
**JAYARATNE AND ANOTHER
VS
GUNAWARDANE AND ANOTHER**

COURT OF APPEAL
WIMALACHANDRA J.
CALA 171/2003
DC KALUTARA 4199/P
JUNE 15, 2005
DECEMBER 12, 2005

Partition Law-Final decree entered-Lots allotted-Heir seeking to substitute himself in the room of the deceased and seeking a writ of possession in respect of allotted lots-Order by District Court- Is it an interlocutory order or a final order.

By final decree Lot 4f was allotted to the 2nd defendant and Lot 4g to the 3rd defendant. The 2B defendant-respondent claiming to be heirs of the deceased 2nd and 3rd defendants filed applications seeking to substitute themselves in the room of the deceased defendants and sought writ of possession in respect of Lots 4f and 4g. The District Court allowed the applications.

The 15th and 18th defendants challenged that said order by way of leave to appeal.

On a preliminary objection raised that the impugned order is a final order.

HELD:

- (1) In a partition action after entering the interlocutory decree the Court has to enter the final decree. It is the final decree that allots various lots to representative parties.
- (2) To constitute an order of final judgment, nothing more is necessary than that there should be a proper *litis contestation* and adjudication to it on the merits. It would appear that a partition action is terminated only after the final decree is entered.
- (3) Mere fact that the share of each party determined by the Judge in his judgment was entered in the interlocutory decree will not make it a final order as it still remains to be decided, certain other rights of parties.

It is the final decree which specifies the shares to which the parties are entitled to in separate lots and also compensation or owelty to be awarded in the partition action.

APPLICATION for leave to appeal from the order of the District Court of Kalutara.

Cases referred to :

- (1) *Ussoof Vs. The National Bank of India* 60 NLR 381 at 383
- (2) *Bozsm Vs. Altrincham Urban District Council* 1903 1 KB 547
- (3) *Siriwardane vs. Air Ceylon Ltd.* 1984 1 Sri LR 286

N. R. M. Daluwatte PC with P. P. Gunasena for 15th - 18th defendant-respondent-petitioners

Dr. Jayantha de Almeida Gunaratne PC with C. Abeywickrama for 2B, 3A, 4th, 5A and 6th defendant-respondents.

Cur. adv. vult.

October 20, 2006

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the learned District Judge of Kalutara dated 08.05.2003. Briefly, the facts relevant to this application as set out in the petition are as follows :

The 1A, 2A and 3rd plaintiffs-respondents-respondents (plaintiffs) instituted this partition action to partition the land called Millagahawatte *alias* "Arachchiyawatte" which is in extent of 1A, 3R, 37.5P described in the schedule to the plaint. After trial the judgment was entered and the interlocutory decree was entered thereafter. Prior to the entry of the final decree, the original 3rd defendant, Samaraweera Mudalige Baby Singho together with the 16th and 19th defendants transferred the rights that would have been allotted to them in the final decree to the 18th defendant-respondent-petitioner (18th defendant), by deed No. 27/2641 dated 25.10.1985, marked 'P1'. The original 2A defendant,

Samaraweera Mudalige Sirisena (now deceased) and the 14th defendant-Samaraweera Mudalige Dias Appuhamy transferred the rights that would have been allotted to them in the final decree to the 15th defendant-respondent-petitioner (15th defendant) by deed No. 3186 dated 01.01.1987, produced marked 'P2".

The Commissioner submitted to Court the final partition plan No. 5495 dated 22.06.1989, produced marked 'P3'. The partition plan was confirmed by Court and the final decree was entered. After the final survey, the 15th and 18th defendants went into occupation of the lots allotted to the 2nd and 3rd defendants as the 2nd and 3rd defendants to whom the said lots were allotted, transferred their rights pending the partition action to the 15th and 18th defendants. By the final decree the lot 4F was allotted to 2nd defendant and the lot 4G to the 3rd defendant.

The 2B defendant-respondent claiming to be the heir of the deceased 2A defendant, and the 3A defendant claiming to be the heir of the deceased 3rd defendant, filed two applications seeking to substitute themselves in the room and place of the said deceased defendants and sought writs of possession in respect of lots 4F and 4G respectively.

