

IN THE COURT OF APPEAL OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

CA No.596/97 (F)
DC Balapitiya Case No.1705/P

Kodituwakku Shelton Ariyaratne
of Kinnaliyadda-watte
Akureliya, Baddegana – 80200

Substituted 6th Defendant/Appellant

Vs.

Jayanthapriya Sarath Abeynayake
Of “Abhaya”
Sandarawala, Baddegana – 80200
Et.al

Plaintiff/Respondent

Before: Janak De Silva J.
&
N. Bandula Karunaratna J.

Counsel: Bimal Rajapakse with Amrit Rajapakse and Nimesha Rodrigo for
the Appellant.
Rohan Sahabandu PC with Chathurika Elvitigala for the Plaintiff-
Respondent.

Written Submissions: 10.09.2019 and 24/07/2019 by the Substituted 6th
Defendant/Appellant.
14/10/2019 by the Plaintiff/ Respondent

Argued on: 23/07/2019

Judgment on: 16/11/2020

N. Bandula Karunaratna J.

This Appeal is preferred by the 6th Defendant Appellant (hereinafter referred to as the Appellant) seeking to set-aside the Order dated 12.08.1997 by the Learned Additional District Court Judge/Magistrate of Balapitiya.

Plaintiff Respondent (hereinafter referred to as the Respondent) filed this Partition Action on 2/2/89 to partition a land called and known as ‘Kinnara Liyadde Watte’ and ‘Kinnara Liyadde Owita’ comprising of A1-R1-P20’.

The Respondent states that the Appellant is not entitled to any share of the corpus. She has been made a party as she was in possession. Original Appellant never appeared in Court and

failed to file a Statement of Claim, though present at the preliminary survey on 13/10/94. Her senior counsel Mr.Senarat Mendis informed Court on the 05/01/1995, when this case was taken up for trial that he has "no instructions" from his client who was the original 6th Defendant Appellant.

The Appellant was a licensee of the Plaintiff. It was revealed when the Plaintiff answered a question posed by the Trial Judge on the 13/10/1994. However, Respondent graciously agreed to give the house standing on lot I, in the Preliminary Plan X, to the original Appellant considering her long stay.

The Learned District Judge, as requested and agreed upon by all parties, directed to hand over the house standing on lot I (marked A), to original Appellant.

Later, Original Appellant agitated to get a share of the soil, as well. The Learned Trial Judge has considered and proceeded same to have an inquiry in terms of sec.48 of the Partition Act. Accordingly, the Trial Judge has fixed the matter for inquiry on 17.03.1997, giving an opportunity to the Appellant's application. At this time of inquiry, the Plaintiff and the Appellant had agreed to a settlement. This was as per journal entry No.56 dated 17.03.1997. The Plaintiff has agreed to give 10 perches to the Appellant, including the house which was occupied by the Appellant. By Order made on 12/8/97, the said settlement has been signed by the Appellant who appeared with his registered Attorney on the said date before the trial Judge.

The Appellant instituted this action in the Court of Appeal on the ground that she is entitled to an undivided one-tenth (1/10) of the subject matter and not nearly 10 perches, from and out of the disputed land. Her claim is based on a deed No. 7367 dated 27/08/1965, written by Hewawithana N.P. The schedule of the Plaintiff is different from the schedule of the said deed. Therefore, the claim of the Appellant does not relate to the subject matter of this Partition action.

It is evident that the original owners were, one Johanis De Silva Abeynayaka Wijesekara, who owned 7/8 shares and the balance, 1/8 was with Kukulage Udaris. The said Johanis De Silva had transferred 3/8 shares out of his rights to 3 people- Wilson Abeynayake, Margret Abeyanake and Harold Abeynayake by Deed No. 2871 dated 29/08/1943.

The said Harold got married to one Padma Abeygunawardhana and died leaving behind his wife Padma and child – Channa Abeynayake. The aforesaid Wilson, Margret, Padma and Channa had transferred all their shares to Plaintiff by Deed No.5053, dated 18/11/1988.

The rest of 4/8 share of aforesaid original owner Johanis De Silva had devolved on his 4 children. That is the 1st Defendant, Harold Abeyanake, 4th and 5th Defendants. The aforesaid Kukulage Udaris had transferred the balance share of the corpus 1/8, to Richard Abeynayake by Deed no. 3121 dated 16/11/1914.

