SPECIAL CHARACTERISTICS OF THE PARTITION ACT: AMENDMENT OF THE PLAINT AFTER RETURNING THE PRELIMINARY SURVEY IN A PARTITION ACTION

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Historical Back Ground

Co-ownership* of the undivided land is a major land dispute in the scenario of Sri Lankan land Law. A Partition action is the mostly recommended mechanism to terminate the co-ownership among all the co-owners by the intervention of judiciary. The partition law had been introduced through British legal system by way of a Partition ordinance No 10 of 1863 which is an instrument to end-up the co- ownership. In additionally drafting a Partition deed among all the co-owners is another mechanism of terminating the co-ownership, but if there is a lack of intention of following the agreement to divide the land, the partition action is the only solution to terminate the Co-ownership. According to the No 16 of 1951 Partition Act, a separate procedure had been introduced to conduct a partition action.

The Partition Act No 21 of 1977 has been enacted to accurate the partition procedure but most of the core materials which are relevant to the action, have been absorbed from the Partition Act No 13 of 1951. The distinguish fact is that the final partition decree considers as a *jus in rem* (against the whole world) and the final decree gives the *abintio,*a clear title to the land.

In the case of ***Hettige Don Tudor*** Vs ***Hettige Don Ananda Chandrasiri and others*** (Unreported , SC Appeal 134/2016 Decided 0n 19.02.2018) Eva Wanasundara J held that:

"An action for partition of land is an action in rem. When the decree in a partition action is entered, it is a decree in rem which binds the whole world and not only the parties to the partition action. It will be effective at all times. That is the vital point and the basis for the Partition Law being enacted. The provisions are imperative."

Special Characteristics of the Partition Act No 21of 1977

According to section 25 of the partition Act gives paramount directions to the Trial Judge for identifying the corpus and investigating the title in a proper manner.

Section 25(1) of the partition act read as follows:

"(1) On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and. fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."

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Further, in the case of ***Jayasuriya*** vs ***Ubaid*** (61 NLR 352) Sansoni CJ held that

"In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open him to call for further evidence(in regular manner) in order to make a proper investigation."

In the case of ***Sopinona*** Vs. ***Pitipanaarachchi and two others***, (2010 1 S.L.R. 87) Marsoof J clearly held that;

"*Clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title."*

On perusal of the above judgments, there is a special duty cast on the Trial Judge to identify the corpus. However the mere discrepancies with regard to the extent between the preliminary survey report and the schedule to the plaint can be ignored without dismissing the action.

In the case of ***Gabrial Perera*** Vs ***Agnes Perera*** (43 CLW 82) held that :

"In a deed the partition of the land conveyed is clearly described and can precisely ascertained, a mere inconsistency as to the extent thereof should be treated as a mere false demonstration not affecting that which is already sufficiently conveyed."

The above decision was followed in ***Yapa Vs Dissanayake Sedara*** (1999 1 SLR 361) and ***Sopiya Silva*** Vs ***Magilin Silva*** (1989 2 SLR 105) S.N Silva J held that,

"If the land surveyed is substantially different from the land as described in. the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed."

According to the above judgments, Superior Courts encourage the Trial Judges to move their attention towards the fundamental factors in order to the identification of the corpus without dismissing the case. The Section 18(1) iii of the Partition Act No 21 of 1977 has directed to Preliminary surveyor to properly report his opinion regarding the corpus as follows:

Section 18(1) iii of the Partition Act read as follows:

"(iii) whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint;"

The above mentioned requirement binds with the finality of the partition decree which is described in the section 48(1) of the Partition Act. This legal contention was clearly described in ***Sopiya Silva*** Vs ***Magilin Silva*** (Supra) as follows:

"The surveyor under section 18(1)(a)(iii) of the Partition Law must in his report state whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of s. 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon due compliance with this requirement by the surveyor."

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The ***Sopiya Silva*** Vs ***Magilin Silva*** (supra) is the land mark case law which has introduced the guidance to the trial Judges to decide to take proper actions after receiving the Preliminary Survey with the discrepancy of the extent of the Corpus. Justice S.N. Silva observed that there are 3 major options to follow by the parties with permission of the Court. Those are read as follows:

"On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed the District Judge should have decided on one of the following courses after hearing the parties:

(i) to reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

(iii) to permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law."

It is crystal clear that the Court has discretionary powers to grant permission to the Plaintiff to amend his plaint after receiving the Preliminary Survey under subject to the conditions which can be imposed by the Court.

Further it is a settled law that the Court can only issue a Preliminary commission to the Court Commissioner and after receiving the preliminary survey, the Court has no powers to issue another commission to another commissioner by request of a party.

