

## Perera v. Perera

COURT OF APPEAL.

RANASINGHE, J. AND ATUKORALE, J.

C. A. (S.C.) 267/79—D. C. GAMPAHA 16993/P.

JULY 20, 1979.

*Partition Law, No. 21 of 1977, section 32, 48 (4)—Application for relief under subsection (4) of section 48—Requirement that such application be made within thirty days of return to commission by Surveyor—Whether imperative provision.*

### Held

(1) A party who wishes to avail himself of the relief provided by section 48 (4) (c) of Partition Law, No. 21 of 1977, must make his application to Court not later than thirty days after the return to the commission by the surveyor under section 32 of the said Law has been received by the Court. This is an imperative provision.

(2) Where the surveyor is commissioned by Court to make his return on or before a certain date, there is nothing to preclude the surveyor from making his return to Court before the said date mentioned in the order and the thirty days will then run from the date of the actual return to the commission made by the surveyor.

APPLICATION to revise an order of the District Court, Gampaha.

V. Dharmalingam, with L. Hirimuthugoda, for the 16th defendant-petitioner.

L. C. Seneviratne, for the plaintiff-respondent.

*Cur. adv. vult.*

September 14, 1979.

**ATUKORALE, J.**

The plaintiff-respondent (hereinafter referred to as the respondent) filed this action to partition a land called Galabodawatta described in the schedule to the plaint. The 16th defendant-petitioner (hereinafter referred to as the petitioner) appeared before the surveyor and made claim to a share of the land, to certain plantations and also to that portion of a building which fell within the corpus surveyed. He was then added as the 16th defendant. He filed a statement of claim in which he averred that the corpus surveyed was only a part of a larger land which should have been made the subject matter of the action. He set out his title to the larger land which he described in the schedule to his statement of claim and prayed for a dismissal of the action. He made no application to court to have the larger land surveyed. The preliminary investigation into the case was fixed for 26.11.1976. On that day the Attorney-at-law appearing for the petitioner stated to court that he had no instructions from his client and that he was not appearing for him. As the petitioner refused to pay costs in the event of a postponement being granted to him, the court proceeded to hold the preliminary investigation on that day and fixed the case for trial on 17.12.1976. On that day the petitioner was absent and unrepresented and after hearing the evidence the learned District Judge delivered judgment ordering a partition of the corpus surveyed. Interlocutory decree was entered in terms of the judgment and a commission was ordered to be issued to partition the land returnable on 29.4.1977. As the interlocutory decree had not been filed by that date, court re-fixed the returnable date of the commission for 25.7.1977. On that day court ordered the commission to issue returnable on 3.10.1977. Thereafter the returnable date was extended from time to time and on 2.8.1978 it was re-extended for 1.11.1978. On 20.9.1978 the surveyor's return to the commission was received by court. On 15.11.1978 the petitioner filed an application under section 48(4) of the Partition Law asking for special leave to establish his right, title and interest to the land and to have the interlocutory decree set aside. Notice of this application was ordered to be issued on the parties returnable on 1.12.1978. On that day although no notices had been served on the parties for want of time, the respondent's attorney took notice of the application and objected thereto on the ground that the application was out of time. The learned District Judge after hearing both parties held that the application had not been made

within the time prescribed therefor and refused the application. The present application is to revise this order of the learned District Judge.

Learned counsel for the petitioner submitted to us that the learned District Judge was wrong in not issuing notices of the application to the parties who had derived interests under the interlocutory decree. He also submitted that the learned District Judge should have under section 48(4) (c) of the Partition Law proceeded to hold an inquiry on the application and if at such inquiry he was satisfied of the existence of facts set out in subsection (4) (c) of that section it was incumbent on him to have granted the petitioner special leave upon such terms and conditions as he may impose at his discretion. I do not think there is any merit in either of these submissions. Subsection 4 (a) of section 48 of the Partition Law states that a party "may at any time, not later than thirty 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 . . ." These words make it imperative that the application should be made to court not later than the prescribed period of thirty days. In the present case it is quite clear that the return of the surveyor under section 32 was received by court on 20.9.1978. The petitioner had therefore, if he wished to avail himself of the relief provided by section 48(4) (c), to apply to court not later than thirty days after 20.9.1978. He filed the application on 15.11.1978 which was clearly beyond the period prescribed. In view of the clear and plain meaning of the words used in the subsection, I cannot agree with the submission of learned counsel for the petitioner that the thirty days must be computed from 1.11.1978, namely the date fixed by court for the return of the commission. On a consideration of sections 27 and 28 of the said Law together with the form prescribed in the Second Schedule thereto, it is clear that the surveyor was commissioned by court to make his return on or before 1.11.1978. There was thus nothing to preclude the surveyor from making his return to court on any day prior to 1.11.1978. Hence the application of the petitioner was not one that the court could have entertained as it was out of time. There was thus no duty cast on court to issue notices on the parties concerned. When this matter was brought to the notice of the learned District Judge, he quite correctly rejected the application. For the above reasons the present application is refused with costs fixed at Rs. 210.

**RANASINGHE, J.**—I agree.

*Application dismissed.*