

PODINONA
V.
PREMADASA

SUPREME COURT.
G.P.S. DE SILVA, C.J.
KULATUNGE, J.
RAMANATHAN, J.
S.C. 1/96,
S.C. SPLA 348/95,
CALA 211/92
D.C. KEGALLE 22333/P
FEBRUARY 13, 1996.
JUNE 3, 1996.

Partition - Partition Law No. 21 of 1977 - S.32, S.42 Special Leave under S.48 (4) - Anytime not later than 30 days - Meaning.

The Appellant (10th Defendant) failed to appear at the Trial. Evidence was led and judgment was delivered on 30.9.87, and the Interlocutory Decree entered. On 10.2.89, the 10th Defendant made an application under S48 (4) for special leave to establish her Right, Title and Interest to the land. The District Court dismissed the application on the ground that it was filed prematurely inasmuch as it was filed before the date on which the return of the Surveyor under S.32 was received by Court. The Surveyor made his return on 3.11.89. On appeal, the Court of Appeal held that, the application is premature and dismissed the appeal, on appeal.

Held:

(1) It would appear that once the Court enters the interlocutory Decree the aggrieved party could make the application for relief "at any time", subject however to the qualification that the application has to be made "Not later than 30 days" after the return to the Commission under S.32 (or S.42).

(2) The section specifically sets out the last day for filing the application for relief. A final date for making the application has to be specified for otherwise, there would be no finality to the Interlocutory Decree itself.

The purpose of the reference to the return of the Surveyor in the section is to determine the last day on which the application could be filed. The reference to the return does not postulate the commencement of the time after which the application could be filed.

(3) The grievance of a party arises upon the entering of the Interlocutory Decree and that would constitute the commencement of the time for filing the application. It is the Interlocutory Decree which could extinguish or prejudice the rights of the party.

AN APPEAL from the judgment of the Court of Appeal.

Case referred to:

1. Perera v. Perera - 1978-79 2SLR - 191(CA)

N.R.M. Daluwatte, P.C. with *Gamini Silva* for 10th Defendant-Appellant.
R.K.S. Suresh Chandra for Plaintiff-Respondent.

Cur. adv. vult.

March 13, 1996.

G.P.S. DE SILVA, C.J.

This is a partition action and the date of trial was 18.8.87. The 10th Defendant who is the Appellant failed to appear at the trial. Evidence was led, and judgment was delivered on 30.9.87; interlocutory decree was entered accordingly. On 10.2.89 the 10th Defendant made an application under section 48 (4) of the Partition Law No. 21 of 1977 "for special leave" to establish her right title or interest to the land which formed the subject matter of the interlocutory decree. The District Court dismissed the application on the ground that it was filed prematurely inasmuch as it was filed before the date on which the return of the surveyor under section 32 was received by the Court. The surveyor made his return to the commission only on 3.11.89.

The 10th Defendant applied to the Court of Appeal for leave to appeal against the order of the District Court. The Court of Appeal, agreeing with the view of the District Court stated, "it is quite clear that the Petitioner has filed the papers 9 months prior to the return of the Commission. Therefore the application is premature." The 10th Defendant has now preferred an appeal to this Court against the judgment of the Court of Appeal.

The material part of section 48(4) reads thus :-

"Whenever a party to a partition action being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial and in consequence thereof the right title or interest of such party to or in the land which forms the subject matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party may at any time, not later than 30 days after the date on which the return of the surveyor under section 32. is received by the Court, apply to the Court for Special Leave to establish the right title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

The short point that arises on this appeal is whether the application for "special leave" under section 48(4) can be filed only after survey has made his return to the Commission under section 32. It seems to me that the view taken by the Court of Appeal (and the District Court) is not in accord with the plain meaning of section 48(4). It would appear that once the court enters the interlocutory decree the aggrieved party could make the application for relief "at any time", subject, however, to the qualification that the application has to be made "not later than 30 days" after the return to the Commission under section 32 (or section 42). In other words, the section specifically sets out the **last day** for filing the application for relief. As submitted by Mr. Daluwatte, a final date for making the application has to be specified, for otherwise, there would be no finality to the interlocutory decree itself. The purpose of the reference to the return of the surveyor in the section is to determine the last day on which the application could be filed. It is by reference to the return of the surveyor that the last day for filing the application is calculated. The reference to the return does not postulate the commencement of the time after which the application could be filed. I agree with the contention of Mr. Daluwatte that the "grievance" of a party arises upon the entering of the interlocutory decree and that would constitute the commencement of the time for filing the application. It is the interlocutory decree which could "extinguish" or "prejudice" the rights of the party. The case of *Perera v Perera*⁽¹⁾ which was cited by the Court of Appeal is if no assistance as the question before us did not arise for consideration in that case.

I accordingly hold that the Court of Appeal and the District Court