

MUNIDASA & OTHERS

v.

NANDASENA

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKREMA, J.
C.A. 698/97 (REV)
D.C. KURUNEGALA 2903/P
NOVEMBER 17, 1999
MARCH 23, 2000
JANUARY 15, 2001
FEBRUARY 20, 2001

Partition Law 21 Of 1977, S.52(1), S.53(1), S.77, 79 - Civil Procedure Code S.325, S.226 (1)b - Cassus Omissus - Order for delivery of possession in a Partition Action - applicability of the provisions of the Civil Procedure Code.

The question arose as to whether a party to a Partition Action who was allotted a lot could proceed under S.325 C.P.C. without resorting to the specific provisions under S.52(1) and S.53(1) of the Partition Act.

Held :

- (i) The Partition Law provides a specific remedy, the Plaintiff Respondent is not entitled to resort to provisions of the Civil Procedure Code. Provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.
- (ii) The provisions of the Civil Procedure Code could be made use of as regards the formalities of execution of writs etc., but regarding the delivery of possession of land to parties and purchasers, application should be made under S.52 of the Partition Act.

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

Cases referred to :

1. Samarakoon vs. S.M. Punchi Banda - 78 NLR 525.
2. Esabella Perera vs. Emalia Perera Hamine - 1990 1 SLR 13.

Lakshman Perera for Defendent - Petitioners - Petitioner.

Rohan Sahabandu for Plaintiff - Respondent - Respondent.

Cur. adv. vult.

February 20, 2001

JAYAWICKRAMA, J.

This is an application to revise and set aside the order of the learned District Judge dated 14.08.1997. The learned District Judge by his order has allowed an application made by the Substituted-Plaintiff under Section 325 of the Civil Procedure Code and made order that the Substituted-Plaintiff be placed in possession of the subject matter under Section 326(1) (b).

The Question to be decided in this case is whether a party to a partition action who was allotted a lot could proceed under Section 325 of the Civil Procedure Code without resorting to the specific provisions under Section 52(1) and Section 53(1) of the Partition Act.

By final decree dated 21.07.1997 the Plaintiff-Respondent was allotted Lot 2 in final plan No. 4223 dated 28.05.1976 in D.C. Kegalle Case No. 2703/P. Lot 1 was allotted to the Substituted-1st Defendant and pro rata costs estimated at Rs. 2438. 84 had to be paid by the 1st Substituted-Defendant to the Substituted-Plaintiff. The 1st Substituted-Defendant did not pay the costs awarded and writ was applied for and issued and the aforesaid Lot 1 was seized in execution. Thereafter the said Lot 1 was sold by public auction and at the fiscal sale the Substituted-Plaintiff purchased Lot 1. 30 other persons who were interested in the corpus challenged the auction sale and moved the Court to invalidate the sale. After inquiry on 12.02.1996 the Court dismissed that application. 3 out of the 30 persons who challenged the auction are the 2nd, 3rd and 6th Petitioners to this application.

Thereafter on 14.04.1996 by the fiscal conveyance 103, the aforesaid Lot 1 was transferred to the Substituted-Plaintiff in terms of Section 286(1) of the Civil Procedure Code and the Substituted-Plaintiff moved Court under Section 52(1) of the Partition Act for an order of delivery of possession. The Court issued a writ and when the fiscal sought to take over possession on 15.07.1996, the Petitioners objected to the taking over of

possession and resisted the fiscal. The fiscal filed his Report on 15.07.1996 and the Plaintiff-Petitioners thereafter within a month from 15.07.1996 moved Court under Section 325(1) to obtain possession as per journal entry 60. The Court after inquiry made order under Section 326(1) on 14.08.1997 directing the fiscal to place the Plaintiff in possession and the Petitioners have moved this Court in revision to set aside that order.

The learned Counsel for the Defendant-Petitioners submitted that the District Court had no jurisdiction to entertain an application under Section 325 of the Civil Procedure Code, in view of the mandatory and specific provisions set out in the Partition act. He further contended that as the particular application for execution of writ has been made in terms of the Civil Procedure Code, the said application is bad in law. He further submitted that the Court had power in terms of Section 53(1) of the Partition Act to enforce the order of delivery of possession to any person entitled thereto, in this instance namely, the Plaintiff-Respondent.

The learned Counsel for the Plaintiff-Respondent submitted that as Section 77 of the Partition Act states that the procedure to be followed in the execution stage is as governed by the provisions of the Civil Procedure Code, that one could resort to the procedure laid down in Section 325 on wards. He further submitted that when an application is made under Section 52 for an order of delivery of possession, it has not laid down, the form the said order emanating from Court should take even though in the schedule to the Partition Act, the forms are specified in respect of Section 12(2); Section 15(2); Section 16; Section 18(1)a; Section 19(3); Section 28, Section 32 and Section 46. The learned Counsel contended that the form issued under Section 52 should be the form provided for under Section 287(1) and the enforcement would be under Section 287(c) of the Civil Procedure Code. He further contended that the **cassus omissus** Section 79 of the Partition Act comes into operation in such a situation and therefore one has to follow the procedure laid down