The said Richard Abeynayake married Emgina Gunawardhana and both died leaving behind 3 children- Badhra, Kamala and Sumana who transferred all their shares, 1/8 to Plaintiff by Deed No.12769 dated 20/11/1988.

It is the position of the Appellant that the case was mentioned for the final plan on 25.10.1995. Thereafter the Appellant made an application as per the Journal entry No. 48 dated 13.12.1995, filing her objections through the Registered Attorney, stating that she was not summoned and also stated that the journal entry dated 13.10.1994 at page 109 of the Brief had been recorded by an error. She states that it is due to this reason she could not file any statement of claim and she was absent and unrepresented.

However, it is very clear that as per the Journal entry No.21 dated 12.06.1991 at page 40 of the brief, it was recorded that the summons has been served to the 6th and 7th Defendants, hence the 6th Defendant Appellant's contention that he was not summoned by Court, is not true.

Moreover, under Sec. 12 of the Partition Law after Lispendens is registered the Plaintiff cause to be filed in Court a declaration under the hand of an Attorney at Law, certifying that all such entries maintained under the Registration of Documents Ordinance as relating to the land constituting the subject matter has been personally inspected by that Attorney at Law. That was after the registration of the Lispendens and containing a statement of the names of every person found upon the inspection of those entries, to be a person whom the Plaintiff is required by Sec.5 to include in the Plaint as a party to the action. This is commonly called as the sec. 12 declaration.

Section 12 of the Partition Act is as follows;

(1) After a partition action is registered as a lispendens under the Registration of Documents Ordinance and after the return of the triplicate referred to in section 11, the plaintiff in the action shall file or cause to be filed in court a declaration under the hand of an attorney-at-law certifying that all such entries in the register maintained under that Ordinance as relate to the land constituting the subject-matter of the action have been personally inspected by that attorney-at-law after the registration of the action as a lispendens, and containing a statement of the name of every person found upon the inspection of those entries to be a person whom the plaintiff is required by section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid register, that address.

The importance of Sec.12 declaration was examined in Somawathie Vs. Madawela (1983)2 SLR 15, by Justice Soza, at pages 30 and 31. It states that, Sec.12 declaration is a legal imperative. It is a declaration that gives the green light for the case to proceed. The purpose of this declaration is to satisfy conscience of the Court, that all persons who are seen upon inspection of the entries in the land Registry, to be persons entitled to a right share interest in the Court issued summons.

This shows the importance of Sec 12 declaration.

In the instance case, it is seen that the Sec. 12 notice has been registered and the Appellant had been summoned according to journal entry 11 and 21.

Therefore, it is my view that, as per the Partition Law and affidavit dated 13.12.1995, filed by the Appellant, objecting to the final Partition Plan No.1187, dated 23/10/1995 by surveyor Pathirana, stating that the Appellant did not receive any summon and therefore Appellant was not heard, is an erroneous contention made by the Appellant.

According to the inquiry fixed by the learned trial Judge awarding an opportunity as per section 48, the Appellant had agreed to a settlement as per journal entry No.56 dated 17.03.1997. Accordingly, the Plaintiff has agreed to give 10 perches including the house which was occupied by the Appellant and the said settlement has been signed by the Appellant who appeared with her Registered Attorney on the said date before the trial Judge.

Therefore, the contention made by the Appellant, that she has signed it without proper understanding cannot be considered as a fair request when she was represented by an Attorney at Law.

Furthermore, it is important to note that one cannot appeal against a settlement order. That party has to move by way of Restitution in Intergram.

It was decided in Nandawathie Vs Jayathilaka and Others (2005) 3 SLR 230, that once the terms of settlements agreed upon are presented to court and notified thereto and recorded by court a party cannot resile from the settlement even though the decree has not yet been entered.

It is important to note that in Lameer Vs Senarathna (1995) 2 SLR 13, it was held that, a client cannot seek to set aside a settlement so entered when he has signed the case record.

While this Appeal was pending, the 6th Defendant Appellant died on the 12/02/2018 and his son was added as the Substituted 6th Defendant Appellant.

In the circumstances, it is my view that the Appellant has understood the settlement terms and the learned Judge/ Magistrate has properly analyzed, explained and concluded this Partition case finally by his order dated 12.08.1997.

For the aforesaid reasons, we affirm the Order of the learned Additional District Judge/Magistrate of Balapitiya dated 12/08/1997 and dismiss this Appeal with cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal