

SIRINATHA
v.
SIRISENA AND OTHERS

COURT OF APPEAL
ISMAIL, J. (P/CA),
TILAKAWARDANE, J.,
C.A.L.A. NO. 30/97(LG)
D.C. GAMPAHA NO. 3578/P
SEPTEMBER 14, 1998

Partition Act, No. 21 of 1977 – S. 66 – S. 69 – Addition of Parties – Necessary Parties – Claimants before Surveyor – Rights acquired after registration of lis pendens – Interest in the land-contingent interest.

The plaintiff-appellant instituted action to partition the corpus. The *lis pendens* was registered on 3.2.93. One J. made a claim before the Surveyor stating that he was entitled to rights by purchase on 19.10.93; he also made an application to be added as a party. The objection to him being added as party was upheld.

The 2nd defendant then sought to amend his statement of claim and moved to have J. added as a necessary party on the basis that he is a party disclosed and as having made a claim before the Surveyor. The trial Judge accepted the amendment and permitted the addition of J. as the 3rd defendant, on appeal.

Held:

1. Considering the legal effect of a transfer of whatever rights that will be allotted to the transferor by a final decree in a partition action, the transferee cannot justifiably claim to be added as a necessary party.

The transferor is a party and his rights will be determined in the present action, the transferee of the yet undermined rights is not a necessary party.

2. It cannot be accepted that the transferee has a *prima facie* interest in the land and that he is therefore entitled to be added as a party in terms of s.69 (1)b of the Partition Law as one claiming an interest in the land.
3. There is no basis for the interpretation that the phrase "interest in the land" in s 69 (1)d includes his contingent interest.

Leave to appeal, Leave being granted from the judgment of the District Court of Gampaha.

Cases referred to:

1. *Khan Bhai v. Perera* (1923) 64 NLR 204.
2. *Sirisoma v. Saranelis Appuhamy* (1950) 51 NLR 337.
3. *Babun v. Amarasekera*, 1 S.C.C 24.
4. *Annamalaipillai v. Perera* – 6 NLR 108.
5. *Subasena v. Porolis* – 16 NLR 393.
6. *Hewawasam v. Gunasekara* – 28 NLR 33.
7. *B. Lillie Fernando v. W. Silman Fernando* (1962) 64 NLR 401.

G. L. Geethananda for plaintiff-appellant.

Manohara R. de Silva for 3rd defendant-respondent.

Cur. adv. vult.

October 08, 1998

ISMAIL, J. (P/CA):

The plaintiff-appellant instituted an action in December '92 to partition an extent of 13.5 perches of land described in the schedule to the plaint. According to the pleadings the rights of the original owner Jane Nona came to the plaintiff and to the 1st defendant and the balance share was to remain unallotted. The 2nd defendant intervened as an heir and claimed the balance share that was to have remained unallotted. The *lis pendens* relating to this action was registered on 3.2.93.

The preliminary survey was carried out on 2.9.94. One P. A. Chandra Jayasiri made a claim before the Surveyor stating that he was entitled to rights in the land by purchase on deed No. 406 dated 19.10.93 attested by N. K. S. Marapitiya, Notary Public. The said Jayasiri by a petition dated 2.9.94 also applied to be added as a party to the action claiming that the 2nd defendant had by the said deed sold to him rights to which he would be entitled to in the action.

Both the plaintiff and the 2nd defendant objected to the addition of the claimant Jayasiri as a necessary party on the ground that the right claimed by him was one purchased after *lis pendens* was registered and that it did not therefore entitle him to have his rights adjudicated in this action. Meanwhile, the 1st and 2nd defendants had filed their respective statements of claim.

The trial judge by his order dated 1.12.95 refused the application of Jayasiri to be added as a party on the ground that the right claimed by him was obtained after the action was instituted, and that it was a claim to a future right to which the 2nd defendant may become entitled.

The case was then fixed for trial to be held on 13.6.96. However, the 2nd defendant on that date moved to file an amended statement of claim. In his amended statement of claim filed dated 23.10.96, the 2nd defendant moved to have Jayasiri added as a necessary party on the basis that he is a party disclosed and as having made a claim before the Surveyor.

The trial judge by his order dated 6.2.97 accepted the amended statement of claim of the 2nd defendant and permitted the addition of Chandra Jayasiri as the 3rd defendant on the basis that he was a claimant before the Surveyor. The plaintiff-appellant was granted leave to appeal against this order, and in this appeal, he moves to have the aforesaid order set aside and a direction made that Jayasiri be not added as a party to the action.

Learned counsel for the plaintiff-appellant submitted that the question whether Jayasiri should be added as a necessary party on the basis of his claim before the Surveyor and that he had purchased the contingent rights of the 2nd defendant had already been considered and rejected by the former District Judge in his order dated 1.12.95. He submitted that, in the circumstances, the contrary order now made on 6.2.97 on the same matter by the succeeding Judge has been made without jurisdiction.