in the Civil Procedure Code. The learned Counsel for the Plaintiff-Respondent further submitted that as the Petitioners have submitted to the jurisdiction without taking all these specific issues cannot now be heard to object to the jurisdiction and in any event the District Court had jurisdiction to look into this matter and the parties were heard, and no prejudice could be caused, in fact, if Section 53 proceedings were instituted, he would have been fined for contempt of Court whereas under Section 325 of the Civil Procedure Code it would not be tantamount to contempt of Court in the first instance. He further submitted that the Petitioner had stood to gain an advantage when the Respondent resorted to procedure under Section 325 of the Civil Procedure Code. Learned Counsel contended that Section 53 of the Partition Act is not an adequate relief which stands upon the principles that are found in justice and convenience and when Section 53 is silent as it does not state that, it is the only Section that could be resorted to, in case of resistance to an order of delivery of possession, and Section 53 only gives "the power to a Court", being an enabling section, it is the only remedy available, and the other more convenient remedies in the Civil Procedure Code are excluded, and as it accepted '***semper in dubiis benigniora preferenda***' - always in doubtful matters the more beneficial constructions should be preferred. He further contended that every procedure is presumed to be valid unless expressly stated that it is not valid.

In view of the foregoing submissions this Court has to consider the validity of the order for delivery of possession upon which the Plaintiff-Respondent could be justified.

In *Samarakoon Vs. S.M. Punchi Banda*⁽¹⁾ it was held that the provisions of Section 337 of the Civil Procedure Code do not apply where a party to a partition action applies to Court for an order to put him in possession of the lot allotted to him in the final decree. The correct procedure that should be adopted is set out in Section 52 of the Partition Act.

Udalagama, J. held:-

“And under Section 53 a Court exercising its jurisdiction in a partition action has full power to give effect to every order made in the action including the power to order delivery of possession of any land or portion of land to any person entitled thereto and to punish as for contempt Court any person who disobeys any such order. These sections are in my view, compendious enough, to give effectual possession to a party, who has been allotted shares in a final decree. There is, therefore no necessity to resort to the provisions, dealing with execution proceedings, in the Civil Procedure Code.

As there provision for the taking of possession of a lot declared in a final partition decree, there is no necessity to resort to the provisions of the Civil Procedure Code and Section 79 of the Partition Act. If the fiscal is resisted, he will report the resistance to Court and the procedure set out in Section 53 of the Partition Act will apply.

In the proceedings under Section 53, it will be open to the party resisting, to satisfy the Court, that his resistance did not constitute a contempt of the Court. This he could do, for example by showing that he had prescribed to the said lot after the final decree had been entered, and the party applying for an order of possession under Section 52, had no right to be given possession of the land.”

In the above case, the Plaintiff-Appellant made a second application for an order for delivery of possession of the lots to which he was declared entitled to in the final decree after 10 years of the first application. This application was refused by the learned District Judge upholding that Section 337 of the Civil Procedure Code applied. In view of the conclusion that

Section 337 of the Civil Procedure Code does not apply to an application under Section 52 of the Partition Act the order was set aside. In the instant case the Substituted-Plaintiff who was entitled to Lot 2 became the owner of Lot 1 which was allotted to 1st Defendant by a fiscal sale and he became the owner of both Lots 1 and 2. As both these lots are part of the corpus of the partition action, the only remedy available to the Substituted-Plaintiff is to proceed under Section 52 of the Partition Act.

In *Esabella Perera V. Emalia Perera Hamine*⁽²⁾ S.N. Silva, J. (as he was then) observed that in a Partition Action, where the respondent has been in occupation of a house as a tenant and was evicted upon an order for the delivery of possession, "*his case comes squarely within the ambit of Section 52(2) of the Partition Law.*"

Under that section "every party to a partition action who has been declared entitled to any land by any final decree entered under this law and every person who has purchased any land at any sale held under this law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the Court, shall be entitled to obtain from the Court, in the same action, on application made by motion in that behalf, and order for delivery to him of possession of the land."

As the above provisions of the Partition Law provides a specific remedy, the Plaintiff-Respondent is not entitled to resort to provisions of the Civil Procedure Code. Provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.

As far as Section 77 of the Partition Act the provisions of the Civil Procedure Code could be made use of as regards the formalities of execution of writs etc., but regarding the delivery of possession of land to parties and purchasers, application should be made under Section 52 of the Partition Act.

Section 52(a) of Act No. 17 of 1997 not only protects the interest of a person who has directly obtained title from a decree but also persons who have derived title from such person. A person who is dispossessed within 10 years of the final decree is entitled to make an application by way of petition in the same action in which the decree was entered seeking the restoration of possession.

Hence I set aside the order of the learned District Judge dated 14.08.1997.

As this being a partition action the Plaintiff-Respondent is entitled to proceed under Sections 52 and 53, if he wishes to obtain delivery of possession of the land, and it will be open to the Defendant-Petitioners to take up any defence they chooses should proceedings be initiated under Section 53 of the Partition Law. Application for revision is allowed with costs fixed at Rs.2,500/- payable by the Plaintiff-Respondent to the Defendant-Petitioners.

JAYASINGHE, J. - I agree.

Application allowed.