

PANDIWELA
v
ASHOKA AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
SARATH DE ABREW, J.
CALA 550/2002 (LG)
DC KULIYAPITIYA 12091/P
JULY 10, 2006
DECEMBER 15, 2006

Partition Law – Section 30, Section 48(1) – Section 48(4)(c) – Section 48(4)(d) – Applicability – Procedure – Mandatory? Failure – Is it fatal? Evidence Ordinance - Section 33

It was contended that the failure on the part of Court to comply with (a) Section 48(4)(c) – to consider granting special leave upon such terms and conditions, (b) Section 48(4)(d) – after granting special leave to settle in the form of issues the questions of fact and law arising from the pleadings and failure to thereafter appoint a date for the trial and the determination of issues – and not giving reasons – has occasioned a failure of justice.

Held:

(1) The learned District Judge has amalgamated the inquiry and the trial envisaged in Section 48(4)(c) and (d) of the Partition Law into one proceeding and delivered an order turning a blind eye to the statutory important requirements contained in Section 48(4)(a)(d). If issues had been raised and a proper trial on a given future date had been held, it

would have afforded the petitioners an opportunity to call evidence and challenge the position taken up by the plaintiff which tantamount to a miscarriage of justice.

Per Sarath de Abrew, J.

"The Partition Law is a specialised law seeking to award rights, title and interests in the land in suit to the parties concerned against all other suitors and against the world at large. The very finality of the interlocutory *decree* and the final *decree* envisaged in Section 48(4) demands that the mandatory statutory procedure laid down by the legislature in all its wisdom should be followed to the very letter."

APPLICATION for leave to appeal from an order of the District Court of Kuliyaipitiya, with leave being granted.

Case referred to:

(1) *Abeygoonesekera v Wijesekera* 2002 2 Sri LR 269.

Dr. Sunil Cooray with D.H. Siriwardane for 9th and 11th defendant-respondent-petitioners.

Upul Kumarapperuma with Suranga Munasinghe for 3rd defendant-petitioner-respondent.

March 23, 2007

SARATH DE ABREW, J.

This is an application for leave to appeal from the order of the learned District Judge of Kuliyaipitiya dated 04.12.2002. By that order the learned Judge allowed the application made by the 3rd defendant-petitioner-respondent (hereinafter sometimes referred to as the respondent) under Section 48(4) of the Partition Law and while holding that the respondent was entitled to an undivided 1/2 share of the *corpus* for partition, made order that the respondent is permitted to have the Interlocutory Decree dated 14.06.2006 amended accordingly at his expense. Being aggrieved of the above impugned order, the 9th and 11th defendant-respondent-petitioners (hereinafter sometimes referred to as the petitioners) have filed this leave to appeal application in this Court. The Court of Appeal has granted leave on 20.05.2003.

Briefly, the relevant facts are as follows. The plaintiff in the District Court case filed action on 06.01.1999 before the District

Court of Kuliypitiya seeking to partition the land described in the schedule to the plaint, in extent three acres. The plaint disclosed 1st to 8th defendants as parties, whereas 9th to 11th defendants intervened in the action. Only the 2nd, 9th, 10th and 11th defendants filed a joint statement of claim while no other defendant filed a statement of claim.

By their joint statement of claim, the 2nd, 9th, 10th and 11th defendants pleaded, *inter alia*, that although the 2nd defendant gifted his 1/2 share to the 3rd defendant (respondent) by deed of gift No. 2234 dated 04.06.1982, subject to his life interest, the 2nd defendant thereafter by deed No. 3884 dated 15.09.1991 had revoked the said deed of gift No. 2234 and subsequently thereafter by deed No. 377 dated 03.07.1998, had gifted this 1/2 share to the 9th, 10th and 11th defendants, reserving life interest to the 2nd defendant. Accordingly the 9th, 10th and 11th defendants claimed the said 1/2 share, namely an undivided 1/6 of the *corpus*, subject to the life-interest of the 2nd defendant. At the trial, there had been no contest and the plaintiff alone had given evidence which was not subjected to cross-examination. On the strength of the oral and documentary evidence produced, the learned District Judge had accordingly entered judgment on 14.06.2002 for partitioning of the land in suit, and the interlocutory *decree* had been entered accordingly. The following parties were declared entitled to the following interests in the *corpus*.

- Plaintiff : to an undivided 1/2 share less 1 acre.
1st defendant : to 1 acre
2nd defendant : to the life-interests over the shares of the 9th, 10th and 11th defendants.
9th, 10th and 11th defendants : to an undivided 1/6th share each.