The learned District Judge, after an inquiry with regard to the applications made by the 2B and 3A defendants-respondents made order on 08.05.2003 allowing the said applications. It is against this order the 15th and 18th defendants have filed this application for leave to appeal. In the impugned order the learned judge held that the 2B and 3A defendants are entitled to the possession of the aforesaid lots 4F and 4G in the partition plan.

The 2B and 3A defendants raised a preliminary objection that, upon entering of the interlocutory decree in relation to the allotment of shares in the corpus, the partition action has come to an end and the final decree is only concerned with regard to the physical demarcation of separate allotments upon the final survey, and that the order of the learned judge entering the interlocutory decree is a final order. The learned President's Counsel for the 2B and 2A defendants submitted that as the judgment and the interlocutory decree entered in this

action are final orders, the application for leave to appeal is misconceived.

The question to be determined is, does the interlocutory decree finally dispose of the rights of the parties, and if it does, is there anything more to decide in relation to the rights of the parties. That means, was there a finality in the adjudication of the rights of the parties upon the entering of the interlocutory decree?

In the case *Usoof Vs. The National Bank of India*⁽¹⁾ at 383 Sansoni, J. (as then he was) cited *Bozson Vs. Altrincham Urban District Council*² where the Chief Justice said "It seems to me that the real test for determining this question ought to be this. Does the judgment or Order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then in my opinion, an interlocutory order." His Lordship refers to Viscount Cares finding. "The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the courts in the ordinary way."

In the case of *Siriwardena Vs. Air Ceylon Ltd.*, Sharvananda J. (as he then was) held that,

"To decide whether a party dissatisfied with the order of a civil court should lodge a direct appeal under section 754(1) of the Civil Procedure Code or appeal with the leave of Court first had and obtained under section 754(2) of the Civil Procedure Code the definitions of 'judgment' and 'order' in section 754(5) should be applied.

In view of the definition in section 754(5) of the Civil Procedure Code the procedure of direct appeal is available to a party dissatisfied not only with a judgment entered in terms of section 184 of the Civil Procedure Code but also with an order having the effect of a final judgment, that is, a final order. Orders which are not judgments under section 184 of the Civil Procedure Code or final orders are interlocutory orders from which a party dissatisfied can appeal but only with leave to appeal.

The tests to be applied to determine whether an order has the effect of a final judgment and so qualifies as a judgment under section 754(5) of the Civil Procedure Code are -

- (1) It must be an order finally disposing of the rights of the parties.**
- (2) The order cannot be treated as a final order, if the suit or the action is still left alive for the purpose of determining the rights and liabilities of the parties in the ordinary way.**
- (3) The finality of the order must be determined in relation to the suit.**
- (4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order a final one."**

It appears that the real test for determining the question is, whether the judgment or order as made, finally disposes of the rights of the parties. If it does, it could be treated as a final order and if it does not it is an interlocutory order. In the instant case the entering of the interlocutory decree does not finally dispose of the rights of the parties but leaves them to be determined by the Court in the ordinary way.

The second test formulated by Sharvananda, J. in the aforesaid case is, if the suit or action is still left alive for the purpose of determining the rights and liabilities of the parties in the ordinary way, the order cannot be treated as a final order. In a partition action after entering the interlocutory decree the Court has to enter the final decree. It is the final decree that allots various lots to respective parties. To constitute an order of final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and adjudication to it on the merits. Hence, it appears that a partition action is terminated only after the final decree is entered.

In the circumstances, applying the principle laid down in the aforesaid cases it appears that the mere fact that the share of each party determined by the judge in his judgment was entered in the interlocutory decree will not make it a final order as it still remains to be decided certain other rights of the parties. It is the final decree which specifies the shares to which the parties are entitled to in separate lots and also compensation or owelty to be awarded in the partition action.

In these circumstances on the basis of the *Siriwardena Vs. Air Ceylon Ltd.*, case, cited above, the order from which leave to appeal is sought is not in effect a final judgment. Accordingly, the preliminary objection raised by the respondents is overruled and leave to appeal is granted on the correctness of the order made by the learned District Judge of Kalutara on 08.05.2003.

*Preliminary objection overruled.
The order is a interlocutory order.
Leave to appeal granted.*
