

EASWARY

v

SIVANATHAN AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
ABEYRATNE, J.
CALA 234/2002
DC COLOMBO 17262/P
OCTOBER 30, 2002

Law of Thesawalamai – Partition Law 21 of 1977 – Plaintiff filed against wife not making husband a party – Is it valid? – Court making order to amend plaintiff by adding the husband – Legality.

Held:

- (i) The only defect in the plaintiff is the failure to make petitioner's husband a party. No relief is claimed against the petitioner. This being a partition action, the plaintiff can file another action even if the case is dismissed.
- (ii) There is no prejudice caused to the petitioner by allowing the plaintiff to amend the plaintiff by adding the petitioner's husband or any advantage to her dismissing the action.

APPLICATION for Leave to appeal from the Order of the District Court of Colombo.

Cases referred to:

1. *Ibrahim v Annamma* – 1982 2 SRI LR 633 (distinguished)
2. *Candappa v Sivanathan* – CALA 206/92 – CA 712/92, CAM 28.5.93 (distinguished)

S. Mandaleswaran with P. Peramunegama to appellant

F.C. Perera for plaintiff-respondent.

Other respondents absent and unrepresented.

Cur.adv.vult.

August 26, 2003

AMARATUNGA, J.

This is an application for leave to appeal against the order of the learned Additional District Judge dated 06/06/2002 allowing the petitioner's husband to be added as a party to the partition action. 01

The plaintiff-respondent has filed this partition action for the partition or the sale of a block of land about 21 perches in extent situated at Kotahena. According to the plaint all parties to the partition action are persons governed by the Thesawalamai Law. The plaintiff is one of the sons of the original owner of the property. The appellant is a daughter of the original owner. It is stated in the plaint that the appellant was given in marriage with a dowry without leaving a right to her to be an heir to the intestate estate of the original owner. The petitioner has sought a decree for the partition or sale of the property among other children and the heirs of the deceased children of the original owner. The plaintiff has not conceded any share of the property to the 1st defendant-petitioner and it is stated in the plaint that she has been named as a defendant to enable her to prove if she has any right to the property. 10

The 1st defendant has filed her statement of claim. In her claim she has stated that the property sought to be partitioned was her proposed dowry; that her father has fraudulently got the deed of purchase written in his name; that she and her husband with their money constructed a house in the said property which now bears assessment Nos 45 and 45/1; that during the riots in July 1983, the building was partially destroyed; that her husband got the property 20

released to him by REPIA and rebuilt the house; that Arulananthan, one of her brothers had transferred his rights to the property to her by deed in 1972 and that she and her husband had acquired prescriptive title to the corpus to be partitioned.

She has further taken an objection to the validity of the plaint on the ground that she being a woman subject to Thesawalamai is not a feme sole who can sue or be sued without making her husband a party. On this submission the Court having heard submissions of parties has made order allowing her husband to be added as a party or the plaintiff to file an amended plaint. 30

In this appeal the petitioner seeks to have that order set aside and the plaint in the partition action dismissed. It is the correct legal position that a married woman subject to Thesawalamai cannot appear in Court without being assisted by her husband. *Ibrahim v Annamma*.⁽¹⁾ In *Candappa v Sivanathan*⁽²⁾ it was held that a plaint filed by a married woman subject to Thesawalamai without the assistance of her husband is not a valid plaint and as such an amendment cannot be brought to a plaint which has no existence in law. 40

In this case there are several other defendants and as far as they are concerned there is a valid plaint. In the plaint the only defect is the failure to make the petitioner's husband a party. In this action no relief has been claimed against the petitioner and it is specifically stated that she has been made a party to enable her to establish any right she has to the property sought to be partitioned. This being a partition action, the plaintiff can file another action even if this case is dismissed. In *Ibrahim v Annamma (supra)* the action was on a promissory note. In such a case if the action is not properly constituted the dismissal of the action can produce some meaningful result to the adverse party. After the dismissal of the action and before a fresh action is filed the cause of action might become prescribed. In a partition action no such thing can happen. Therefore the dismissal of the action would not result in any meaningful benefit to her. On the other hand it can further delay this action causing prejudice to the other parties. 50

In this case the land sought to be partitioned belonged to the father of both the petitioner and the plaintiff. The petitioner has 60

pleaded prescriptive title and also that the father held the land in trust for her. These are matters to be adjudicated at a trial. The amendment allowed is merely to cure the defect in the plaint. In these circumstances I cannot see any prejudice caused to the petitioner by allowing the plaintiff to amend the plaint by adding the petitioner's husband as a party and any advantage to her by dismissing the action. Accordingly the appeal is dismissed without costs.

ABEYRATNA, J. - I agree

Application dismissed.