Accordingly the final commission for partition had been duly issued, executed and returned and thereafter the matter had been fixed for 08.12.2002 for consideration of the final partition plan.

At this juncture, the 3rd defendant-petitioner, who had not so far participated in the proceedings, had sought to intervene by petition and affidavit dated 07.10.2002 and documents marked 3 Pe 1 to 3 Pe 10, by making an application under Section 48 (4) of

the Partition Law, as amended by Act No. 17 of 1997, to which application the other parties to the action were made respondents. The contention of the 3rd defendant-respondent was that, as the judgment in the *ex-parte* trial in D.C. Kuliyaipitiya case No. 11903/L had annulled and declared invalid on the basis of forgery the purported deed of revocation of gift (Deed No: 3884) executed by the 2nd defendant to revoke gift (Deed No: 2234) given to the 3rd defendant, the aforesaid deed of gift bearing No. 2234 was valid and therefore the 03rd defendant was entitled to an undivided 1/2 share of the *corpus*. -

After the 9th, 10th and 11th defendant-petitioners had filed their statement of objections to the aforesaid application of the 3rd defendant, the learned trial Judge had taken up the matter for inquiry on the preliminary question whether the aforesaid application was time-barred, and having considered the written submissions tendered by both parties, had delivered order on 04.12.2002 that the aforesaid application was not time-barred and was maintainable. The inquiry into the application itself was taken up on the same day, and having considered the evidence of the 3rd defendant and the documents produced, the learned trial Judge had made order as follows:

- a) that the 3rd defendant had proved that he had no notice of this partition action prior to the interlocutory *decree*.
- b) That as it had been held in DC Kuliyaipitiya Case No: 11903/L that deed No. 3884 was invalid, the said decision operated as *res judicata*, and therefore the 9th, 10th and 11th defendants were not entitled to any interest in the *corpus*.
- c) And that instead, the 3rd defendant was entitled to the undivided 1/2 share of the *corpus* for partition, and therefore the 3rd defendant was permitted to have the interlocutory *decree* amended accordingly at this expense.

It is the above impugned order that the 9th and 11th defendant-respondent-petitioners are aggrieved of. The main contention of the petitioners as stated in paragraph 16 of the petition *inter alia* and sub-paragraph (d) to the prayer in the petition was that the application of the 3rd defendant (respondent)

be dismissed with costs, or in the alternative, that the District Court be directed to comply with Section 48(4)(c) and Section 48(4)(d) and settle issues and proceed to trial in order to determine the issues and thereafter to proceed according to law.

In the oral submissions made during the course of the argument and in their written submissions the following contentions were promulgated by the petitioners.

- 1) The failure on the part of the learned trial Judge to comply with the mandatory provisions of the law set out in Section 48(4)(c) of the Partition Law – namely to consider granting Special Leave upon such terms and conditions Court may impose.
- 2) The failure on the part of the learned trial Judge to comply with the mandatory provisions set out in Section 48(4)(d) of the Partition Law – namely after granting Special Leave, failure to settle in the form of issues the questions of fact and law arising from the pleadings and failure to thereafter appoint a date for the trial and determination of issues.
- 3) The learned District Judge had manifestly erred in law in holding that the judgment in D.C. Kuliyaipitiya Case No. 11903/L operated as *res judicata* and was binding on the 9th, 10 and 11th defendants who were not parties in the said action.
- 4) The learned District Judge had erred in law in not giving reasons as to how the Court arrived at the finding that the 3rd defendant-respondent was unaware of the partition action until the interlocutory *decree* was entered. The respondent in his oral submissions argued that:

Under Section 33 of the Evidence Ordinance, the decision in D.C. Kuliyaipitiya Case No. 11903/L was relevant, and the action of the learned District Judge in admitting same was in accordance with the law.

b) Under the provisions of Section 30 of the Partition Law the 3rd defendant-respondent should have received due notice of the partition action well in time.

Further, the respondent in his written submissions raised the

contention that, notwithstanding the provisions of Section 48(4)(c) and 48(4)(d) of the Partition Law, the only issue before Court was that whether the deeds on which the petitioners were relying on were forged or not, which question was satisfactory answered at the inquiry, and therefore it was not necessary to embark on a fresh inquiry again to check the authenticity of the said deeds.

