
**SIRISENA PERERA AND ANOTHER
VS
VINSON PERERA**

COURT OF APPEAL
WIJAYARATNE J. AND
SRIPAVAN, J.
CA (REV.) 1993/2001
D. C. KALUTARA 5994/P
AUGUST 31, 2004

*Partition Law, No. 21 of 1977, amended by Act, No. 17 of 1997, section 67(3)-
Injunction - Special jurisdiction - Necessary ingredients-Civil Procedure Code,
section 662.*

The partition action instituted by the plaintiff respondent was dismissed. The plaintiff appealed. Pending the appeal the plaintiff-petitioners made an application under section 67(3) of the Partition Law praying for an injunction restraining the defendant respondents from carrying on any construction work of the subject matter on the ground that the defendant respondent had obtained the approval of the building plan contrary to law and that the defendant respondents were unlawfully changing the nature/character of the corpus. Injunction was granted.

HELD:

1. Specific provision of section 67(3) empowers the court to make orders, pending appeal necessary for the purpose of preventing of waste or damage to the subject land. The court has not considered whether the alleged construction would cause waste or damage - there is no finding that such construction would cause waste or damage to the land necessitating an order to prevent same.

2. The fact that a convenient division of the land may be affected adversely is not a waste or damage to the land. Any other factor than the waste or damage to the land, shall not be the basis of the court exercising special jurisdiction granted to it under section 67(3).

Per Wijayaratne, J.

"Even if the defendant respondent petitioner is considered to be a co-owner of the land in extent 57 perches despite plaintiff petitioner respondent's action being dismissed, he is entitled to build without the plaintiff petitioner-respondent's consent, *vide* approved building plan, if he is not shown to utilize an extent disproportionate to his share of the land."

APPLICATION in Revision from an order of the District Court of Kalutara.

Case referred to :

1. *Elpinona vs Punchi Singho* - 52 NLR 115

S. C. B. Walgampaya P. C., with *W. A. N. Jayanath* for defendant respondent petitioner.

O. W. K. Gunasena with *R. M. Tilakaratne* for plaintiff respondent respondent.

Cur.adv.vult.

October 21, 2004

WIJAYARATNE, J.

The plaintiff-petitioner-respondent instituted action for the partition of the land described in the schedule to the plaint in the above styled action No. P 5994, on the basis that he and the 1st to 5th defendants-respondents-petitioners are the co-owners of the land in suit. The defendant-respondent-petitioners filed their statement of claim after the preliminary survey of the

land claiming shares in the land and the entirety of the improvements and the plantations on the land. The respective parties at variance of claims, suggested several points of contest on which the trial proceeded. The learned trial Judge having heard and considered the evidence held that plaintiff failed to prove his title and possession of the rights he claimed and the defendants too failed to prove the devolution of title in the manner given in the pedigree though he accepted that the defendants were in possession of improvements including plantations, dismissed the plaintiff's action. The plaintiff appealed from such judgment dated 03.10.2000. Pending such appeal, the plaintiff-petitioners on 22.06.2001 made application against 1-3 defendant-respondents under and in terms of Section 67(3) of the Partition Law, No. 21 of 1977 as amended by Act, No. 17 of 1997 read with Section 662 of the Civil Procedure Code, praying for an injunction restraining the defendant-respondents from carrying on any construction work of the subject matter of the above action on the grounds that the defendant-respondent obtained the approval of a building plan contrary to law and that the 1st and the 2nd defendant-respondents unlawfully changed the nature/character of the corpus acting contrary to the provisions of the Partition Act. The defendant-respondent showed objection to the grant of such relief by way of injunction and the declaratory relief sought by the plaintiff-petitioner, when given notice of the application. The Court inquiring into the matter resolved the same by way of pleadings, affidavits and written submissions tendered by the parties, after consideration of the same, issued injunction in terms of the enjoining order issued at the stage the Court entertained the application for the same. Alleging that the order granting the injunction is perverse and causing very grave hardships and inconvenience, the defendant-respondent-petitioner made this application invoking the revisionary jurisdiction of this Court seeking to set aside the order of the learned District Judge delivered on 02.11.2001 and discharge of the injunction issued against them restraining them from constructing any buildings on the land in suit.

Given notice of this application for revision, the plaintiff-petitioner-respondent filed his statement of objection alleging that the defendant-respondent-petitioners have attempted to mislead Court and the construction if completed would cause serious damage and irreparable loss to other co-owners who may get their share of the land and it definitely changes the character of the land and adversely affects the rights of the other owners. At the stage of arguments the parties moved Court to dispose

of the matter by way of written submissions to be tendered by the parties, which this Court now considers.

It is common ground that the application for injunction was made pending partition and in terms of Section 67(3) of the Partition Act.

