeal, the judgment of the District Judge and entered judgmer plaintiff as prayed for. From that judgment the defendant to this Court.

SUBMISSIONS OF COUNSEL ON APPEAL FROM JUDGMENT OF COURT OF APPEAL

Learned President's Counsel for the defendant-appellant submitted that the decision in *Ranasinghe v. Marikar* (supra) has no application to this case in that firstly that decision considered the effect of S. 13 of the Rent Restriction Act (Cap. 274) which is different from S. 3(2) of the Agricultural Lands Law, the like of which is to be found in S. 14 of the Rent Act No. 7 of 1972 ; Secondly, that in Marikar's case the entirety of the premises was let by a co-owner but in this case only a portion was let. Counsel further submitted that the said S. 3 (2) (which has been re-enacted as S. 5 (2) of the Agrarian Services Act No. 58 of 1979) does not make any distinction between persons whose tenancy had commenced prior to the institution of the partition action and those whose tenancy had commenced after the institution of such action. The protection conferred by that section would enure to any person who is a tenant at the time of the purchase under the Partition Act or the allocation of land to a co-owner under a decree for partition. It was also submitted that rights of parties are to be determined as at the time of the institution of the action i.e. 26.05.80.

Counsel submitted that in any event, the plaintiff-respondent had failed to apply to Court under S. 52 of the Partition Law for delivery of possession of the land allotted to her in the partition action and filed this action four years after the partition decree during which period the defendant-appellant remained in occupation of the land as the tenant cultivator, paying rent to the plaintiff-respondent ; that she accepted rents paid by the defendant-appellant ; and that thereby the defendant-appellant became the tenant cultivator of the paddy field under the plaintiff-respondent.

During the hearing of this appeal, it appeared to us that S. 67 of the Partition Act (Cap. 69) has relevance to a consideration of the defendant-appellant's claim based on S. 3 (2) of the Agricultural Lands Law in the event of a finding that the evidence fails to establish a letting of the paddy field to him by the plaintiff-respondent after the conclusion of the partition case. S. 67 prohibits any voluntary alienation, lease or hypothecation of any undivided share or interest in the corpus after a partition action is registered as a lis pendens, until the final determination of the action and provides that any such

alienation, lease or hypothecation shall be void. The question is whether assuming that the decision in *Ranasinghe v. Marikar* (supra) has no application to a case in which the claim is made under S. 3 (2) of the Agricultural Lands Law, the benefit to " be deemed to be the tenant cultivator of a co-owner " conferred by that section is available to the defendant-appellant who relies upon a lease which was prohibited by S. 67 of the Partition Act. In view of the fact that this appeal raised complicated questions of law, Counsel for the parties were permitted to tender further submissions in writing.

In his written submissions, learned Counsel for the plaintiff-respondent traced the history of the Partition Law. He drew our attention to the fact that S. 17 of the Partition Ordinance No. 10 of 1863 (corresponding to S. 67 of the Partition Act No. 16 of 1951 (Cap. 69) provided that whenever legal proceedings for a partition or sale of any property are instituted " it shall not be lawful for any of the owners to *alienate* or *hypothecate* his undivided share or interest therein ", unless and until the Court has refused to grant the application for such partition or sale, as the case may be ; and " *any such alienation* or *hypothecation* shall be void ". (Vide Cap. 56 of the 1938 L. E.). In *Kirihamy v. Mudiyanse* [2] it was held that a lease made during the pendancy of a partition action is not void, as it is not an alienation within the meaning of S. 17 of the Partition Ordinance. This decision was followed in *Appuhamy v. Nonis* [3]. S. 67 of the Partition Act which replaced the Partition Ordinance specifically mention leases as being in the prohibited class of transactions during the pendancy of a partition action and provides that they too shall be void. As such, Counsel submits that the letting of the paddy field by Hendrick to the defendant-appellant during the pendancy of the partition act was void.

Counsel for the plaintiff-respondent further submits that S. 3 (2) of the Agricultural Lands Law No. 42 of 1973 could not have retrospectively affected rights under the Partition action in question which was instituted in 1968 in that the plaintiff-respondent had a " vested right " to a decree free from all encumbrances under the Partition Law and that on the authority of *Ranasinghe v. Marikar* (supra) the lease, if any, by Hendrick (to which the plaintiff-respondent was not a party) did not prejudice the rights of the plaintiff-respondent to the portion of the paddy field allotted to her by the partition decree.

Learned President's Counsel for the defendant-appellant submits that S. 67 of the Partition Act has no relevance to the matter for decision by this Court. If, however, there was an application for delivery of possession in the partition action itself, the question whether the person sought to be ejected was a tenant cultivator as at the date of the institution of the partition action would be relevant on the basis that the rights of parties have to be determined as at the date of the partition action. Even in such a case, the Court will have to consider whether S. 3 (2) of the Agricultural Lands Law is wide enough to protect a tenant whose tenancy had commenced during the pendancy of the partition action under a co-owner of the land.

Counsel then proceeds to reiterate the point which he made during the oral submissions that in any event, the evidence establishes that the plaintiff-respondent had by her conduct accepted and acknowledged the defendant-appellant as her tenant during the period of four years between the final decree in the partition action and the institution of this action in May 1980 ; that as such the District Judge's finding that defendant's occupation of the paddy field was not wrongful but was as tenant cultivator is correct and has been wrongly set aside by the Court of Appeal.

CONSIDERATION OF THE APPEAL

I cannot agree with the submission that the evidence in the case establishes a tenancy between the plaintiff-respondent himself and the defendant-appellant quite apart from the letting of the paddy field by Hendrick. The plaintiff-respondent who purchased 1/16 share of the land in 1968 did not have possession of the land ; and it seems that in the partition action she preferred to have allotted to herself a portion of the paddy field to the South as the same was adjacent to another land owned by her. She persistently objected to the *ande* claims of the defendant-appellant both before and after the partition decree. The acceptance of paddy on two occasions and a sum of Rs. 40 on the occasion were obviously under protest.

I do not agree with the submission that the failure of the plaintiff-respondent to apply for delivery of the land under S. 52 of the Partition Law constitutes an acknowledgement of the *ande* claim of the defendant-appellant. The plaintiff-respondent in filing this action has

exercised her unchallenged right to file a vindicatory action on the basis that the defendant-appellant was in unlawful occupation of the land.

In the circumstances, I hold that the evidence does not establish that the plaintiff-respondent had engaged the defendant-appellant as her tenant cultivator after the entering of the partition decree (or earlier). The learned District Judge himself did not make any finding on this aspect of the case. He only held that the defendant-appellant had cultivated the paddy field as its tenant cultivator for several years prior to the institution of this action.

Consequently, we have to decide whether, assuming that the decision in *Ranasinghe v. Marikar* (supra) has no application where a claim is made under S. 3 (2) of the Agricultural Lands Law, the defendant-appellant's claim under that section is barred by S. 67 of the Partition Act. After a careful analysis, I find that the learned President's Counsel's submission is to the following effect.

1. In a case where an application for delivery of possession of the land has been made in the partition action itself, S. 67 would bar the claim of a person who has been appointed a tenant cultivator during the pendancy of the action on the basis that rights of parties have to be decided as at the date of the institution of the action. Even in such a case, it is arguable that S. 3 (2) is wide enough to protect such tenant as the protection provided by that section is conferred on any person who is a tenant cultivator *as at the date of the decree.*

2. S. 67 is irrelevant to this action because the rights of the parties are to be determined as at the institution of this action (i.e. in May 1980) on which date the defendant-appellant was a tenant cultivator on the strength of the letting by Hendrick and hence the plaintiff-respondent is bound to continue him as a tenant cultivator.

I am of the opinion that there is no merit in the submission that S. 67 is irrelevant (except perhaps in a case of an application for delivery of possession of the land), for in determining the rights of parties in the situations referred to at (1) and (2) above, the relevant consideration is not the date at which rights of parties are to be

determined but the legitimacy of the tenancy in respect of which the protection under S. 3 (2) is claimed. If such tenancy is legitimate it is protected, even if it is not specified in the decree, notwithstanding provision as to the finality of a partition decree.

It is a condition precedent to the protection under S. 3 (2) that th claimant should be the " tenant cultivator " of the land purchased under the Partition Act or allocated to a co-owner under the decree for partition. Under S. 2 (1) of the law " tenant cultivator " is defined as being any person who is the cultivator of any extent of paddy land let to him under any oral or written agreement. This connotes a valid lease. However, lease effected after the registration of the partition action as a lis pendens is void in terms of S. 67 of the Partition Act.

It is quite probable that the defendant-appellant was appointed as the tenant cultivator of this land by Hendrick somewhere in 1972 as the plaintiff-respondent's complaint P5 states. The learned District Judge appears to have assumed (without a serious consideration of the evidence) that the defendant-appellant was a tenant from about 1970. This action was instituted in 1968 and the preliminary survey was held in 1969. Commission to survey the land is issued under S. 16 of the Partition Act at the same time as the order is made for the issue of summons. Summons are issued under S. 13 after the Court is satisfied that a partition action has been registered as a lis pendens. I am, therefore, satisfied that Hendrick had appointed the defendant-appellant as tenant cultivator of the paddy field " pendente lite " in breach of S. 67 of the Act. That lease was void. I, therefore, hold that the defendant-appellant is not entitled to the protection under S. 3 (2) of the Agricultural Lands Law. In this view of the matter, it would be unnecessary to decide the other questions raised by Counsel.

CONCLUSION

Accordingly, I dismiss the appeal and affirm the judgment of the Court of Appeal, with costs.

DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.