Having considered the totality of the material placed before court I now proceed to consider the sustainability of the main contention of the petitioners. Their main contention was that instead of following the mandatory statutory provisions laid down in Section 48(4)(c) and 48(4)(d) of the Partition Law and by adopting a procedure manifestly erroneous, the learned District Judge had effectively denied the opportunity for the petitioners to contest the position raised by the 3rd defendant-respondent regarding the invalidity of deed No. 3884 and establishing that there was a subsequent deed executed prior to this action by which the 2nd defendant had revoked the said deed No. 2224 in which the 3rd defendant-respondent claimed title.

The statutory provisions in question may be examined as follows. Section 48(4)(c) and 48(4)(d) of the Partition Law are quoted below.

Section 48(4)(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 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 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."

Section 48(4)(d)

"Where the Court grants special leave as herein-before 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, the Court shall appoint a date for 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."

On an examination of the above mandatory provisions of the law, on an application by the 3rd defendant-respondent to intervene by applying for special leave to establish any right, title or interest of such party as against an interlocutory *decree* already entered, the following salient points have to be fulfilled.

- 1) The respondent should make the application on or before the date fixed for consideration of the scheme of partition.
- 2) The respondent upon inquiry should satisfy Court that he had no notice whatsoever of the said partition action prior to the date of the interlocutory decree.
- 3) On Court after inquiry being satisfied of the above matters, Court shall grant special leave to the applicant on such terms and conditions Court may deem fit which may include an order for payments of costs or for deposit of security for costs.
- 4) Thereafter Court shall frame issues on questions of facts and law that arises for determination from the pleadings.
- 5) Finally, the Court shall fix a date for trial and determination of

the issues and proceed to trial in accordance with the procedure applicable to a partition action.

In the light of the above mandatory requirements of the law, I now proceed to examine procedure adopted by the learned District Judge in making the impugned order dated 04.12.2002 marked and produced as 1. The application of the respondent (E) had been supported on 08.10.2002 on the day fixed for consideration of the final scheme of partition. After notice to the parties concerned, 9th, 10th and 11th defendants had filed objections supported by written submissions later. Thereafter, the learned District Judge, after inquiry, had over-ruled the preliminary objection that the application is not time-barred and made order accordingly on 04.12.2002. However, the learned Judge at this juncture had not gone into the question whether the 3rd defendant had satisfied Court that he has no notice of the partition action prior to the date of the interlocutory decree. The learned Judge has arrived at this finding, without giving reasons, only after the subsequent inquiry held thereafter after the evidence of the 3rd defendant had been led before Court, in making his final order with regard to the application. Neither special leave to try the application has been granted nor issues framed and a date fixed for trial. In plain language, the learned District Judge had amalgamated the inquiry and the trial envisaged in Sections 48(4)(c) and (d) of the Partition Law into one proceeding and delivered order turning a blind eye to the statutory imperative requirements contained in the above provisions of the Partition Law.

If issues had been raised and a proper trial on a given future date had been held, it would have afforded the petitioners an opportunity to call evidence and challenge the position taken up by the respondent, which tantamount to a miscarriage of justice.

On the other hand in *Abeygoonesekera v Wijesekera*⁽¹⁾ it has been held by Somawansa, J. that express statutory provisions cannot be completely disregarded in the guise of invoking inherent power of Court under Section 839 of the *Civil Procedure Code*. The Partition Law is a specialised law seeking to award rights, title and interests in the land in suit to the parties concerned against all other suitors and against the world at large.

The very finality of the interlocutory *decree* and the final decree envisaged in Section 48(1) of the Partition Law demands that the mandatory statutory procedure laid down by the legislature in all its wisdom should be followed to the very letter.

In the case in hand, for the foregoing reasons, I am firmly of the view that the failure on the part of the learned trial Judge to adhere to the mandatory statutory provisions laid down in Section 48(4)(c) and 48(4)(d) of the Partition Law has occasioned a failure of justice, and therefore the main contention of the petitioners should succeed. In view of the above finding I do not propose to examine the merits of the other two contentions put forward by the petitioners.

I therefore make order setting aside the impugned order dated 04.12.2002 of the learned District Judge of Kuliypitiya and direct that the case record be forwarded back to the District Court of Kuliypitiya with the direction that the present learned District Judge of Kuliypitiya should hold a fresh inquiry into the application of the 3rd defendant-respondent in strict compliance with the provisions of Section 48(4)(c) and 48(4)(d) of the Partition Law as amended by Act No. 17 of 1997. Taking into consideration all the circumstances of this case, I make no order with regard to costs.

Appeal is allowed accordingly.

EKANAYAKE, J. - I agree.

Appeal allowed.