"The provision under Sec.16 does not recognize any second plan in a partition action. In any single partition action there should be only one preliminary plan that is made by the court commissioner and all the plans relied upon by the parties are to be superimposed on the said preliminary plan. After the preliminary plan is made and filed in Court, if necessary, the trial Court is entitled to issue a commission to the Surveyor General to prepare a plan to identify the corpus, on its own motion or at the instance of the parties to the action. If the necessity arises to survey any larger or smaller land than that pointed out by the plaintiff, where a party claims that such survey is necessary for the adjudication of that action, such commission can be issued to the same commissioner who made the preliminary plan. It cannot be issued to another surveyor." *Hettige* ***Don Tudor Vs Hettige Don Ananda Chandrasiri and others*** (Unreported, SC Appeal 134/2016 Decided 0n 19.02.2018)

Practically, most of the parties of the partition actions are accepted the subsequent survey commission as the preliminary survey, thus aforesaid case clearly indicates that 1st commission of the action or otherwise survey General Survey can be considered as the Preliminary Survey of a partition action.

"……Then such plan and the report of the Surveyor General would be the preliminary plan in the case. Issuing another commission to another second surveyor other than the

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commissioner who did the preliminary plan is contrary to the partition law and is erroneous." Hettige Don Tudor Vs Hettige Don Ananda Chandrasiri *and others* (Unreported, SC Appeal 134/2016 Decided 0n 19.02.2018 p 12).

According to section 75 of the Partition Act indicates the remarkable intention of the legislature in order to enhance the opportunities to terminate the co-ownership through the judicial intervention, exempting the *res judicata* concept.

Section 75 of the Partition Act read as follows:

"(1) The dismissal of a partition action in respect of any land under section 10, section 12, section 29, section 63, section 66 or section 71 shall not operate as a bar to the institution of another partition action in respect of that land.

(2) The dismissal of a partition action under section 29, section 63, section 66 or section 71 shall not affect the final and conclusive effect given by section 48 to the interlocutory decree entered in such action."

According to this section, a dismissal of a partition action is not the conclusion or the termination of the co-ownership process. Any party can institute a new partition action to the same land which was failed to partition or process.

After fixing the Trial, partition law allows to call the fresh witnesses and the documentary evidences by way of filling an additional list of witnesses and documents, 30 days prior to upcoming trial date.

Section 23 (1) of the Partition Act read as follows:

" (1) Every party to a partition action shall, not less than thirty days before the date of the trial of the action, file or cause to be filed in court a list of documents on which he relies to prove his right, share or interest to, of or in the land together with an abstract of the contents of such documents. No party shall, except with the leave of the court which may be granted on such terms as the court may deter-mine, be at liberty to put any document in evidence on his behalf in the action if that document is not specified in a list filed as aforesaid. Nothing in this subsection shall apply to documents produced for cross-examination or handed to a witness merely to refresh his memory……."

In the case of ***Pushpa vs Leelawathi and another*** (2004 3 SLR 162) S.N. Sliva CJ held that :

"*When section 23(1) is considered with section 25(1) it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial but would also include any date to which the trial is postponed."*

On perusal of the above case law, Partition Law can be considered as a flexible procedure to ascertain all the material facts of the action. This flexibility indicates that before entering the *jus in rem* decree of the partition action; the main elements named in the identification of the Corpus and the investigation of the title should be achieved at a satisfactory level.

In light of the above guidance, the Partition Law encourages the litigants to process with their respective partition actions successfully without any delays. However some special procedures of the partition may be taken much time to conclude the action. However aforesaid special characteristics of the

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Partition Act support to amend the pleadings of the action and permit to present a strong case to each party, subject to the discretionary powers of the Court.

Amendment of the Plaint after receiving the Preliminary Survey: Legal Back Ground

The cardinal principle of the amendment of pleadings has not been clearly mentioned in the Partition Act No 21 of 1977, but section 79 of the said Act deals with the *casus omissus* situations as follows:

Section 79 of Partition Act no 21 of 1977

79. In any matter or question of procedure no provided for In this Law. the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court, if such procedure is not Inconsistent with the provisions of this Law.

Therefore section 93(1) of the Civil Procedure Code covers the amendments of the pleadings of partition suits. When the matter has not been fixed for trial at the 1st date and subsection 1 of the said section can be adopted under the scenario.

Section 93(1) of the Civil Procedure Code

> ***(1) Upon application made to it before the day first fixed for trial of the action, in the presence of, or after reasonable notice to all the parties to the action, the Court shall have full power of amending in its discretion, all pleadings in the action, by way of addition, or alteration, or of omission.***

In the terms of the above section, Court has eminent powers to amend all the pleadings in this action by way of addition, or alteration or of omission by using the discretionary powers.

