

ABEYRATNE

v.

ROSALIN

COURT OF APPEAL
EDUSSURIYA, J. (P/CA)
JAYASINGHE, J.
C.A. 360/88(F)
D.C. KEGALLE 19789/P
APRIL 27, 1999

Partition Law 21 of 1977 - S.66, S.67 - Transfer of Right, Title and interest pending Partition Action - Can the transferee be added? Should the transferee be allotted shares in the judgment.

Held :

- (i) Though the 3rd Defendant - Respondent had transferred his right, title and interest to the 3rd, 23rd and 24th Defendants (Appellants) they had no right or status to be added as a party.
- (ii) They cannot be awarded undivided rights by the judgement and the interlocutory decree.

APPEAL from the judgement of the District Court of Kegalle.

N. R. M. Daluwatte, P.C., with Gamini Silva for the 23rd and 24th Defendant - Appellants.

S. C. B. Walgampaya with W. A. N. Jayanath and S. A. D. S. Suraweera for the Plaintiff - Respondent.

Cur. adv. vult.

June 11, 1999.

EDUSSURIYA, J. (P/CA)

This appeal has been filed from the Judgment of the learned District Judge of Kegalle in an action instituted by the Plaintiff - Respondent to partition the land called Galpottehena described in the schedule to the plaint and depicted in Plan 2136 (X) dated 21st May 1973, made by K. Kapugeekiyana, Licensed Surveyor.

It is common ground that the Appellants had after the institution of this action purchased on deed 24D1 contingent rights, namely, the lot that may be allotted to the 3rd Defendant by the Final Decree in this action. So that, clearly the Appellants had no interest whatsoever in the corpus and as such had no right or status to be added as parties under Section 67 of the Partition Law. Not only were the Appellants added as the 23rd and 24th Defendants but were also awarded undivided rights by the Judgment and the interlocutory decree, in spite of the manner in which issues 5, 6 and 18 were raised by Counsel for the 3rd, 23rd and 24th Defendants at the trial. Counsel for the 3rd, 23rd and 24th Defendants quite correctly only claimed rights on behalf of the 3rd Defendant.

Although by deed 24D1 the 3rd Defendant has sold and conveyed "All my right title and interest or whatever share or lot that will be allotted to me in the District Court, Kegalle partition Case No. 19789", this deed is only valid to convey the lot that will be allotted to the 3rd Defendant vendor, in view of the several decisions of this Court and the former Supreme Court which dealt with the effect of Section 17 of the Partition Ordinance, Section 67 (2) of the Partition Act of 1951 and Section 66 of the Partition Law of 1971.

Therefore, that part of the Judgment and interlocutory decree awarding undivided shares to the 23rd and 24th Defendants must necessarily be set aside and those shares awarded by the Judgment and interlocutory decree to the 23rd and 24th Defendants must be awarded to the 3rd Defendant.

This would result in the Appellants appeal being dismissed.

Counsel for the Appellants contended that the Appellants have a right to maintain this appeal as the Plaintiff - Respondent did not object to their being added as parties or to their participating at the trial, and also because the 3rd Defendant is no longer interested as he was not allotted any rights by the Judgment and interlocutory decree.

However, as I have hereinbefore mentioned the Appellants quite rightly claimed no rights at the trial. The Appellants and the 3rd Defendant were represented by the same counsel and issues 5, 6 and 18 were all raised on behalf of the 3rd Defendant. Therefore when the District Judge awarded undivided shares to the Appellants, an appeal should have been filed in the name of the 3rd Defendant. Therefore, Appellants 'Counsels' contention is not tenable. I will next consider the appeal on merit, assuming that the Appellants are entitled to maintain this appeal.

Counsel for the Appellants urged, firstly, that the Appellants predecessor in title had possessed a portion of the corpus depicted in Plan X as a separate land on the basis of Plan 3D5 and acquired prescriptive title to the said portion. Even Plan 3D5 sets out that it is a Plan of allotments of land called Galpottehena and Nagahahena Watte. However, that Plan 3D5 was not superimposed on Plan X to show the portion of the corpus which the Appellants claim by prescription. Counsel for the Appellants conceded that this was not infirmity in their case.

In any event, although evidence of a same may have been led at the trial, the question of prescription was not put in issue at the trial.

What was put in issue by issue No. 18 was that the 3rd Defendant and his predecessor in title had acquired prescriptive title to the entire corpus.

The Appellants cannot succeed in their claim of prescriptive title to the entirety in as much as their predecessor in title was a co - owner and there is no evidence of an overt act of ouster.

These were the only matters urged at the hearing of this appeal.

Therefore, the appellants cannot succeed even on merit.

This Court sets aside (1) the answer to issue No. 6 and answers it in the affirmative, (2) that part of the Judgment

awarding 250/3360 shares to the 23rd and 24th Defendants and awards the same to the 3rd Defendant, (3) that part of the Judgment awarding the Rubber Plantation on lot 1 in Plan X to the 23rd and 24th Defendants and awards the same to the 3rd Defendant, (4) that part of the Judgment awarding the plantation claimed by the 12th Defendant to 23rd and 24th Defendants and awards the same to the 3rd Defendant.

The interlocutory decree is to be amended accordingly.

The appeal is dismissed with costs fixed at Rs. 5250/-.

JAYASINGHE, J. - I agree.

Interlocutory Decree - Varied

Appeal dismissed.