It was also submitted that the transfer to Jayasiri and his consequent claim that he on "deed No. 406 dated 19.10.93, attested by M. K. S. Marapitiya, Notary Public, became entitled to the rights in the corpus" is illegal and void in terms of section 66 of the Partition Law, No. 21 of 1977. It was contended that the claim of Jayasiri was to a speculative and a future right that need not be investigated at this stage and that he is therefore not a necessary party to the action.

Section 66 of the Partition Law, No. 21 of 1977, which corresponds in the main with section 17 of the earlier Partition Ordinance, section 67 of the Partition Act, No. 26 of 1951 and section 65 (1) of the Administration of Justice (Amendment) Law No. 25 of 1975, is as follows:

"66 (1) After a partition action is duly registered as a *lis pendens* under the Registration of the Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under section 36 or by the entry of a certificate of sale.

- (2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void:

Provided that any such voluntary alienation, lease or hypothecation shall, in the event of a partition action being dismissed, be deemed to be valid.

- (3)"

In *Khan Bhai v. Perera*⁽¹⁾ in a decision of a full bench, the observation was made that persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest ultimately to be allotted to them in the action.

In *Sirisoma v. Saranelis Appuhamy*⁽²⁾, Gratiaen, J. interpreting section 17 of the Partition Ordinance held that it "prohibits the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of partition proceedings. There is no statutory prohibition against a person's common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance.

The submission that the transfer by the 2nd defendant of the rights to which he may become entitled to in the partition action, is obnoxious to the provisions of section 66 of the Partition Law cannot therefore succeed. Section 66 of the Partition Law prohibits only the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings. There

was no bar preventing the 2nd defendant from transferring the interests which he would acquire upon the conclusion of the partition action.

The object of the prohibition in section 17 of the Partition Ordinance, No. 18 of 1863, was explained by Phear, CJ. in *Babun v. Amarasekera*⁽³⁾ as follows:

“The sole purpose of the clause seems plainly to be, to reserve full effect to the legal proceedings for partition, when once instituted, and to take care that it shall not be in the power of any party concerned to defeat them or embarrass the course of them while transferring his share or any interest in the property to a stranger.”

In *Annamalaipillai v. Perera*,⁽⁴⁾ Middleton, J. cited these words with approval and in *Subaseris v. Prolis*,⁽⁵⁾ Woodrenton, ACJ. stated that:

“the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interest had been created since the proceedings began.”

These words of Woodrenton, ACJ. were adopted by Dalton, J. in *Hewawasam v. Gunasekera*⁽⁶⁾.

Thus it is clear that the object of section 66 of the Partition Law is to prevent the passage of a partition action being prolonged by permitting new parties to be added on every occasion that the interests presently vested in the parties to the action are alienated or hypothecated.

The effect of the sale of a contingent interest was considered in *Sirisoma v. Saranelis Appuhamy* (supra) and the following proposition was set out to be considered as settled law:

“If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor; and no further instrument of conveyance or mortgage requires to be executed for the purpose; the execution of ‘a deed of further assurance’ confirming the result which has already taken place may in certain cases be desirable but it is not essential in such a case”.

This was followed in *B. Sillie Fernando v. W. Silman Fernando*^m the head note to which is as follows:

"Where, prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before entering the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives."

Considering the legal effect of a transfer of whatever rights that will be allotted to the transferor by a final decree in a partition action, the transferee cannot justifiably claim to be added as a necessary party. The transferor is a party and his rights will be determined in the present action. The transferee of the yet undetermined rights is not a necessary party to the action. I do not accept the submission of counsel that the 3rd defendant-respondent Jayasiri has a *prima facie* interest in the land and that he is therefore entitled to be added as a party in terms of section 69 (1)(b) of the Partition Law as one claiming an 'interest in the land'. Admittedly Jayasiri claims to have a contingent interest in the land upon deed No. 406 dated 19.10.93. But there is no basis for the interpretation that the phrase 'interest in the land' in section 69 (1)(d) includes also his contingent interest. As the 3rd defendant-respondent has no present interest in the land and as no opinion could justifiably be formed by court that he should be made a party, the order permitting him to be added as a party to the action cannot stand.

The trial judge has in his order dated 6.2.97, erred in accepting the position taken up by the 2nd defendant in his amended statement of claim that Jayasiri should be added as a necessary party on the basis of his claim before the Surveyor. We therefore set aside the said order and direct that the trial be continued without an amendment to the caption by adding Chandra Jayasiri as the 3rd defendant.

The appeal is allowed with costs.

TILAKAWARDENE, J. – I agree.

Appeal allowed.