The section 93(3) and the provision of section 46 indicate some guidelines to follow. However the proposed amendments to the plaint of the matter should be reasonable and if Court disallows the amendments it may cause to gravity and irremediable injustice to the Plaintiff. Further, the case has not been fixed for trial and the amendments to the plaint should not harm to the Defendants and they should have opportunity to amend their Statement of Claims too.

In the case of ***Senanayake* Vs *Antony*** (69 NLR 225), *Thambiah J* had explained the test regarding allows the amendments of pleadings as follows:

"The principles governing the amendment of a plaint have been clearly set out by my Lord the Chief Justice who, after an exhaustive review of all the authorities, laid down the following propositions (vide Daryanani v. Eastern Silk Emporium L td) (1963) 64 N LR. 529)

1. the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties ; and

2. an amendment which works an injustice to the other side should not be allowed."

In this juncture, it is a settled law that, a partition action in respect of one land cannot be converted into an action in respect of another land by way of the amendment of pleadings. The case of ***Uberis* Vs *Jayawardhane*** **62 NLR 217**, inclined with the above legal principle. According to these, the proposed amendments to the Plaint do not seek to convert the corpus to another land.

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Amendment to the Pleading can deal with the schedule to the Plaint. In this context there might be done clerical mistakes on the pleadings by all the parties of the action. If parties had shown the boundaries to the Surveyor and that amendment to the schedule should not affect to the parties and it should be a compulsory amendment to the Plaint. **As a result of that amendment ,there should not any converting of the corpus to another land**.

Therefore the plaintiff has a duty to disclose the present boundaries to identify the corpus properly. But amendment to the plaint should not be caused to change the land.

The rationale of the aforesaid amendment is explained as follows: When the Defendants had reserved their right to tender the statement of claims after receiving the preliminary commission. So they had a chance to go through the commission and report before preparing their pleadings, but that kind of opportunity does not arise to the plaintiff and his only opportunity is to amend the Plaint. Because the final partition decree considers as a *jus in rem* and section 25 of the partition act directs the paramount duty to the Trial Judge to identify the corpus and the investigation of the title. Therefore at the 1st instance the Plaintiff can make an application to amend the Plaint according to smooth partition procedure. On perusal of those aforesaid proposed amendments are reasonable and not harming to the Defendants.

After receiving the preliminary plan and the report, the legal structure of the amendments to the plaint should investigate according to the granted Judicial Directions through ***Sopiya Silva* vs *Magilin Silva*** (1989 2 SLR 105.)
It was held that if there is a discrepancy of the extent, the reasons should be disclosed even amending the plaint and the lis pendence for the larger land.

Sopiya Silva vs ***Magilin Silva*** (1989 2 SLR 105)

(ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.

Applicability of the rule of "an amendment which leads to an injustice to the other party should not be allowed"

The action is proceeding with preliminary steps; the Court has a wide discretion to allow the proposing amendments to the Plaint. The Defendants have a chance to amend their own pleadings with the permission of the Court and there should not any injustice cause to the Defendants by allowing amendments to the plaint. If the Court disallows the amendments, the Plaintiff might be suffered from gravity and irremediable injustice; because the plaintiff should have pay the survey cost before returning the commission. The amendment to Plaint before returning the commission may be important to ascertain the partition decree *jus in rem*.

In the case of ***W.M. Mendis & Co Vs Excise Commissioner*** (1999 1 SLR 351) De Silva J held regarding the rule of procedural law as follows:
"The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence."

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Conclusion

In light of the above vital legal principles, the Court has full discretionary powers to allow the proposing amendments to the original Plaint of a partition action. But the plaintiff should not guilty of leaches and if the proposing amendments disallows by the Court, the plaintiff has to establish that it may cause gravity and irremediable injustice. But also the proposing amendments should not cause any injustice to the Defendants. The partition Law is one of the dying laws in Sri Lanka due to the Title Registration process. Once covering all the lands by title registration, the partition law will become a historical concept in Sri Lanka. Whatsoever, the special characteristics of the partition law grant more discretion to the Judiciary to facilitate the litigation process in the Law of Partition.

References

No 10 of Partition Ordinance

No 16 of 1951 Partition A

No 21 of 1977 Partition Act

Gabrial Perera Vs Agnes Perera (43 CLW 82)

Hettige Don Tudor Vs Hettige Don Ananda Chandrasiri and others (Unreported , SC Appeal 134/2016 Decided 0n 19.02.2018)

Jayasuriya vs Ubaid (61 NLR 352)

W.M. Mendis & Co Vs Excise Commissioner (1999 1 SLR 351)

Pushpa vs Leelawathi and another (2004 3 SLR 162)

Senanayake Vs Antony (69 NLR 225)

Sopiya Silva Vs Magilin Silva (1989 2 SLR 105)

Sopinona Vs. Pitipanaarachchi and two others, (2010 1 S.L.R. 87)

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