

AMARASINGHE
v.
PODIMENIKE AND OTHERS

COURT OF APPEAL.
SENANAYAKE, J.,
EDUSSURIYA J.
C.A. 606/96
D.C., KURUNEGALA 275/P
OCTOBER 1, 1996.

Partition Act, 21 of 1977 – s. 70 of the Partition Act – Withdrawal – Could the Court permit a defendant who had asked for dismissal of the action to proceed to prosecute.

Held:

- (1) When there is a deliberate act of withdrawal of the partition action it is not open to the defendant who had asked for a dismissal of the action to proceed to prosecute the partition action.
- (2) Under S.70 Court can dismiss a Partition Action for non prosecution, however the proviso to S.70 permits a defendant to prosecute a partition action where the plaintiff fails or neglects to prosecute an action.

APPLICATION for Revision from the order of the District Court of Kurunegala.

L. V. P. Wettasinghe for 6th defendant-petitioner.

Faiz Musthapa P.C., with *H. Withanachchi* for plaintiff-respondent.

Cur. adv. vult.

October 1, 1996.

EDUSSURIYA, J.

This is an application to revise the order of the learned District Judge refusing a further date to file amended pleadings and other relevant documents in order to proceed with the partition action which the plaintiff sought to withdraw.

In fact it is our view that when the plaintiff informed Court that he was withdrawing the partition action, the learned District Judge should have dismissed the partition action without permitting the petitioner date to file amended papers and at that stage the petitioner could have asked for costs from the plaintiff, especially in view of the fact that the 6th defendant had been ordered to pay costs, when he had filed the amended statement of claim. Under Section 70 of the Partition Law a Court can dismiss a partition action for non-prosecution. However the proviso to Section 70 permits a defendant to prosecute a partition action where the plaintiff **fails or neglects** to prosecute the partition action. In this instant case, there was no failure or neglect by the plaintiff to prosecute this partition action. On the other hand there was a deliberate act of withdrawal of the partition action and it is not open to the Court to permit the defendant, who had asked for a dismissal of the action to proceed to prosecute the partition action by filing an amended plaint. The Partition Law does not provide such a procedure. For these reasons we refuse notice and the application.

SENANAYAKE, J. – I agree.

Application refused.

Editor's Note: Special Leave was refused in S.C. Spl. L.A. 579/19 on 20.1.97 by the Supreme Court.