

ANTHONY APPU
v.
MARGRET FERNANDO AND OTHERS

COURT OF APPEAL.

DE SILVA, J.,

WEERASURIYA, J.

C.A. NO. 804/97.

D.C. MARAWILA NO. 233/P.

JANUARY 21, 1999.

FEBRUARY 22, 1999.

Partition Law, No. 21 of 1977 – Sec. 25 (1) (2) – Statement of claim not filed – Can objections be taken for the supposed scheme of partition?

Held:

1. The Partition Law makes no prohibition against a party who had failed to participate at the trial. In the absence of a specific prohibition it is not possible to presume any such prohibition.
2. The order of the District Judge had deprived the respondent from making his objections to the Scheme of Partition.
3. Order confirming a Final Scheme of Partition in terms of s. 35 of the Partition Law was appealable before the amending Act No. 17 of 1997 – S. 36 (a) provides for an appeal with the leave of Court of Appeal first had and obtained.

APPLICATION in Revision from the Order of the District Court of Marawila.

S. F. A. Cooray with *C. Liyanage* for 3rd defendant-petitioner-petitioner.

M. C. Jayaratne for plaintiff-respondent-respondent.

Cur. adv. vult.

April 29, 1999.

WEERASURIYA, J.

The plaintiff-respondent-respondent (hereinafter referred to as the plaintiff), instituted action in the District Court of Marawila, to partition the land called Wellabada. Licensed Surveyor, Ranjith Yapa, who was commissioned to carry out the preliminary survey, made his return to the commission depicting the land sought to be partitioned in his plan bearing No. 1793 dated 09.07.91. The 3rd defendant-appellant-petitioner (hereinafter referred to as the 3rd defendant) did not file a statement of claim and the case proceeded to trial in his absence without a contest on 27.07.95. After the conclusion of the evidence of plaintiff, learned District Judge by his judgment dated 05.12.95, ordered a partition of the land and allotted rights to the parties accordingly. Thereafter, upon entering of interlocutory decree, a commission was issued to Licensed Surveyor, Ranjith Yapa, to prepare the final plan for partition. The Commissioner made his return to the commission submitting his plan and report bearing No. 1798 A, dated 16.08.1996. On 05.12.96, Attorney-at-law, Melwin Silva, tendered proxy on behalf of the 3rd defendant and filed a statement of objections to the proposed scheme of partition. At the inquiry held on 10.06.97, in the absence of the plaintiff and other defendants with the exception of the 3rd defendant, a settlement was effected with the concurrence of the Attorneys-at-law appearing on behalf of the plaintiff, 1A and 4th defendants and the 3rd defendant for which 3rd defendant subscribed his signature accepting the terms of the settlement. However, a calling date was nominated to enable the other parties to signify their acceptance to the said settlement. But, contrary to that expectation, 1A defendant refused to accept the said settlement, whereupon on the application of the Attorney-at-law appearing for the plaintiff, District Judge confirmed the final plan prepared by Commissioner Ranjith Yapa bearing No. 1798 A, dated 16.08.96. Thereafter, learned District Judge rejected the notice of appeal and petition of appeal lodged by the 3rd defendant against the said order. The present application has been filed seeking to revise the aforesaid orders of the District Judge.

At the hearing of this application, learned counsel for the 3rd defendant contended that learned District Judge had misdirected herself by holding that the 3rd defendant was not entitled to object to the final scheme of partition.

The learned District Judge had observed that the 3rd defendant was not entitled in law to object to the scheme of partition for the reason that he had defaulted in filing a statement of claim and participating at the trial.

Section 25 (2) of the Partition Law, No. 21 of 1977 provides that if a defendant fails to file a statement of claim on the due date, the trial may proceed against him *ex parte*. Further, it is important to note that even if he is present at the trial, he would not be entitled without leave of Court to raise any contest or dispute the claim of any other party to the action.

However, Court is vested with jurisdiction to permit a defendant who had defaulted in filing his statement of claim on the due date, if after notice to the affected parties, Court is satisfied of the *bona fides* of the claim set up by him.

Section 25 (1) of the Partition Law imposes on the Court the obligation to examine the title of each party to the action and section 26 (F) gives Court power to leave a share unallotted. Investigation of title in partition cases would include inquiry into the question of possession. The trial Judge would need to have before him sworn testimony specifying the person in possession and satisfy himself that all of them are parties entitled to rights.

In the instant case, on the testimony of the plaintiff, even in the absence of the 3rd defendant, he (3rd defendant) was allotted 4/10 undivided shares excluding an extent necessary for planting 35 coconut trees.

The Partition Law provides for the issue of a commission for the division of land into lots for allotting among the co-owners according to their rights. Upon receipt of the commission to partition the land, the Surveyor is required to fix a date for partitioning the land and at least 14 days before that date issue notice in writing to each party mentioned in the statement attached to the commission.

It would be seen that after the Surveyor makes the return to the commission, the Court is required to fix a date for consideration of the scheme of partition proposed by the Surveyor.

The Partition Law makes no prohibition against a party who had failed to participate at the trial in terms of section 25 (2) to file objections to the proposed scheme of partition. In the absence of a specific prohibition it is not possible to presume any such prohibition.

In the instant case, when the commissioner made his return to the commission, 3rd defendant filed a statement of objections and Court fixed the matter for inquiry. In fact, Attorneys-at-law appearing on behalf of the plaintiff and 1A and 4th defendants, entered into a settlement and they sought permission to get the consent of the parties.

The order of the District Judge dated 10.07.97 had deprived 3rd defendant from making his objection to the scheme of partition. The order confirming the scheme of partition was made without his participation.

Having examined the relevant provisions of the Partition Law, it seems to me that District Judge was manifestly in error when she confirmed the scheme of partition without considering the objections of the 3rd defendant.

The order confirming a final scheme of partition in terms of section 35 of the Partition Law is appealable before the Act No. 17 of 1997 introduced an amendment to section 36 and brought in section 36A, which provided for an appeal with the leave of Court of Appeal first had and obtained. This amendment which was certified on 12.08.97 would have no application against the order made on 10.07.97. Therefore, the orders rejecting the notice of appeal and petition of appeal are wrong.

For the above reasons, I set aside the orders of the District Judge dated 10.07.97, 29.07.97 and 08.09.97. District Judge is directed to hold an inquiry relating to the objections raised by the 3rd defendant against the scheme of partition and make an appropriate order in terms of the law.

This application is allowed. I make no order as to costs.

DE SILVA, J. – I agree.

Application allowed.