Section 67(3) states

“Where an appeal has been preferred against any judgement, decree or order made or entered by any court in any partition action, such court may, on application made by way of petition and affidavit in that behalf, make such orders, pending the determination of the appeal, as may be necessary to prevent any waste, or damage to the land in respect of which such action was instituted. Any such order may be given effect to in the manner provided for in section 53.”

The defendant-respondent-petitioners have conceded that they were carrying out some construction work which they stated was renovation of existing buildings. What was in dispute was whether the construction was of the nature of renovation or whether they were new constructions. The learned District Judge upon examination of relevant documents concluded that the defendant-respondents attempted a new construction and the plaintiff-petitioner-respondent alleged that it was an attempt to mislead Court when they stated that it was only a renovation of existing buildings. The learned District Judge who inquired into the matter of granting the injunction has concluded that the action to partition the land in suit did not come to an end and therefore any new construction would cause a change in the corpus resulting in irreparable loss and damage to the other parties to the action. The injunction was granted upon conclusion and consideration of loss and damage the parties other than the defendant-respondents would suffer. It appears on the impugned order of the learned District Judge, that the sole criterion used in the exercise of the jurisdiction to grant the injunction prayed for is the likelihood of the construction changing the nature/character of the land and the irreparable loss and damage that would be caused to the other party, the plaintiff-petitioner who invoked the jurisdiction of the Court.

However, the Court exercised its jurisdiction to grant the injunction in terms of Section 67(3) of the Partition Act, conceding the fact that it was

exercising such jurisdiction despite the dismissal of the action but on the basis of express provision empowering the Court to make orders as envisaged under such provisions notwithstanding the Court being *functus officio* or ceased to have jurisdiction over the matter. Accordingly the Court should exercise such special jurisdiction within the ambit of the section empowering the Court and strictly according to the conditions stipulated therein.

The specific provisions of Section 67(3) of the Partition Act empowers the Court to make orders, pending appeal necessary for the purpose of preventing of 'waste or damage' to the subject land of the partition action. The learned District Judge did not consider the alleged construction would cause 'waste or damage' to the land. There is no finding by the learned District Judge that such construction would cause 'waste or damage' to the land necessitating order to prevent the same. The plaintiff-petitioner-respondent too has not complained of any waste or damage to the land which is the subject of the partition action. His allegation that construction would change the character/nature of the land is without any basis. Any construction on a buildable land cannot reasonably be described or considered as tending to change the nature/character of the land unless there is specific reference to the nature of such change and any change to be considered as causing waste or damage to the land there should be specific evidence of such waste or damage. The mere fact that a convenient division of the land may be affected adversely is not a waste or damage to the land. Any other factor than the waste or damage to the land, shall not be the basis of the court exercising special jurisdiction granted to it under Section 67(3) of the Partition Act. Any irreparable loss and damage certainly is no ground in terms of Section 67(3) to exercise the special jurisdiction pending appeal.

The apprehension of the plaintiff-petitioner-respondent that in the event of defendant-respondent-petitioner being allowed to construct the house will result in his losing proportionate share of the road frontage is definitely no ground to make orders under and in terms of Section 67(3) of the Partition Act, specially in view of the fact that such an event will entitle him under partition law to compensation to the extent of loss of share of road frontage and that a matter that can be remedied by payment of compensation is a ground even during the pendency of an action to refuse an injunction for damage or loss if any then is not considered irreparable.

The plaintiff-petitioner-respondent has always conceded that the defendant-respondent-petitioners are co-owners of the land sought to be partitioned. The 1st defendant-respondent-petitioner has exclusively claimed all the buildings and plantations except three coconut trees of 100 years of age and plaintiff-petitioner-respondent had no claim or dispute against the claim made by the 1st defendant who obviously was in the possession of the land at the time of survey.

In the case of *Elpinona Vs. Punchi Singho* ⁽¹⁾ it was held.

“a co-owner has the right to build on the common property without the consent of his co-owners, provided that he acts reasonably and to an extent which is proportionate to his share and he does not infringe the co-proprietary rights of his co-owners....”

Even if the defendant-respondent-petitioner is considered to be a co-owner of the land in extent 57 perches despite plaintiff-petitioner-respondents action being dismissed, he is entitled to build without the plaintiff-petitioner-respondent's consent, *vide* approved building plan, he is not shown to utilize an extent disproportionate to his share of the land.

The learned District Judge has granted the injunction on grounds other than those specified in Section 67(3) of the Partition Act and on improper consideration. The order impugned is thus contrary to law and specially to provisions of Section 67(3) of the Partition Act. It results in a miscarriage of justice and hence this Court acting in revision sets aside the order of the learned District Judge dated 02.11.2001 and discharges the order affirming the enjoining order issued on 27.06.2001.

The defendant-respondent-petitioner is entitled to the costs of this application fixed at Rs. 5,000.

SRIPAVAN, J. — I agree.

Application allowed.
