

**1975 Present: Samerawickrame, J., Udalagama, J., and Weeraratne, J.**

**S. M. S. B. SAMARAKOON, Appellant and S. M. PUNCHI-BANDA and others, Respondents**

**S. C. 197/70 (Inty)—D. C. Kandy 4236/P**

*Partition Act—Sections 52, 53 and 79—Applicability of Section 337 of the Civil Procedure Code.*

The provisions of Section 337 of the Civil Procedure Code do not apply where a party to a partition action applies to Court for an order to put him in possession of the lots allotted to him in the final decree. The correct procedure that should be adopted is set out in Section 52 of the Partition Act.

**A**PPEAL from an order of the District Court, Kandy.

*Nimal Senanayake with Miss S. M. Senaratne and R. Perera for the Plaintiff-Appellant.*

*H. W. Jayewardene with Miss I. V. Marasinghe for the Defendant-Respondents.*

*Cur. adv. vult.*

June 6, 1975: UDALAGAMA, J.—

The plaintiff-appellant brought this action to partition the divided western portion out of Heenatiponayage Kumbura of two pelas paddy sowing extent and Mederiyangodahena of 1½ acres in extent, and on 11.9.1955 final decree was entered allotting to the plaintiff lot No. 1 in final plan No. 4105A of 4.1.1955 and lot No. 1 in final plan No. 4106A of 4.1.1955.

On 3.7.57 the plaintiff-appellant applied for an order to put him in possession of the said lots allotted to him in the final decree. This application was allowed on 23. 1. 1961. The plaintiff-appellant however did not pursue with this application and obtain possession of the said respective lots. According to affidavit filed of record in this case, the defendants who are his brothers, had persuaded him not to humiliate them, by taking possession of the lot through the fiscal with all the attendant publicity such a step would involve. Further they promised to sell their shares of the said two lands to him (Plaintiff-Appellant). However, the defendants in breach of this undertaking, were found by the plaintiff-appellant taking steps in 1968, to sell their rights to outsiders. So on 5.3.68, the plaintiff-appellant applied for writ of possession.

The learned District Judge had wanted notice of the application, given to the other parties. On 22.2.70 the 1st defendant-respondent filed objections against the issue of writ alleging inter-alia :—

- (1) That there had been earlier applications on 24.6.57 and 29.2.68 and the plaintiff-appellant had failed to show due diligence.
- (2) That 10 years had elapsed, since decree was entered and therefore the present application could not be maintained.

The learned District Judge upheld the objection of the 1st defendant-respondent and refused to issue an order to place the plaintiff-appellant in possession of the respective lots.

The objections raised by the 1st defendant-respondent rest on the short question, whether Section 337 of the Civil Procedure Code applies in an application for an order, under a final decree, directing the fiscal to place the applicant in possession of the lots allotted to him in the final decree and to eject any person in unlawful possession thereof.

Under Section 52 of the Partition Act, every party to a partition action who has been declared entitled to any land by any final decree entered under the Act shall be entitled to obtain from the Court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land.

And under Section 53 a Court exercising its jurisdiction in a partition action has full power to give effect to every order made in the action including the power to order delivery of possession of any land or portion of land to any person entitled thereto and to punish as for Contempt of Court any person who disobeys any such order.

These sections are in my view, compendious enough, to give effectual possession to a party, who has been allotted shares in a final partition decree. There is, therefore no necessity to resort to the provisions, dealing with execution proceedings, in the Civil Procedure Code.

The case of *Hadjiar v. Mohamadu*—4 CWR—371 was decided under the old Partition Ordinance which did not contain provisions similar to Sections 52 and 53 of the Partition Act — Section 79 of the Partition Act provides for resort to the provisions of the Civil Procedure Code, if there is a casus omissus in the Act. As there is provision for the taking of possession of a lot declared in a final partition decree, there is no necessity to resort to the Provisions of the Civil Procedure Code under Section 79 of the Partition Act.

Learned counsel for the plaintiff-appellant also relied on the decision—*Charles Singho v. Appuhamy*—58 CLW—83. In the view, I have taken that Section 337 of the Civil Procedure Code would not apply, in the present case, I do not think, it would be necessary to consider the correctness of the decision in that case.

The correct procedure that should be adopted in giving possession of a divided lot, to a party who had been declared entitled to it under a final partition decree, is set out in Section 53 of the Partition Act.

A party requiring possession must apply by way of a motion in the same action for an order for the delivery of possession of the lot. The Court thereafter on being satisfied that the person applying is entitled to the order will issue an order to the Fiscal to put the party in possession of the lot. The Fiscal on receiving the order, will repair to the land and deliver possession of the lot to the party.

If the Fiscal is resisted, he will report the resistance to Court and the procedure set out in Section 53 of the Partition Act will apply.

In the proceedings under Section 53, it will be open to the party resisting, to satisfy the Court, that his resistance did not constitute a Contempt of the Court. This he could do, for example by showing that he had prescribed to the said lot after the final decree had been entered, and the party applying for an order of possession under Section 52, had no right to be given possession of the land.

In the present case, the plaintiff-appellant applied to have himself placed in possession of the lots to which he was declared entitled to, in the final partition decree on 3.7.57. On 23.1.61 the learned District Judge allowed the application "if in order".

I agree with the learned counsel for the plaintiff-appellant that this was a most unsatisfactory order and amounted to no order. Be that as it may, the plaintiff-appellant did not proceed to take delivery of possession of the lots, for the reasons stated in the affidavit of 30.10.68 and referred to by me earlier at the beginning of this judgment.

On 5.3.68 the plaintiff-appellant made a second application for an order for delivery of possession of the lots to which he was declared entitled to in the final partition decree. This application was refused by the learned District Judge upholding that Section 337 of the Civil Procedure Code applied.

In view of the conclusion I have arrived at, that Section 337 of the Civil Procedure Code does not apply to an application under Section 52 of the Partition Act, the learned District Judge's order cannot be upheld.

I would set aside the order of the learned District Judge appealed from and allow the application of the plaintiff-appellant for an order of delivery of possession of Lot 1 in final plan No. 4105A of 4.1.1955 and lot 1 in final partition plan No. 4106A of 4.1.1955. It will be open to the 1st defendant to take up any defence he chooses should proceedings be initiated under Section 53 of the Partition Act. The plaintiff-appellant will be entitled to the costs of the inquiry held on 25.10.70 and the costs of this appeal.

SAMERAWICKRAME, J.—I agree.

WEERARATNE, J.—I agree.

*Appeal allowed.*